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This is the second report of the ILA Committee on the International Law on Sustainable Development. As agreed at the conference in Berlin in 2004, the principal focus of this report is on the principle of integration as a fundamental component of sustainable development. This report takes a different approach to the first report of this committee and reports of the previous ILA committee (Legal Aspects of Sustainable Development), in that it focuses – as the first element of a larger project (on which see section 6) – on one particular aspect of the broader debate, *viz.*, integration. Though not ignoring the current global context (with particular reference to the continuing work of the United Nations and Bretton Woods Institutions, especially, in seeking to meet the Millennium Development Goals (MDGs), the ongoing Doha negotiations and recent judicial and arbitral deliberations) this second report very much concentrates on one particular theme. This report has been compiled collaboratively, with detailed correspondence with members of the committee, for which grateful thanks is given by the committee's officers. The report was also subject to a thorough reading by the working group on sustainable development of the Dutch Association of International Law. Before submission to ILA-HQ, the report was again sent out to members for further comment.

1. Introduction

It is a truism to note that sustainable development will only be realised when the principle of integration is properly – and fully – implemented. As one commentator has said, '[t]o operationalize sustainable development, we need to recognize that one principle – integrated decisionmaking – holds the other principles together'.¹ Others have made a similar point that sustainable development is unattainable without understanding the central role that the principle of integration plays in the broader endeavour.² Moreover, one might go even further and argue that if sustainable development is actually about process rather than substance, sustainable development is not only achievable *via* integration but that sustainable development *is* no more than simply the *mot juste* for a new enlightened form of integration.

The notion of integrating environmental considerations into economic planning came principally to the fore, both within certain domestic jurisdictions and internationally, in the early 1970s with the rise of environmental awareness, more generally; it was not only emerging recognition that development was having a significant impact on the environment and related natural resources but, and just as importantly, processes and procedures could be put in place to try to ameliorate some of these consequences. At the international level, one of the first attempts to expand upon these ideas was contained within the 1972 Stockholm Declaration on the Human Environment, which – though clearly overtaken by subsequent events – remains both surprisingly relevant and astute on many issues. As Principles 13 and 14 of that declaration clearly state, 'States should adopt an *integrated and coordinated approach* to their development planning' and '[r]ational planning constitutes an essential tool for *reconciling any conflict* between' economic development and environmental protection. Similarly, though not identical, wording can be found in almost all subsequent international policy documents on the issue, including the 1982 World Charter for Nature,³ 1987 report of World Commission on Environment and Development,⁴ and significantly at the 1992 UN Rio Conference on Environment and Development in both Agenda 21⁵ and – in a much abbreviated form – the Rio

¹ See J. Dernbach, 'Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking' 10 *Indiana Journal of Global Legal Studies* (2003) 248.

² See, for instance, P. Sands, *Principles of International Environmental Law* (Cambridge, Cambridge University Press, 2nd ed. 2003) 263: 'this element is the most important'. A similar remark is contained in the argument that 'sustainable development is comprised of, and interacts with, many different principles found within the international legal system – one of which is the principle of integration. Whilst all of the independent principles...are important, the principle of integration is an essential norm in giving effect to the overall objective of sustainable development without which, it would be impossible to recognise *true* sustainable development (i.e. how could genuine sustainable development be achieved save for the proper integration of economic, environmental and social considerations? It is perhaps more conceivable that sustainable development might be reached without adopting, for example, an EIA or public participation process – although clearly not ideal). In this way, the other principles of international law relating to sustainable development should be employed and implemented 'in light of' the idea of integration' (correspondence from Dr Angela Williams).

³ GA Res. 37/7, 28 October 1982, Principle 7: 'In the planning and implementation of social and economic development activities, due account shall be taken of the fact that the conservation of nature is an integral part of those activities'.

⁴ World Commission on Environment and Development (WCED), *Our Common Future* (Oxford, Oxford University Press, 1987) 62-65.

⁵ See, in particular, Chapter 8: Integrating Environment and Development in Decision-Making.

Declaration. Moreover, since 1992, even more intensive thought has been given to the issue in a range of treaties and official, quasi-official and non-official texts.⁶

Such discussion of the principle of integration has, unsurprisingly, spawned much activity, not only at every level of governance, international and domestic, governmental and corporate,⁷ but also in the literature. An increasing number of binding treaties have made provision for integrative decision-making, both as an intrinsic feature of the treaty regime itself and as an obligation for Parties to adopt domestically. Important development goals (ie. the Millennium Development Goals) now also seek to ensure a more integrated approach to their objectives. Significantly, much of the activity that has taken place over the last – almost – fifteen years has made reference to Principle 4 of the 1992 Rio Declaration, which has been taken to provide the internationally-agreed reference-point on the issue. It reads, '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Many have – rightly – suggested that it provides an 'action-oriented approach' to sustainable development.⁸ If interpreted correctly, it should not only influence the composition and implementation of specific measures but also the creation and realisation of policy. Such a view is shared by Philippe Sands who argues that the principle of integration is likely to be one of the Rio Conference's 'most important contributions' to international law. What is particularly noticeable about Principle 4 is that much more so than Principle 1 ('[h]uman beings are at the centre of concerns for sustainable development...') or Principle 3 ('[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations') – both important principles within the 1992 Rio Declaration – the language of Principle 4 'lends itself to legal interpretation and practical application'.⁹

Despite the emerging wealth of State practice and academic commentary, there is nevertheless still much to be written about the principle of integration, particularly in light of the inclusion of social considerations within the traditional environment-development dichotomy.¹⁰ The objective of this report is, however, more limited. Its purpose is to suggest that integration is a much more nuanced notion than Principle 4 might suggest, and that there remains very little in the way of 'a systematic and "principled" understanding of the relationship between the principle of integration and sustainable development'.¹¹ Significantly, though many of the documents consider integration as pivotal to the achievement of sustainable development, there remains an obscurity as to precisely what integration entails or, more specifically, the *range* of means by which integration can be achieved. The purpose of this report is therefore to take a step back from the *mechanics* of integration, so as to address a different issue, namely the *framework* of integration. This report takes an unashamedly legal approach to its subject, though recognising that the topic has distinct economic and political aspects, which in the final analysis cannot be ignored.

⁶ See, for instance, article 2.2 1994 UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Desertification Convention): 'Achieving [the convention's] objective will involve long-term integrated strategies'.

⁷ D. Ong, 'The Progressive Integration of Environmental Protection within Offshore Joint Development Agreements' in M. Fitzmaurice and M. Szuniewicz (eds.), *Exploitation of Natural Resources in the 21st Century* (The Hague: Kluwer Law International, 2003) 114: 'An ideal scenario would ensure that *all* public, and arguably even private, decision-making processes that could conceivably have environmental implications would implement the integration principle and thereby incorporate environmental considerations'.

⁸ J. Kovar, 'A Short Guide to the Rio Declaration' 4 *Colorado Journal of International Environmental Law and Policy* (1993) 127.

⁹ P. Sands, 'International Law in the Field of Sustainable Development' LXV *British Yearbook of International Law* (1994) 338. For a recent statement on the legal effect, if not legal status, of integration, see *Arbitration regarding the Iron Rhine Railway (Belgium / The Netherlands)* (2005): 'both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities' (paragraph 59).

¹⁰ This is not to suggest that social considerations were not evident right from the start (see, for instance, the 1972 Stockholm Declaration, paragraphs 2 ('[t]he protection and improvement of the human environment is a major issue, which affects the well-being of peoples) and 4 ('[m]illions continue to live far below the minimum levels required for a decent human existence')).

¹¹ Letter from Professor Nico Schrijver (chair) and Drs. Duncan French and Ximena Fuentes (co-rapporteurs) to members of the ILA International Committee on International Law on Sustainable Development (23/01/06) in preparation for the 2006 ILA Conference (see Annex I).

Moreover, while not, in any way, wishing to undermine the importance of Principle 4 to the achievement of sustainable development, we want to argue that though this principle is often suggested to be the central premise for the further elaboration of integration, integration is, in fact, much more complex. The very wording of Principle 4 clearly suggests that it was never intended to be comprehensive, and this has been affirmed by the various strands of meaning that have been given to integration subsequently. In other words, the reference to ‘environmental protection shall constitute an integral part of the development process’ – while useful shorthand for much of what integration entails – cannot, in fact, reflect the totality of the uses to which integration is now put. This is especially the case when one considers the emerging non-institutional and legal aspects in which integration is said to be at work.¹²

There are undoubtedly many different ways of (re-)conceptualising the principle of integration. The purpose of this report is to suggest that one can divide integration under three headings, referred to as ‘systemic’, ‘institutional’ and ‘legal’ integration, as set out in the schematic below.

A Framework of Integration

Integration		
Systemic Integration	Institutional Integration	Legal Integration
sustainable development <i>qua</i> systemic integration	intra-institutional v. inter-institutional (horizontal & vertical)	<u>normative integration</u> intra-treaty inter-disciplinary intra-disciplinary
idealistic imperative v. real-life trade-offs	<u>level-specific</u> project policy programmatic organisational	integration as a judicial reasoning tool

Though recognising both the difficulties of maintaining this admittedly somewhat rather artificial divide (for further discussion, particularly of integration as a judicial reasoning tool, see the comments of Dr Broude in Annex II) and the inadequacy of the terminology, this is – we would argue – nevertheless, a more useful way of understanding integration than grouping everything under the banner of Principle 4. Moreover, such a division into three categories may, at least, assist in clarifying the range of issues under discussion, something that is arguably less feasible when considered from the perspective of Principle 4 alone. In addition, in the longer-term, breaking down the principle of integration in this way may also lead to a better understanding as to what is required to make sustainable development more of a reality.

¹² Cf. M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law – Principles, Practices & Prospects* (Oxford, Oxford University Press, 2004) 106: ‘there is a second meaning to integration, one that seems closer to what is intended in the 1992 *Rio Declaration*, which looks to integration between economic and social law and policy, and environmental law and policy. This type of integration is not simply a trend or a “coming together”, on the international level, but rather, a need to undertake development in a way that fully takes into account, and combines, its social, economic and environmental aspects’. See also S. Jodoin, ‘The Principle of Integration and Interrelationship in Relation to Social, Environmental and Social Objectives’ (A Legal Working Paper in the CISDL “Recent Developments in International Law Related to Sustainable Development” Series (2005)).

2. Systemic Integration: The Grand Endeavour

At the level of global politics, the principle of integration provides an overarching conceptual framework for sustainable development.¹³ At its most idealistic, integration is not only concerned with *bringing together* the ‘pillars’ of economic growth, environmental protection and social development as the stated objective(s) of sustainable development,¹⁴ but also – underlying this – is the imperative that sustainable development *must* be achieved without, in any way, undermining any of the three pillars. Sustainable development is, therefore, not only an attempt to reconcile environmental protection and human development; it is a belief that only by attaining all of these things concurrently can sustainable development ever be truly achieved. Sustainable development is thus not an artificial attempt to group together issues that are more properly understood separately, but it is sustainable development itself that provides the most coherent intellectual and pragmatic framework through which such issues should be analysed.¹⁵

It is also apposite at this point to take note of Professor Dire Tladi’s detailed comment that ‘[s]ustainable development, often referred to, is also often subject to some criticism (or objections). These objections, I think, can both be traced back to the principle of integration. In particular, these objections can be divided into two categories: (i) indeterminacy objection i.e. that sustainable development can mean different things to different constituencies; and (ii) the subordination of objection i.e. the notion that sustainable development has the effect of subordinating environmental imperatives to economic growth concerns. Both these objections are very real. Equally true is that these objections flow directly from the principle of integration. Because sustainable development requires the integration of the three pillars (what I prefer to call values) of sustainable development, different ways of integrating these pillars lead to both the indeterminacy and subordination objection. We should not avoid these objections. We should approach the objections head on. One way of dealing with these objections is to acknowledge that there are, indeed, different ways of integrating the pillars of sustainable development. This immediately deals with the indeterminacy objections because now the content of sustainable development becomes determinable once an integration model is accepted. Similarly such an acknowledgment of different models of integration is a first step in finding a model of sustainable development that does not subordinate environmental concerns (and to this I would add social concerns) to economic concerns....the answer to some of these questions lies in asking *how* must these pillars be integrated? In other words in cases of irreconcilable conflict which of these values must triumph?...there are different ways that these pillars can be integrated and we must not fall into the trap of assuming that the process of integration is understood by everyone in the same way. These different ways of integration must be made subject to scrutiny to determine the extent of the ethical contribution to sustainable development i.e. whether particular integration models make sustainable development poorer or richer’.¹⁶

In other words, and as noted in the introduction, for some, sustainable development is not only achievable *via* integration but that integration incorporates the very essence of sustainable development. As Vice-President Weeramantry argued in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997),

‘After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is

¹³ ‘In many ways, the principle of integration can be viewed as reflecting the globalisation process, whereby previously independent values / legal concepts / customs etc are merged in an attempt at reconciliation and the promotion of a more integrated and reflective attitude towards traditionally competing norms’ (correspondence from Dr Angela Williams).

¹⁴ See, for instance, 2002 Johannesburg Plan of Implementation: ‘the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars’ (paragraph 2).

¹⁵ D. French, *International Law and Policy of Sustainable Development* (Manchester, Manchester University Press, 2005) 213.

¹⁶ See also D. Tladi, ‘Strong Sustainability, Weak Sustainability, Intergenerational Equity and International Law: Using the Earth Charter to redirect the Environmental Ethics Debate’ 28 *South African Yearbook of International Law* (2003) 200-210.

sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development'.¹⁷

Of course, unfortunately, concurrent attainment of both human development and environmental protection is often difficult to achieve fully other than at the level of rhetoric. Real life situations almost always involve trade-offs; the best that one can hope for – hopefully through the many *micro* forms of integration that are discussed below – is to mitigate, as far as possible, the consequences.¹⁸ Nevertheless, for many, if sustainable development is to be different from the *status quo*, it should require us to aspire to a *macro* vision of development that attains, at all times, the highest levels possible in environmental quality and human development.

This tension within the very foundations of sustainable development can be seen, most acutely, when the concept is removed from its natural policy surroundings (ie. of the United Nations) and placed within a different, potentially more divisive, environment (eg. the WTO). On the other hand, some would argue that by seeking to understand its relationship with such other issues, a much needed sense of realism creeps into the political discussions surrounding sustainable development. Take, for instance, the following key quotation from the 2001 Doha Ministerial Declaration: '[w]e 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'.¹⁹ On one level, the language would seem to continue to reflect the systemic nature of integration, focusing on the broad – over-arching – goals of the international community. Certainly, the notion that international trade, environmental protection and sustainable development can be made 'mutually supportive' is indicative of how the debate has changed in the past decade; largely – though not completely – away from debates over green protectionism, and towards a more synthesised discussion.

However, whatever 'mutual supportive[ness]' is taken to mean – and there remain many doubts as to how precisely it should be operationalised²⁰ – it is clearly intended, semantically, that sustainable development is not placed *above* the international trading system, but rather on a *par* with it, otherwise the wording would have reflected this different prioritisation. International trade is not subsumed within the wider goal of sustainable development in some mechanistic manner, but is rather viewed as something that can contribute to achieving sustainable development, while at the same time achieving other, equally valid, purposes (*in casu*, 'upholding and safeguarding an open and non-discriminatory multilateral trading system'). The very notion of *mutual* support indicates parity in expected outcomes.

If one approaches from the different perspective that sustainable development is, in fact, an objective of international trade,²¹ this still risks being moderated by earlier views that sustainable development is

¹⁷ ICJ Reports (1997) 92.

¹⁸ One might also point to the 2001 Draft Convention on Prevention of Transboundary Harm from Hazardous Activities ((2001) GAOR A/56/10), which introduces modalities for the equitable balancing of interests (articles 9 and 10), as a variation on the notion of environmental/economic trade-offs.

¹⁹ WT/MIN(01)/DEC/1, 20 November 2001, paragraph 6.

²⁰ See, for instance, paragraph 31 of the 2001 Doha Ministerial Declaration: 'With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on...'. On the difficulty of reconciling such issues, see the tension in the preamble of the 2000 Cartagena Biosafety Protocol (note 92). Note, however, the following reservation; 'although the intentions of such a term hinge upon an altruistic vision of universal compatibility between environmental, social and economic development concerns, a more circumscribed view would challenge this position identifying the term as lacking any substantive merit, merely reflecting a political compromise among States. The principle of mutual supportiveness is also undermined by the variances regarding its articulation in different international instruments'. (correspondence from Kevin Gray).

²¹ M. Gehring and M.C. Cordonier Segger (eds.), *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International) (2005) 1-2: 'Public international law, as it regulates international trade, can and should ensure that it can deliver on its global objective of sustainable development'.

simply a positive consequence of economic growth and international trade²² or that what is, in fact, contributing to sustainable development is primarily the effective implementation and enforcement of the international trading system *per se*.²³ These views – whatever their validity – both begin and end from the same premise, namely that sustainable development can largely be accommodated within the current political and economic framework. Integration thus becomes less about an idealistic imperative and is viewed, perhaps too critically, as more concerned with maintaining continuity of structures and systems.

Of course, as already noted, sustainable development *qua* systemic integration is meaningless – and certainly cannot be implemented – without recourse to other, more practical, forms of integration. Thus, to that extent, systemic integration – as seen in clinical isolation – tells us very little about integration, in any real sense, at all. The discussion, nevertheless, points to a broader question; if the goal that one is seeking to achieve is unclear, is there not also a risk that whatever integrative mechanisms are put in place are also in danger of being stymied by a lack of clear direction? Might it not also be suggested that Principle 4 Rio Declaration itself, reflects this foundational uncertainty with its rather vague reference to ‘shall constitute an integral part of’, which is neither particularly prescriptive in specifying intended consequences nor very clear as to the actual role non-economic considerations should have in the development process? Systemic integration may seem somewhat removed from the practical realities of integration, but it does reveal continuing – and arguably significant – divergences in the broader conceptual framework, of which integration forms a part.

3. Institutional Integration: the Essential Building Block

Integration at the institutional level is arguably what Principle 4 of the Rio Declaration had principally in mind when it said that ‘environmental protection shall constitute an integral part of the *development process* and cannot be considered in isolation from it’.²⁴ As the 2002 International Law Association (ILA) New Delhi Declaration of Principles of International Law relating to Sustainable Development notes, ‘[a]ll levels of governance – global, regional, national, sub-national and local – and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development’.²⁵ Perhaps, more descriptively, is article 13.2(c) of the revised non-governmental 2004 Draft International Covenant on Environment and Development, which states that the principle of integration requires States to ‘establish or strengthen institutional structures and procedures to fully integrate environmental and developmental issues in all spheres of decision-making’.²⁶ Thus, institutional integration is both the most obvious form of integration and the one that most fully reflects what Principle 4 was quite clearly referring to.

²² See, for instance, Principle 12 Rio Declaration: ‘States should cooperate to promote a supportive and open international economic system *that would lead to* economic growth and sustainable development in all countries, *to better address* the problems of environmental degradation’ (emphasis added).

²³ For a discussion as to how the debate on sustainable development has changed within the WTO, see Gehring and Cordonier Segger, above note 21 at 9-12. See also ‘the WTO position as to this objective has actually moved, quite clearly, on this issue in recent years...sustainable development is [now one] of the objects of trade law (hence the way that the Preamble has been interpreted in the Shrimp-Turtle, Tariff-Preferences and recent Biotech cases, and in recent Ministerial Declarations), rather than [the] goal of trade law, and as such, the WTO and other trade treaties need to take it into account by seeking to integrate social and environmental considerations where appropriate overlaps occur’ (correspondence from Marie-Claire Cordonier Segger). In response to this, see the following comment, ‘it begs the question whether integration, from a formal international law perspective, is demand driven. That is, is the need to integrate environmental law with other areas predicated on the existence of conflict between such areas? In the WTO cases, the fact that there was no legal (treaty-interpretation) conflict limited the value of the integration as seen in some of the jurisprudence. Of course, it provides an interpretative scope to non-environment instruments and therefore reflects an integrated result....but on the other end of the integration spectrum, would full integration result when there is an actual conflict between treaty provisions necessitating an choice between competing provisions. Can international law truly integrate areas of law in these situations?’ (correspondence from Kevin Gray).

²⁴ Emphasis added.

²⁵ International Law Association (ILA), *Report of the Seventieth Conference, New Delhi* (London, ILA, 2002) 29 (also available as UN Doc. A/57/329 (2002)).

²⁶ Commission on Environmental Law of IUCN (World Conservation Union) in cooperation with the International Council of Environmental Law (ICEL), *Draft International Covenant on Environment and Development* (Gland, Switzerland, World Conservation Union, 3rd ed. 2004).

Such institutional integration may be sub-divided further into intra-institutional integration and inter-institutional integration. As regards *intra-institutional integration*, the focus is clearly on each individual institution²⁷ to ensure sustainable development considerations are integrated into their decision-making processes. As a 1996 UNEP expert group report notes, this includes both taking into account all relevant environmental, developmental and social dimensions in the decision-making process and concomitantly ensuring the ‘importance of long-term approaches that take into account long-term strategies’ through such mechanisms as environmental impact assessment, risk analysis and cost-benefit analysis.²⁸ The sheer variety of the ways – both formal and informal – that such integration might be achieved is beyond the scope of this report, though it is hoped that the next step of the Committee’s work (the development and dissemination of a questionnaire on integration as suggested in section 6) will help classify many of the various forms of integrative decision-making.

What is paramount is that there is a growing awareness that consideration of sustainable development issues should no longer be thought of either as an optional extra or something that can be dealt with separately, but that it should be central to the very functioning of all institutions, whose operations and policies have an impact on human development, natural resources and the environment, more generally.²⁹ Of course, implementation of integrative decision-making continues to vary greatly within and between institutions, and it is certainly true that so much more can be learnt through the spreading of best practice. Nevertheless, there is an emerging consensus that institutional integration – whether the institution happens to be governmental or corporate – is a *sine qua non* of sustainable development.

Specific mention may be made of the evolution of the environmental impact assessment (EIA) procedure, which as a specific application of the integration principle was given discrete mention within the Rio Declaration,³⁰ and has evolved and been subsequently refined over the years, in both domestic³¹ and international law,³² as one of the most powerful integrative tools currently available to decision-makers. As Judge Weeramantry said of the role environmental impact assessment should play in the decision-making process, ‘[o]f course the situation may well be proved to be otherwise and fears currently expressed may prove to be groundless. But that stage is reached *only after* the Environmental Impact Assessment and *not before*’.³³ In his dissenting opinion in the same case, he also noted the close link between the significance of EIAs and the rise of the precautionary principle, seeing the former as ‘ancillary’ to the latter.³⁴ Environmental impact assessments thus put into practice the theory, and have often proved an effective technique in not only incorporating the range of issues to be considered within the decision-making process, but equally importantly, in addressing them in a proactive, and potentially preventative, manner. Though less well-developed, human rights and social

²⁷ Of course, how one identifies an ‘individual’ institution is itself contentious. Should one, for instance, focus upon a government department or the government as a whole as the relevant institution when considering intra-institutional integration?

²⁸ UNEP/IEL/WS/3/2, 4 October 1996: Final Report of the Expert Group Workshop on International Environmental Law aiming at Sustainable Development, paragraph 35(c).

²⁹ See Ong, above note 7 at 115: ‘it is possible to argue that the true test of the successful implementation of the integration principle will only be passed when environmental concerns form part of the *a priori* consideration of any policy decision-making process, irrespective of whether in fact environmental concerns are significant to the matter at hand’.

³⁰ See Principle 17: ‘Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority’.

³¹ See J. Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford, Oxford University Press, 2004).

³² Instances include the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty, Annex I and 2001 Draft Convention on Prevention of Transboundary Harm from Hazardous Activities, article 7. K. Gray, ‘The Internationalization of Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement’ 11 *Colorado Journal of International Environmental Law and Policy* (2000) 101. Mention should also be made of the development of other forms of impact assessment including social and human rights considerations.

³³ *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court’s Judgment of 20th December 1974 in the Nuclear Tests Case (New Zealand v. France)* ICJ Reports (1995) 345, emphasis added. Weeramantry was, in fact, considering the role the ‘principle’ of EIA should have in the judicial decision-making process, which is debatable. Nevertheless, the general view expressed as to the importance of EIAs is surely correct. He returned to the issue of EIA in his separate opinion in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Reports 111-113, in which he discussed the importance of ‘continuing EIAs’.

³⁴ *Ibid* at 344.

impact assessment are increasingly playing an important integrative role, as are numerous innovative provisions to be found within, particularly, more recent regional trade agreements.

Moreover, as well as incorporating all relevant considerations, a truly integrative approach necessitates the involvement of all relevant actors; '[r]ecognizing that the integration of environmental, social and economic policies requires transparency and broad public participation in governmental decision-making'.³⁵ This notion that public involvement is a basic element of the principle of integration is not only an increasingly firmly established human right but harmonises what have become two of the most instrumental principles of sustainable development.³⁶ As the preamble to the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters states, '*Recognizing* the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information'. It is, perhaps, unsurprising that such linkages are made between these principles, again confirming the interconnected network of ideas and themes that have evolved around the broader notion of sustainable development.

Though institutional integration is most obvious at the level of the individual institution, Principle 4 is arguably more wide-ranging in its remit, speaking of the development *process*. Thus, promoting integration between institutions becomes just as important as ensuring that it happens within individual institutions. *Inter-institutional integration*, therefore, focuses upon promoting coherent and coordinated policy- and decision-making across institutions, both *horizontally*³⁷ and *vertically*.³⁸ The call in Agenda 21 for fundamental institutional change³⁹ was, in many ways, a wake-up call; though, unfortunately, one that is still proving difficult to accomplish.

Even between institutions with apparently similar concerns, inter-institutional integration remains difficult. The fact that the 2002 Johannesburg Plan of Implementation needed to '[e]ncourage the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the Convention to Combat Desertification to continue exploring and enhancing synergies, with due regard to their respective mandates, in the elaboration and implementation of plans and strategies under the respective Conventions' is a good – if unfortunate – example of both this need for 'enhanced cooperation' in the furtherance of sustainable development and the continuing difficulties that are being encountered in its fulfilment.⁴⁰ The continuing difficulties over acquiring observer status for certain

³⁵ UNEP report, above note 28, paragraph 35(d).

³⁶ 'In terms of the mechanisms employed to give effect to integration, one must look to the procedural nature of sustainable development. The principle of integration can perhaps best be demonstrated by examining mechanisms such as public participation and environmental impact assessment, where a specific opportunity (or process) is provided establishing an opportunity for discussion and evaluation as to how integration should be implemented and the effectiveness of this approach in light of the particular environmental, social and economic conditions. In this way, a genuine sense of integration can be achieved as mechanisms such as participation and EIA allow for a responsible and accountable process leading to sustainable development' (correspondence from Dr Angela Williams).

³⁷ Whether internationally (ie. between the United Nations, Bretton Woods institutions and the WTO) or domestically. Arguably one good example of inter-institutional integration at the international level is the work of the World Bank, UNEP and UNDP through the Global Environment Facility.

³⁸ That is, integration between global, regional and national institutions. Nevertheless, both Agenda 21 and the 2002 Johannesburg Plan of Implementation reflect a lack of discussion of vertical integration, with the latter stating that '[a]n effective institutional framework for sustainable development at all levels is key to the full implementation of Agenda 21' (paragraph 140(a)) with the substantive paragraphs remaining, on the whole, horizontally-focused.

³⁹ With specific reference to domestic decision-making, see Agenda 21, paragraph 8.2: 'An adjustment or even a fundamental reshaping of decision-making, in the light of country-specific conditions, may be necessary if environment and development is to be put at the centre of economic and political decision-making, in effect achieving a full integration of these factors'.

⁴⁰ See Annex III for a paper prepared by Professor Joyeeta Gupta on institutional integration within the climate change and water regimes. As regards the global economy, see the following comment by Professor Schlemmer-Schulte: 'Seen from a lawyer's perspective, existing rules of international monetary, financial, trade, and investment law guarantee formal equality between states participating in the global economy but do not offer substantive equality among states. From an economist's perspective, numerous gaps and serious asymmetries at the expense of developing countries denote our current international economic order. We lack a comprehensive system of global governance in which developed and developing states, their economies, and their peoples participate and compete with each other on a fair level playing field. Put differently, IFIs and WTO as well as their critics need to focus on pushing for a system of governance for a global market rather than promoting

MEA secretariats within WTO Committees⁴¹ is arguably even more symbolic of deep-seated issues of lack of policy coordination – as well as potential normative inconsistencies – between such regimes.

Similarly within the United Nations, which should be at the forefront in implementing sustainable development, attempts at institutional integration remain hamstrung by complex institutional frameworks and jealously guarded institutional mandates. The Johannesburg Plan of Implementation, for instance, '[s]tress[ed] the need for international institutions both *within* and outside the United Nations system, including international financial institutions, the World Trade Organization and the Global Environment Facility, to enhance, within their mandates, their cooperative efforts'.⁴² In addition, the role and operation of the Commission on Sustainable Development, seen as the central body within the UN system to promote sustainable development, not only within States but at all levels, continues to be inchoate in its ability to fulfil its responsibilities.⁴³

Moving away from intra- and inter-institutional integration, a further way of classifying institutional integration is on the basis of the *level* that integration takes place; that is whether integration is project-, policy-, programmatic- or organisational-specific. Though admittedly this is a very arbitrary and subjective division, with many examples falling under possibly more than one head, nevertheless, such a classification may help us consider both the range of techniques under discussion and how they interact. Of course, it says little about the actual *effectiveness* of these attempts at integration.

At the most fundamental level, there is *project-specific* integration, arguably the most obvious form of which – environmental impact assessment – has already been briefly mentioned. Other examples include cost-benefit analysis and environmental accounting.⁴⁴ Moreover, in light of the broadening of sustainable development to incorporate a wider range of – social – considerations, attempts have been made to similarly modify these techniques to include such issues or develop new methods, more suited to encapsulating these specific requirements.⁴⁵ Often, project-specific integration is the first – sometimes only – step that is taken to institutionalise integration within an organisation. In many ways, project-specific integration does not challenge the internal structure and processes of the institution itself, focusing as it does on specific schemes rather than systematic features, and certainly historically, EIAs were often not given the prominence necessary to ensure the development of a fully integrative, and mainstreamed, decision-making process. Moreover, whatever its merit, the procedural focus of the project-specific EIA cannot, in and of itself, guarantee an 'integrated' result. If sustainability is not further embedded within an organisation, the actual weighing up of the range of considerations can still be unbalanced.⁴⁶ Moreover, project-specific EIAs are, by their very nature, limited in scope to the particular scheme under consideration and cannot include matters dealt with at an earlier stage in the process.⁴⁷

numerous individual governance systems for their many clients and their separate markets with their bargained for exchanges of asymmetric liberalization commitments. The design of a new global governance system would also go beyond the half-hearted and neo-liberal "Washington Consensus" strategy including its institution-building "governance" element. Its ultimate aim would be integration as opposed to current cooperation on unequal footings, and the creation of a global market based on the rule of law' International Financial Institutions, WTO and Social Ordering: Human Rights, Labor Standards, Environmental and Consumer Protection in the Global Economy (2005)).

⁴¹ See, for instance, paragraph 31(ii) Doha Ministerial Declaration.

⁴² Paragraph 151. Emphasis added.

⁴³ French, above note 15 at 19.

⁴⁴ This ties the principle of integration with the polluter pays principle (see Principle 16: 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment).

⁴⁵ See, generally, Cordonier Segger and Khalfan, above note 12 at 179-180. See also K. Khoday, 'Sustainable Development, Trade and Social Exclusion' in Gehring and Cordonier Segger, above note 21 at 521 – 546.

⁴⁶ 'One of the fundamental problems with the implementation of this principle is ascertaining to what extent each of the three elements is represented in an 'integrated approach'. It may be possible to 'integrate' (or incorporate) social and environmental considerations into economic issues, without achieving a truly integrated result in which environmental, economic and social considerations are attributed relatively equal weighting. In this case sustainable development loses much of its credibility and risks representing a little more than an empty concept' (correspondence from Dr Angela Williams).

⁴⁷ 'In terms of the way in which the principle of integration is approached, it must be present both during the procedural stage, and similarly be identified as a part of the outcome. In order to be effective, sustainable development must incorporate integration so that the overall result reflects an integrated approach to development whereby environmental, economic and social considerations have been adequately considered are subsequently

A second form of institutional integration, and one that seeks to provide some answers to such concerns, is at the level of *policy*. The emergence of strategic impact assessment arose both from the limitations just mentioned and a broader realisation that effective integration requires a more wide-ranging and holistic perspective. As Cordonier Segger and Khalfan note,

‘[o]ver the last 25 years, EIA has evolved into a comprehensive and versatile instrument. However...it has not yet been able to play a significant role in reducing the serious global and regional environmental problems caused by economic growth...EIAs conventionally applied to projects, represent a limited response to these problems...A response to this situation has been to supplement project level EIAs with cumulative or strategic environmental assessment procedures (SEAs)...Strategic-level assessments are more complex. They extend the scope of project-level regulatory provisions, sometimes by less formal arrangements, to cover earlier stages in planning cycles, in particular policies, plans and programmes (PPPs). For example, strategic assessments can apply to rolling national, regional or local development plans, or sectoral investment strategies’.⁴⁸

Such policy-level integration is also in evidence in the attempts by the United Nations and other international bodies to promote the development of such documents as national strategies for sustainable development and national biodiversity strategies and action plans.⁴⁹ In addition, the idea of SEA has been taken one step further within the trade-sustainable development debate with methodologies being developed to undertake assessments of the sustainability of current trade negotiations; attempts which were endorsed – if somewhat half-heartedly – by the 2001 Doha Ministerial Declaration.⁵⁰ Early indications nevertheless suggest that despite ongoing difficulties in refining the methodology, such sustainability or environmental impact assessments have highlighted real fault-lines within the current negotiations.⁵¹

A third form of institutional integration, though arguably simply an advanced form of policy-specific integration, is what might be described as *programmatic-specific* integration. What, in particular, one has in mind here is the inclusion of environmental, social and developmental considerations within longer-term (particularly international) programmes and strategies, such as the UN’s Millennium Development Goals (MDGs) and, more obviously, Agenda 21 and the Johannesburg Plan of Implementation. Documents such as these represent a multilateral attempt to capture – in a very real sense – internationally agreed quality of life aspirations, and the inclusion of the range of sustainable development considerations within such documents reflects an attempt at integration on a much broader canvas. For instance, the seventh MDG is to ensure environmental sustainability.⁵² Of course, the mere inclusion of such issues does not necessarily equate with an integrated response, as some have noted with particular reference to the MDGs.⁵³ And this difficulty in moving away from simply incorporating issues onto an agenda towards more active integration is reflected in the largely failed attempts within the current WTO Doha negotiations to operationalise sustainable development within its outcomes, despite an explicit mandate to this effect.⁵⁴

reflected in the result (i.e. successful sustainable development as an objective must inherently demonstrate genuine integration). However, such a result can only be achieved by implementing the principle of integration at all stages of the process and procedure that leads to sustainable development. For instance, the requirement for cooperation should, where at all possible, be undertaken by adopting an integrated approach thereby facilitating the implementation of ‘integration values’ at all levels of the sustainable development process’ (correspondence from Dr Angela Williams).

⁴⁸ *Ibid* at 180-181

⁴⁹ See, generally, 2002 Johannesburg Plan of Implementation, paragraphs 44(d) and 162(b).

⁵⁰ Paragraph 6: ‘We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis’.

⁵¹ See, generally, Gehring and Cordonier Segger, above note 21 at 205-212.

⁵² See, in particular, Target 9: ‘Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources’.

⁵³ World Resources Institute, *World Resources 2005* (Washington, World Resources Institute, 2005) 154: ‘Despite the innovative aspects of the MDG approach, the treatment of the environment and governance in the MDGs harkens back to old, outmoded ways of thinking. The environment is seen as an add-on rather than the essential foundation of all human well-being and economic production. From an operational perspective, environmental sustainability is more of an afterthought than a cross-cutting concept’.

⁵⁴ Paragraph 51: ‘The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental

The fourth level of integration is *organisational-specific* integration. In many ways, this covers much of what already has been mentioned. However, it goes beyond the previous categories to comprise a wider range of organisational aspects. Examples might include the establishment of the Committee on Trade and Environment (CTE) within the WTO,⁵⁵ the development of the EU's 'Cardiff' process of integration⁵⁶ and domestically, for instance, the UK's Sustainable Development Commission and, during the Clinton Administration, the US's President's Council on Sustainable Development to name but two examples. One should also not forget the bureaucratic element of integration, including the restructuring of organisations and the appointment of personnel skilled in environmental and/or social policy in traditionally economic-growth focused organisations.⁵⁷ Though often overlooked, this is another very practical example of integration 'at work'. Internationally, one might look to the World Bank as positive evidence of how the principle of integration can be incorporated within a complex and multi-tiered organisation. Integration here has taken to mean a series of measures, ranging from structural reorganisation, changes to reforms to investment practices and policies⁵⁸ and wider institutional change to reflect a new developmental ethos. Inevitably these changes are closely inter-related, and despite serious doubts as to the true impact of such reforms, there is an emerging consensus that the World Bank is a good example of institutional iterative learning.⁵⁹

Institutional integration – on which this report only scratches the surface – is an example *par excellence* of what needs to happen to make sustainable development a real political phenomenon; the fact that institutional integration remains erratic and inconsistent merely highlights the progress that still has to be made. Nevertheless, as has already been pointed out, as the 'backbone of sustainable development',⁶⁰ integrative decision-making at *all* levels is a clear prerequisite in achieving broad-based sustainable development.

4. Legal Integration: Normative Interrelationships and Judicial Reasoning

The other form of integration that can be pointed to, and is usually lost within the general discussion, is that which takes place on the legal plane. Of course, institutional integration is very often not possible without a specific legal mandate – particularly in the case of integration within international organisations⁶¹ – and there is the further question (at least at the international level) as to whether there

aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected' (cf. A. Marong and M. Gehring, 'Sustainability Challenges of Paragraph 51 of the Doha Declaration' *Bridges between Trade and Sustainable Development* (January 2002) (<http://www.ictsd.org>) 17: '[i]n the interests of legitimacy, the [paragraph 51] process should be inclusive, transparent and participatory').

⁵⁵ Cf. G. Sampson, *The WTO and Sustainable Development* (Tokyo, United Nations University Press, 2005) 28-33.

⁵⁶ M. Unfried, 'The Cardiff Process: the Institutional and Political Challenges of Environmental Integration in the EU' 9 *Review of European Community and International Environmental Law* (2000) 112-119.

⁵⁷ Cf. 'what appears to have taken place (certainly in respect of international trade law, international investment law, and to a certain extent, EU law), is predominately economic-orientated institutions adopting some form of 'green' or 'social' agenda. In such situations, the result is simply a continuing priority accorded to economic interests, whilst environmental and social issues retain a sense of subsidiary importance. This can hardly be described as successful integration for the achievement of sustainable development' (correspondence from Dr Angela Williams). See also '[a]nother phenomena to explore is the emergence of sustainable development units in large corporations and whether they truly integrate environmental considerations into corporate decision-making. Some would argue that such units are merely promotional rather than part of an enterprises' core operations. Moreover, the actual names of these units (sustainable development) have changed over the years to being the "environment" department suggesting either the difficulties of integrating the environment through corporate programmes or alternatively, the advancement of the environment as a genuine department on even keel with other departments' (correspondence from Kevin Gray).

⁵⁸ Specific mention might be made of the Bank's 'safeguard policies' (including environmental assessment) which the Bank says seeks to operationalise its 'do no harm' ethos.

⁵⁹ Cf. A. Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (London, Earthscan, 2001) 12: 'There is little question that the World Bank's environmental and social rhetoric is exemplary. What is controversial is how well it follows them'.

⁶⁰ Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva, Switzerland 26-28 September 1995) (prepared by the Division for Sustainable Development for the fourth session of Commission on Sustainable Development, 18 April - 3 May 1996, New York) paragraph 15.

⁶¹ See, for instance, article 6 EC: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities...in particular with a view to promoting sustainable development'. On EC integration generally, see N. Dhondt, *Integration of Environmental Protection into other*

is a legal requirement of institutional integration. Thus the 'relationship' between law and integration is both multifaceted and difficult to identify with a great deal of precision. Nevertheless, the focus of this final section is neither on the legal mandate underpinning institutional integration nor on the extent of the obligatory nature of institutional integration, but rather on the separate issue of the integration of legal norms.⁶² Of course, how legal rules inter-relate as compared to integration within and between institutions and processes, is clearly not entirely severable, and it would be incorrect to separate too neatly norms from their institutional setting. Nevertheless, a range of additional factors come into play when considering integration of norms in contrast to integration at the institutional level. In addition, this section continues to argue against over-using the terminology of integration as a comprehensive principle without also seeking to refine its various elements.

Legal integration can be sub-divided in a range of ways. For instance, during the ILA working session on sustainable development in Berlin in 2004, one participant noted that integration can take various distinctive forms;⁶³ 'integration of different factors' (already referred to as institutional integration⁶⁴), 'integration of different bodies of law'⁶⁵ and 'reformulation of existing bodies of law' in light of the requirements of sustainable development. Taking a slightly different approach, Cordonier Segger and Khalfan⁶⁶ suggest that most legal regimes can be typified as falling into one of the following; those that exist in separate spheres with little opportunities for integration (eg. 1998 Rome Statute of the International Criminal Court), those that are parallel yet interdependent (environmental and labour 'side agreements' to 1994 North American Free Trade Agreement (NAFTA)), those partially integrated (eg. those that seek to combine trade and environment or human rights and environmental provisions⁶⁷), and those that might be considered highly integrated (eg. 1994 Desertification Convention). Of course, neither of these classifications is purely concerned with legal integration of norms *per se*; in particular, the focus of the latter is surely correct in pointing out the somewhat all-embracing nature of a legal regime, combining both integration of legal rules and institutional processes.

Nevertheless, legal integration is sufficiently different from institutional integration to justify highlighting this division. Moreover, in the area of legal integration one can make a further distinction between what one might refer to as *normative integration* and *integration as a judicial reasoning tool*. Whereas normative integration focuses upon the extent to which rules have incorporated sustainable development considerations within their meaning and provision, integration as a reasoning tool focuses specifically upon the use of integrative techniques as part of the judicial reasoning-process. Though the two elements are often inter-related – in particular, that normative integration may assist, encourage or even mandate a tribunal to interpret rules in a more holistic manner – it is also apparent that judicial tribunals have the ability to use notions of integration unilaterally as part of their broader reasoning processes.

At a more generic level, it is quite clear that the same policy trends and political or socio-economic phenomena can influence both judicial reasoning and normative developments. One might note the following excerpt from the 1998 '*Shrimp-Turtle*' decision of the WTO Appellate Body, '[g]iven the recent acknowledgement by the international community of the importance of concerted bilateral or

EC Policies – Legal Theory and Practice (Groningen, Europa Law Publishing, 2003). As regards, more specifically, integration within EC development assistance, see article 32.1 Cotonou Agreement between the EU and ACP States: 'Co-operation on environmental protection and sustainable utilisation and management of natural resources shall aim at: (a) mainstreaming environmental sustainability into all aspects of development co-operation and support programmes and projects implemented by the various actors'.

⁶² Moreover, this section focuses almost exclusively on international law, while at the same time recognising that many of the same issues will arise within the domestic sphere.

⁶³ ILA, *Report of the Seventy-First Conference, Berlin* (London, ILA, 2004) 608-609, Professor Alan Boyle.

⁶⁴ As reported, Boyle goes further and it is noted that '[he]...recommended the Committee to give serious thought to the mechanisms and institutions which were to ensure that the integration of such factors in decision making would actually come about, one example being courts and tribunals reviewing decision making by governments' (*ibid.*).

⁶⁵ *Ibid.*: 'As an example he offered the work of the ILA Water Resources Committee, in which human rights law, environmental law, development law, the law of armed conflict and many other fields had been integrated in an attempt to codify the international law relating to water resources'.

⁶⁶ Cordonier Segger and Khalfan, above note 12 at 106-109.

⁶⁷ *Ibid.* at 108: 'actors in international legal regimes once thought to be isolated or concerned only with a particular domain are becoming cognizant of linkages with other areas, and designing particular, context-specific manners to take these linkages into account'

multilateral action to protect living natural resources'.⁶⁸ This is explicit admission – admittedly amongst a range of factors⁶⁹ – that the general direction of State practice and more general international activity can affect judicial reasoning, in this case, the interpretation of a particular provision. In many ways, sustainable development is the archetypal example of such a trend; as the International Court noted in *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), '[t]his need to reconcile economic development with protection of the environment is *aptly expressed* in the concept of sustainable development'.⁷⁰ While not seeking to over-emphasise the effect that either *dicta* had on the end-result, as discussed below, their very mention must be considered significant.

It might be useful to mention terminology briefly. As the 2002 ILA New Delhi Declaration points out, the principle of integration is tied closely to the principle of interrelationship, and it may be that in the area of legal integration, what one should really be focusing on is actually the latter. As it notes, '[t]he principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development'.⁷¹ At the normative level, therefore, though there is undoubtedly a place for the mechanistic integration of norms – in terms of ascertaining relevance, applicability and, if relevant, hierarchy of apparently contradictory rules – what is actually more fundamental is that there is an attempt to recognise and build upon the linkages that exist between different rules and, at a higher level of conception, different groupings of rules (eg. trade law, environmental law, human rights law). Thus, unlike institutional integration, normative integration is not necessarily an attempt to ensure a merging of all relevant factors into one singular outcome but rather to work with these differences in order to facilitate better connexions. As a 1995 UN report hypothesised, '[i]nterrelationship and integration reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development, and could lead to the development of general rules of international law in which these separate fields retain their distinct characters but are subject to an interconnected approach'.⁷² What integration as a judicial reasoning tool perhaps then can do – and as hinted at in this quotation – is to operationalise this normative interdependence to ensure a more integrated result in real-life situations.

4.1 Normative Integration: A Focus on Interrelationships

Returning to the issue of interrelationship between norms, normative integration can be seen, as noticed in the previous paragraph, both at the level of rules and at the level of grouping of rules. Such an approach is a useful way to consider the range of issues under discussion. The following analysis is therefore divided into intra-treaty integration, inter-disciplinary integration and intra-disciplinary integration. In terms of *intra-treaty integration*, as Cordonier Segger and Khalfan have pointed out, legal regimes can usually be placed on a continuum in terms of their integrated-ness. Certainly it is the case that the attempt to integrate both the concept and meaning of sustainable development within international agreements over the last fifteen years has become almost an act of faith. Whether it is the 1994 Marrakech Agreement which established the WTO,⁷³ the 2000 Constitutive Act of the African Union⁷⁴ or the 2003 WHO Framework Convention on Tobacco Control⁷⁵ (to name but a few), as well as more obvious multilateral environmental agreements,⁷⁶ some attempt to incorporate either the

⁶⁸ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 12 October 1998, paragraph 131. Emphasis added.

⁶⁹ For further discussion see D. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' 55 *International and Comparative Law Quarterly* (2006) 297-298.

⁷⁰ *Case Concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Report (1997) 78. Emphasis added.

⁷¹ ILA, above note 25 at paragraph 7.1.

⁷² Report of the Expert Group Meeting, above note 60 at paragraph 15.

⁷³ 33 ILM (1994) 15, preamble: 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development'.

⁷⁴ Constitutive Act of the African Union, 11 July 2000, article 3(j): 'promote sustainable development at the economic, social and cultural levels as well as the integration of African economies'.

⁷⁵ See, for instance, article 26: 'economically viable alternatives to tobacco production, including crop diversification should be addressed and supported in the context of nationally developed strategies of sustainable development' (42 ILM (2003) 518).

⁷⁶ For instance, see 2001 Stockholm Convention on Persistent Organic Pollutants (40 ILM (2001) 532) article 7.3: 'The Parties shall endeavour to utilize and, where necessary, establish the means to integrate national implementation plans for persistent organic pollutants in their sustainable development strategies where appropriate'. See also Annex F which contains 'movement towards sustainable development' as a relevant socio-

concept itself or, more ambitiously, its requirements can usually be found. While ‘not all treaties, or actions of states in international law, integrate social, economic and environmental considerations to the same extent, or in the same way’,⁷⁷ the very fact that sincere attempts have been made is, at least, testimony to the rhetorical ‘grip’ and political endorsement of sustainable development.

One might point to the 1994 Desertification Convention as an excellent example of what a ‘sustainable development’ treaty might look like. As article 4.2 states,

“In pursuing the objective of this Convention, the Parties shall: (a) adopt an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought; (b) give due attention, within the relevant international and regional bodies, to the situation of affected developing country Parties with regard to international trade, marketing arrangements and debt with a view to establishing an enabling international economic environment conducive to the promotion of sustainable development; (c) integrate strategies for poverty eradication into efforts to combat desertification and mitigate the effects of drought; (d) promote cooperation among affected country Parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought...’.

Concurrently, one should not get taken away with words. A recent report into the operation of the convention highlighted various concerns, a number of which directly relate to the broader issue of integration. First, there has been a failure to ‘mainstream [the convention’s] programmes and activities into the respective development support initiatives among development partners’ and there is a ‘lack of prioritization in affected country Parties, which have had little success in integrating [the convention’s] objectives into overall national development plans’.⁷⁸ Together with less tangible financial support and political commitment from developed countries – in contrast to other global environmental treaties – the story of the Desertification Convention has so far been deeply mixed. Though these concerns do not directly relate to the level of integration within the convention itself,⁷⁹ but rather the willingness of States to integrate the convention proactively with other considerations, it is nevertheless a telling reminder as to the superficiality of a mere text.

A further concern over intra-treaty integration is how and what effect the push for integration might have on the overall effectiveness of a pre-existing agreement.⁸⁰ Though generally seen as a positive development, the evolution of a treaty in light of changing international policy objectives is not unproblematic.⁸¹ As one report on the 1971 Ramsar Wetlands Convention notes, ‘participants...seemed impressed with the Convention’s progress in broadening its relevance to wider environmental concerns...and the resolve of those seeking to make Ramsar a major player in the sustainable development arena...[however,] [t]he earlier narrow focus may have left Ramsar with less influence, but it also sheltered it from the political arguments that have plagued so many other [multilateral environmental agreements] during the past decade’.⁸² This tension is perhaps unsurprising; conflict between the objectives of a treaty and the more broader goals of sustainable development is, in most cases, inevitable. An unanswered and somewhat open-ended question is whether such treaties make a more effective contribution to sustainable development through simply

economic factor in evaluating possible control measures for chemicals under consideration for inclusion in the Convention.

⁷⁷ Cordonier Segger and Khalfan, above note 12 at 106.

⁷⁸ Joint Inspection Unit, *Comprehensive Review of the Activities of the Secretariat*, ICCD/COP(7)/4, 12 August 2005.

⁷⁹ Cf. K. Danish, ‘International Environmental Law and the “Bottom-Up” Approach: A Review of the Desertification Convention’ 3 *Indiana Journal of Global Legal Studies* (1995) 176: ‘To date, none of the other UNCED regimes has adopted the elements of the bottom-up approach initiated in the Desertification Convention’.

⁸⁰ See A. Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ 54 *International and Comparative Law Quarterly* (2005) 563-584.

⁸¹ See generally, French, above note 15 at 128.

⁸² Earth Negotiation Bulletin, *Summary of the Eighth Meeting of Conference of the Contracting Parties to the Ramsar Convention* Vol. 17 No. 18 (2002) 15.

focusing upon what they were initially established to do, or whether it does require a fundamental realignment in the light of the broader international context?⁸³

A second form of normative integration might be described as *inter-disciplinary integration*, mirroring a previous reference to the integration of different bodies of law. The principal focus here, therefore, is on the development of links between related areas of law; areas of law that may have, for too long, been seen in clinical isolation. One immediately thinks of the overlaps and connexions between rules on the environment, human rights, development, labour standards, international trade and finance, for instance. As the arbitral tribunal noted in *Arbitration regarding the Iron Rhine Railway (Belgium / The Netherlands)* (2005): 'Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm' (paragraph 59). This is an issue that continues to receive significant attention, not only in the vast literature on the topic, but also in political forums and judicial bodies. Particularly at the international level, how to bring together that which ought to be understood holistically, but has evolved, by and large, almost separately? Of course, this desire to amalgam separate areas of law is not necessarily specifically related to the objective of sustainable development, though much of the discussion has certainly focused around this issue.

Though many examples might be given – and the trade-environment debate is perhaps the most well-known⁸⁴ – it is worth briefly mentioning the evolving connexions that are being made between sustainable development and human rights.⁸⁵ Of course, much of what is being done is being achieved through the judicial and quasi-judicial (ie. expert committee supervisory) process.⁸⁶ Nevertheless, there are also attempts, both at the conventional⁸⁷ and 'soft law' level,⁸⁸ to affirm and strengthen the links between these issues, particularly mentioning the General Comments of the Committee on Economic, Social and Cultural Rights on the Right to Health, on the Right to Food and the Right to Water. The international community has taken the first, very hesitant steps, in bringing a greater sense of coherency between what have traditionally been considered as two distinct disciplines,⁸⁹ despite their obvious cognate links. Nevertheless, this broadening of human rights away from its traditional remit is not without its controversy.⁹⁰

⁸³ Cf. 'Competition law has developed well through largely ignoring non-competition oriented, eg. industrial policy driven, factors without ever pretending to provide the one and only answer to the problems of the world (correspondence from Professor Karl Meessen).

⁸⁴ For a more general discussion on integration within the WTO, see Annex II (a comment prepared by Dr Tomer Broude for this report).

⁸⁵ For a general introduction to this issue, see S. Chowdhury, E. Denters and P. de Waart (eds.), *The Right to Development in International Law* (Dordrecht, Kluwer Academic Publishers, 1992), A. Trindade (ed.), *Human Rights, Sustainable Development and the Environment* (Brazil, IIDH, 1992), A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press, 1996) and P. Alston and M. Robinson (eds.) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford, Oxford University Press, 2005). Cf. D. Shelton, 'What happened in Rio to Human Rights?' 3 *Yearbook of International Environmental Law* (1992) 75-93.

⁸⁶ For a broader discussion, see Sands, above note 2 at 294-307.

⁸⁷ For an early example, see, for instance, Article 24 of the 1981 African Charter on Human and Peoples' Rights which provides that peoples have a right 'to a general satisfactory environment favourable to their development'. See also Article 11 1988 San Salvador Protocol to the 1969 American Convention on Human Rights: 'Everyone shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation and improvement of the environment'.

⁸⁸ See Draft Principles on Human Rights and the Environment (Final Report of the Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities) (UN Doc. E/CN.4/Sub.2/1994/9, Annex I (1994)) and Commission on Human Rights (Resolution 2003/71) ('Human rights and the environment as part of sustainable development').

⁸⁹ If the lack of progress in formulating substantive rights has been problematic, one should not forget the development of 'procedural' rights, such as those contained within the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

⁹⁰ Cf. 'I agree that there have been some recent developments in the human rights field that have been controversial...but this sentence, in this paragraph is misleading. It suggests that making links relating to sustainable development, or to environmental issues, are not within the traditional remit of human rights. This is not so - many of the elements of sustainable development (priority to the poor, public participation etc) are and always have been at the centre of what human rights are about' (correspondence from Caroline Dommen). See also 'many human rights advocates and academics who see human rights as natural and not positivistic, would disagree...that there exists any traditional remit' (correspondence from Kevin Gray).

Of course, the somewhat esoteric discussion of integration at the inter-disciplinary level also inevitably raises practical inter-rule questions,⁹¹ some of which will be dealt with through integrative judicial reasoning (on which, see below), but other aspects of which may be dealt with either through explicit provisions within agreements themselves⁹² or through general rules of international law.⁹³ Either way, it seems to point to the importance of continuing to argue for an overarching – and principled – legal framework; as previously noted, the ‘development of general rules of international law in which these separate fields retain their distinct characters but are subject to an interconnected approach’.

The current legal framework, such as it is, remains inchoate and includes only the most rudimentary structural rules on hierarchy, applicability and interpretation.⁹⁴ Yet, what is lacking is a clear understanding as to what the international community is seeking to achieve through such rules. As long as the present system remains as random and *ad hoc* as it traditionally has done, the best that can be hoped for are rules that go some way to promoting integration, however unintentionally. *Intentional* integration (namely, the elaboration of rules – and concepts – that are purposely devised to promote the interrelationship between subject areas in the furtherance of a particular issue) is still somehow in the distance.

The third form of integration that should briefly be referred to is, what might be termed, *intra-disciplinary integration*, corresponding somewhat with what Professor Boyle was reported as saying at the ILA working session on sustainable development in 2004, ‘[t]he third kind of integration related to the *reformulation of existing bodies of law*, such as fisheries law or water law. Bodies such as energy law and agricultural policies needed to be renegotiated in order to achieve integration and ultimately sustainable development’.⁹⁵ One might also add the law relating to commodities. A certain amount of this is now happening, though progress, particularly in terms of implementation, is decidedly patchy.⁹⁶ Recent negotiations on trade in tropical timber, for instance, reflected this increased desire by many participants for a more ‘sustainable’ approach to tropical timber management.⁹⁷ Nevertheless, just as within the WTO, sustainability considerations are perceived very differently by different groupings of States. In particular, many timber-rich States continue to view such arguments with suspicion, worried that such ideas might lessen the traditional commercial emphasis of such agreements and thus reduce their commercial worth; a variant on the traditional fear of ‘green protectionism’.⁹⁸ This argument, however, goes both ways; environmentalists may view such integration with a great deal of suspicion, fearing subordination of environmental considerations.

Therefore, maybe, integration should not necessarily be seen, simplistically, as a rather neutral phenomenon, but rather as a much more complex process. In fact, on the basis that sustainable development tells us as much about the tensions in international society as it does about expressions of

⁹¹ At the international level, this includes both treaty norms of and rules of customary international law.

⁹² See, for instance, 2000 Protocol on Biosafety (‘Cartagena Protocol’), (39 ILM (2000) 1027) preamble: ‘*Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements...*Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements’.

⁹³ See TN/TE/W/61: World Trade Organization / Committee on Trade and Environment / Special Session - Submission by Switzerland (10 October 2005): ‘treaties should generally be construed so as not to create a conflict with other rules of international treaty law’.

⁹⁴ Such structural issues have recently been taken up by a working group of the International Law Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law (Report on Fifty-Sixth Session (2004) Supplement No. 10 (A/59/10)).

⁹⁵ ILA, above note 63 at 609.

⁹⁶ P. Birnie and A. Boyle, *International Law and the Environment* (Oxford, Oxford University Press, 2nd ed. 2002) 549 ‘International law has, until recently, tended to adopt an *ad hoc* approach to wildlife protection, related to identification of ‘endangered species’...In contrast, the law concerning conservation of fisheries has been dominated by their exploitation and has thus concentrated on the need to maintain catches at sustainable levels whilst respecting the principle of equitable allocation through quota systems’.

⁹⁷ *Bridges between Trade and Sustainable Development* (February 2006) (<http://www.ictsd.org>): ‘On the question of the scope of the new pact, references to ecological services, non-timber forest products (NTFPs) and certification and voluntary market-based mechanisms proved particularly contentious’.

⁹⁸ 1971 Founex report: ‘Some environmental actions by developed countries (restrictions on the importation and use of certain commodities, imposition of environmental regulations, standards and other non-tariff barriers on imports as well as increased production costs reflected in higher export prices) are likely to have a negative effect on developing countries’ export possibilities and their terms of trade’ (paragraph 1.12).

community, attempts at integration might be better seen as a form of multilateral dialogue, in which the intrinsic conflicts of sustainable development can be played out. Thus, integration becomes the instrument through which the international community fashions a broad, often uneasy, consensus around the implementation of sustainable development, as it has had to do, on so many issues, so many times before.

Perhaps even more controversial is whether a 'reverse' integration is also occurring in those environmental, particularly nature conservation, treaties whose traditional emphasis has been preservationist, largely to the exclusion of exploitation?⁹⁹ Is there any noticeable movement away from preservation to more limited utilisation? This is more difficult to assess, though undoubtedly the language of sustainable development has been used by some States to support their efforts to secure greater utilisation of biodiversity, such as southern African States attempts within CITES over the African elephant and attempts by such countries as Japan and Norway within the International Whaling Commission over whales. The limited success these countries have had in achieving their intended objectives arguably highlights the wider point that whilst non-environmental treaties have begun to be modified to take greater account of conservation and environmental protection concerns, the same has not necessarily been true of nature conservation treaties.

Progress in normative integration, whether it be intra-treaty, inter-discipline or intra-discipline, will ultimately be measured in terms of whether it makes any substantive impact. It is thus far too early to measure effectiveness, in any meaningful sense. What is perhaps a running theme through much of what has been said so far, however, is that integrating norms is an inherently political endeavour, involving significant policy choices. It is therefore unsurprising that States have faltered in attempts to reflect the interdependence of 'aspects of life that define sustainable development' in their legal relations.

4.2 Integration as a Judicial Reasoning Tool: Present Imperfect

One of the possible consequences of this failure has been an emphasis on the question as to whether sustainable development can be 'achieved' through *integration as a judicial reasoning tool*. To what extent can – and should – tribunals and courts use the inherent flexibility in their judicial independence to seek to 'produce' an integrated answer? This is clearly a matter of general concern, whatever the jurisdiction, though the decentralised nature of international law brings the issue into arguably sharper focus. International courts and tribunals are often faced with a range of legal arguments, each equally seemingly valid when seen from the perspective of a particular sub-discipline. The 'answer' to an issue from a human rights perspective may sit uneasily – if it can be reconciled at all – with the 'solution' proffered by international investment law, for instance. How to select an answer from a broad choice has often confronted such tribunals, with very often little attempt to either synthesise various areas of law or justify a particular – selective – response. The rules of interpretation contained within the 1969 Vienna Convention on the Law of Treaties and reflective of customary international law can be no more than a starting point in matters of such complexity.

Nevertheless, and particularly since the emergence of the 'Rio rhetoric',¹⁰⁰ there has been a growing awareness that the role of the independent judiciary is pivotal in international law's ability to promote sustainable development.¹⁰¹ More specifically is the belief that sustainable development holds the key to a more integrated approach to legal reasoning in this area. As Vice-President Weeramantry so forcefully argued in *Gabčíkovo-Nagymaros* (1997),

⁹⁹ See French above note 15 at 127. On the issue of preservation/utilization, more generally, see P. Stoett, 'Wildlife Conservation: Institutional and Normative Considerations' in N. Schrijver and F. Weiss (eds.), *International Law and Sustainable Development – Principles and Practice* (Leiden/Boston, Martinus Nijhoff, 2004) 501-518. See also '[a]rguably, any preservation goals that negates utilisation of resources cannot lead to either integration or sustainable development. However, some environmental issues, fragile ecosystems and geographical areas such as the Antarctic, may require an imbalance in the relationship between environment and development suggesting the integration is not an optimal result' (correspondence from Kevin Gray).

¹⁰⁰ In particular, Principle 27 Rio Declaration: 'States and people shall cooperate 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'.

¹⁰¹ 2002 Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium held in Johannesburg, South Africa (18-20 August 2002).

‘The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs. To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result. Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.’¹⁰²

Of course, such an approach is not universally accepted, not only because some doubt the capacity of sustainable development to be such a principle of reconciliation but, more fundamentally, because it is unclear whether there is a juridical imperative in international law for such a principle of reconciliation to actually exist. As Vaughan Lowe has incisively noted, ‘it is quite possible as a matter of fact for international law to stumble along without any consistent principle for resolving conflict’.¹⁰³ Thus, one should not take for granted either the utility or acceptability of integration – however one defines that – as part of the judicial function. In particular, it becomes especially controversial if the *application* of integrative reasoning appears to result in a violation of the consensual nature of international adjudication. Though public international law is slowly endorsing the existence of constitutional norms, norms that have the moral and legal power to restrain autonomous State behaviour, there can be little suggestion that sustainable development has yet reached such a pinnacle.

Integration by means of judicial reasoning is thus presently at a very early stage of evolution; neither fully understood nor accepted. Four things should, however, briefly be noted. First, and very obviously, integration as a reasoning process is a technique that is *per se* unrelated to sustainable development.¹⁰⁴ The attempts by the International Court recently to mould together human rights law and international humanitarian law in recent advisory opinions and contentious cases¹⁰⁵ may be a good example of integrative reasoning, but it is clearly not specifically aimed at achieving sustainable development. What it does indicate is that courts are becoming more astute to the problem of fragmentation and are gradually, and rather hesitantly, acting upon it.

Second, integrative judicial reasoning covers an array of various techniques that a tribunal might use. These include, *inter alia*, attempting to reconcile various bodies of law (as in the cases referred to in the previous paragraph), developing structural rules to assist in the integration process,¹⁰⁶ incorporating other rules of law within the treaty interpretation process,¹⁰⁷ relying upon less literal forms of treaty interpretation (ie. greater reliance on a treaty’s ‘object and purpose’¹⁰⁸), as well as utilising – particularly relevant in relation to sustainable development considerations – notions of equity and other

¹⁰² ICJ Reports (1997) 90.

¹⁰³ V. Lowe, ‘Sustainable Development and Unsustainable Arguments’ in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, Oxford University Press, 1999) 22.

¹⁰⁴ Cf. ‘The principle of integration lacks any substance of its own’ (correspondence from Professor Karl Meessen)

¹⁰⁵ See *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 240, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Reports (2004) 178 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005), paragraph 216.

¹⁰⁶ On might mention, in particular, the evolutionary approach to treaty interpretation; see Weeramantry’s controversial dissent in *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports (1999) 1183: ‘Environmental standards transcend temporal barriers...Consequently, in environmental matters, today’s standards attach themselves to yesterday’s transactions, and must be given due effect in judicial determinations stemming from them’.

¹⁰⁷ See, in particular, article 31.3(c) 1969 Vienna Convention on the Law of Treaties: ‘[t]here shall be taken into account, together with the context:...any relevant rules of international law applicable in the relations between the parties’. For a recent and excellent discussion of this provision, see C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ 54 *International and Comparative Law Quarterly* (2005) 279-319.

¹⁰⁸ *Arbitration regarding the Iron Rhine Railway (Belgium v. The Netherlands)* (2005) that ‘it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule’.

general principles. Moreover, though such reasoning techniques are most likely to be seen in such obvious tribunals as the International Court, the International Tribunal for Law of the Sea (ITLOS) and the WTO Appellate Body, they may also be evident, in one form or another, in a more diverse array of forums, including human rights courts and supervisory bodies, domestic and regional courts,¹⁰⁹ as well as possibly international organisations and other treaty bodies, such as sessions of Conferences of the Parties, whenever they are acting in a quasi-interpretative capacity.

Third, though such generic reasoning techniques may not have been developed *purposely* to achieve sustainable development, they may, nevertheless, be utilised in seeking to achieve a more integrated result for the purposes of sustainable development. As has been noted elsewhere, '[t]he recent development of international environmental law, the lack of environmental considerations in many older treaties, the linkages that are now perceived to exist between environmental and non-environmental issues, and the continuous revelation in scientific knowledge can all be pointed to as key factors as to why environmental arguments have been raised in international litigation and why international tribunals have sought to find means by which such arguments are fully reflected in final judgments'.¹¹⁰

Fourth, it has been suggested that, in the field of sustainable development and environmental protection, integrative judicial decision-making is not only succeeding in utilising such generic 'mechanisms', but that it is developing its own bespoke tools. At its most basic, this includes the *use* of the terminology of sustainable development itself in international legal discourse. This can be seen, as already noted, in the use of the notion by, amongst others, the International Court of Justice and the WTO Appellate Body. As Sands carefully notes,

'[t]he jurisprudence of those two bodies has not added greatly to our understanding of "sustainable development": we do not know with a great deal more certainty what it is, or what international legal status it has, or in what precise way it is to be made operational, or what consequences might flow from its application. What we do know is that two important international judicial bodies have been prepared to invoke it to justify or support conclusions with consequences which challenge some basic tenets of traditional international law and are potentially far-reaching'.¹¹¹

Of course, not all accept that such concepts should be utilised to influence the interpretation of binding treaty commitments so as to incorporate a more rounded-result,¹¹² and judicial practice is decidedly mixed on the point.¹¹³ Moreover, as the arbitral tribunal in the *Arbitration regarding the Iron Rhine Railway* (2005) noted, '[t]here is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law...The mere invocation of such matters does not, of course provide the answers'.¹¹⁴ Thus, notwithstanding the point made by Sands

¹⁰⁹ Tracing several such international bodies and decisions relevant to sustainable development, with a view to understanding how the ILA 2002 New Delhi Principles might be used in judicial reasoning, see M.C. Cordonier Segger, 'Governing and Reconciling Economic, Social and Environmental Regimes' in M.C. Cordonier Segger and C.G. Weeramantry (eds.), *Sustainable Justice – Reconciling Economic, Social and Environmental Law* (Leiden/Boston, Martinus Nijhoff Publishers, 2005) 576-584.

¹¹⁰ French, above note 69 at 308.

¹¹¹ P. Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' 3 *Max Planck Yearbook of United Nations Law* (1999) 404.

¹¹² See T. McDorman 'Access to Information under Article 9 of the OSPAR Convention' 98 *American Journal of International Law* (2004) 337-338. He remarks upon 'the difference between operational and litigational approaches to international environmental law and practice'. In particular, he contrasts what he terms the *operational* aspect of international environmental law, relying as much on declarations of principles and other soft law codes as it does on legally binding treaties, and the *litigational* approach, which takes a more circumscribed view to such issues. As he says, 'while states work largely within the operational edifice, they are acutely aware that international environmental law may arise in litigation, and that the distinction between binding and nonbinding instruments is, in that context, a crucially important one'.

¹¹³ *Dispute concerning Article 9 of the OSPAR Convention* (2003) (Judgment of 2 July 2003, paragraph 102): 'A treaty is a solemn undertaking and States Parties are entitled to have applied to them and their peoples that to which they have agreed and not things to which they have not agreed'.

¹¹⁴ Paragraphs 58 and 60. It is significant to note that the tribunal also specifically discusses sustainable development: 'Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require

above with reference to prominent judicial pronouncements on the issue, the point must equally be accepted that the *impact* of such explicit references has not yet been ascertained, either with precision or coherency across judicial institutions.

Moreover, moving beyond the ‘mere invocation’ of sustainable development and related concepts,¹¹⁵ there is the more controversial suggestion that courts and tribunals could develop a more substantive – a more methodological – integrative approach; one referred to previously as *intentional* integration.¹¹⁶ But to what extent is it feasible or desirable to seek an approach, the aim of which is to promote sustainable development within judicial reasoning? Perhaps it is necessary to separate the issues of feasibility and desirability. On the issue of feasibility, while it might be theoretically possible – though not without great controversy – to conceive of a specific model, the purpose of which is to integrate environmental, social and economic considerations within a reasoning framework, the process presupposes the mechanistic application of fact to readily-determined law that is wholly inappropriate.

That, of course, does not mean that there are no outer limits. The legal notion of equity is neither prescriptive nor particularly measurable, but a reasonably clear jurisprudence of what it does and does not permit has evolved. Similarly, a jurisprudence may develop, over time, that outlines what sustainable development does and does not require. As leading commentators have noted, ‘it is difficult to see an international court reviewing national action and concluding that it falls short of a standard of ‘sustainable development’.¹¹⁷ Nevertheless, elsewhere they go on to add that ‘although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development’.¹¹⁸

There is much credibility in an approach to sustainable development that focuses upon procedure rather than substance, though critics of sustainable development may seek to question the nature and extent of State practice and *opinio juris* in supporting even a procedural obligation such as this. A procedural approach does however have the advantage of respecting differences in socio-economic, cultural and political situations, whilst at the same time requiring integration of the vast array of different considerations.¹¹⁹ It may thus be possible for a reasoning model to evolve that focuses upon the procedural, rather than the substantive, elements of the concept, though in turn this may do little to *guarantee* a sustainable result, if one wishes (again) to take up the argument that one can pre-determine when such an outcome would be sustainable.

As regards the desirability of the development of such a judicial ‘tool’, one returns to the point made earlier with reference to intra-treaty integration; to what extent can an unconditional belief in the imperative of integration – overriding all other considerations – negatively affect the intrinsic purpose, *in casu*, of dispute settlement. First, if tribunals were ever to openly – and too consistently – advocate a highly interventionist approach on this issue, most States would voice their objections through not

the integration of appropriate environmental measures in the design and implementation of economic development activities...Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate such harm’ (paragraph 59). The tribunal goes on to quote from the International Court’s decision in *Gabčíkovo Nagymaros*.

¹¹⁵ Though rejecting sustainable development as a rule of customary international law, Lowe argues that ‘as a goal or policy it is perfectly adequate to offer some guidance to judges in their approach to establishing priorities and accommodations between conflicting primary norms...In *Gabčíkovo*, the Court could have managed without it; but it chose instead to refer to the concept and, by doing so, to open up the possibility of the development of the concept as a framework for the reconciliation of conflicts between development and environmental protection when they come before it’ (Lowe, above note 103 at 34-35).

¹¹⁶ For one attempt at discerning the elements of such a scheme, see Cordonier Segger, above note 109 at 590-592.

¹¹⁷ Birnie and Boyle, above note 96 at 95.

¹¹⁸ *Ibid* at 96. Cf. see the following comment: ‘On the point, with reference to Birnie and Boyle, on whether integration refers to a process orientated idea or whether the outcome of the decision-making is equally important, I think that a careful reading of the key instruments on sustainable development (Stockholm, Rio and Johannesburg declaration) will suggest that the outcome of the decision-making process is equally (if not more so) important. The latter is perhaps even clearer when one considers the Johannesburg Declaration. It is equally clear when one considers instruments from civil society such as the ILA Declaration and also the Earth Charter (whatever the merits or demerits). Although principle seven in the New Delhi Declaration may be read to support Boyle and Birnie’s assertion, a holistic reading of the declaration does not’ (correspondence from Professor Dire Tladi).

¹¹⁹ French, above note 15 at 72.

consenting to their jurisdiction and might, ultimately, withdraw their support. In the longer term, this would do a disservice to the *higher* goal of the peaceful resolution of disputes, regardless of the value of the integrative model put in place.¹²⁰

Second, and much more realistically, one returns to the issue on which the discussion on legal integration began; the distinction between the mechanical integration of norms and the interrelationship between sub-disciplines. We suggested that what should distinguish institutional integration and normative integration is that while the former focuses on merging all relevant factors into a unified answer, the latter focuses on facilitating better connexions between pre-existing rules, and thus, if not maintaining, at least accepting the very differences that existed at the outset. Promoting the development of *integration as a judicial reasoning tool* should allow a judicial body to act in a more integrated manner than is currently the case. Perhaps, and in line with and in light of the constraints of the judicial model, courts and tribunals, rather than developing a reductionist approach to problems through the judicial application of some kind of formula or methodology in which rules are modified and misshaped, should instead recognise the complexity of the system of which they form part and seek to use the law sensibly and rationally to provide a coordinated answer; not so much integration for its own sake, but rather using integration as a lens through which synergies are found and then built upon.¹²¹ As one report notes, '[s]ustainable development will be enhanced if competing legal rules strive as a first step towards compatibility and as a second step towards mutual support...Interrelationship as a principle contributing to the achievement of sustainable development depends on the respect of each legal domain for the scope and content of adjacent bodies of law'.¹²²

5. Closing Thought

The principle of integration is being implemented through a range of forms and mechanisms. Whether at the systemic, institutional and legal level, integration is playing a pivotal role in the further elaboration of sustainable development. What has happened so far, however, is that the principle of integration has been used in a rather simplistic manner to cover this whole terrain, with Principle 4 of the Rio Declaration being tirelessly overused. This is unhelpful if we are ever going to truly unpick what role integration can and should play in the global sustainable development endeavour. Though this report suggests an equally artificial divide, it is nevertheless one that, at least, has the merit of highlighting differences as well as similarities. In the final analysis, integration needs to affect the entire spectrum of institutional, corporate, legal and *individual* behaviour if sustainable development is to have any chance of to be meaningfully realised. As a 2002 report noted, 'it is important to recognize that the issues at stake are deeply political, economic and distributional on the world scale, and thus in their very nature highly contentious. They also concern the very essence of human society and economy, of the global system and order, and ultimately of its moral and ethical underpinnings'.¹²³ Integration, as the most practical application of this global agenda for change, must therefore be equally contentious. In fact, if integration is not being applied controversially, might one suggest it is not actually being applied effectively?

6. Future Direction

¹²⁰ 'The question of whether some kind of formula or test for SD more broadly exists is only a 'straw man'...the actual question [is] how different international (or domestic) tribunals actually do, or could, deal with the interrelationships of international norms, and the integration of social, economic and environmental regimes in which they play an important but only partial role depending on the 'subject matter' or 'regime' in which they principally serve' (correspondence from Marie-Claire Cordonier Segger).

¹²¹ 'The law itself, however, follows from whatever rules are applicable in any given context. In construing them, one should avoid prematurely blurring their respective rationale. Lawyers are trained to dissect common sense argument first and to "integrate" partial answers to a single comprehensive answer later, maybe only at the very final stage of reasoning. That process of integration again is subject to the applicable rules. They may, explicitly or by the formal ranking of the sources of law, establish an order of priority that simply has to be observed. To the extent no such hierarchy can be found to exist, the various factors have to be reconciled. Remaining contradictions should be openly stated. Sometimes, burden-of-proof rules may allow for an adequate resolution of individual cases. More often than not, the judiciary will be called upon to take decisions of a law-making character. The political branches of government may, if they so wish, correct the rules resulting from such decisions, at least for the future (correspondence from Professor Karl Meessen).

¹²² Report of the Expert Group Meeting, above note 60 at paragraph 13, emphasis added.

¹²³ South Centre, *The South and Sustainable Development Conundrum: From Stockholm 1972 to Rio 1992 to Johannesburg 2002 and Beyond* (Geneva, South Centre, 2002), available at <http://www.southcentre.org>.

This report is an initial discussion of the principle of integration. There is still much to consider. Building upon what was said in Berlin, one of the most useful things that the Committee might undertake is to survey State and organizational practice through the development and dissemination of a questionnaire. The Committee should consider, in Toronto, how best to achieve this, and in what time-frame. As is clear in this report, integration is a sizeable topic; it is therefore important in devising a future work programme that the Committee retains a sense of the concept as a whole, as well as analysing aspects thereof.

It is suggested that the following outline work programme be adopted:

- (i) preparation and dissemination of questionnaire (Autumn/Winter 2006);
- (ii) analysis and initial evaluation of questionnaire findings (Spring/Summer 2007);
- (iii) Committee seminar to discuss findings and other known examples of State/organisational practice (Autumn 2007);
- (iv) preparation of third report (Winter 2007/Spring 2008).

Annex I

Letter from Professor Nico Schrijver (chair) and Drs. Duncan French and Ximena Fuentes (co-rapporteurs) to members of the ILA International Committee on International Law on Sustainable Development (23/01/06) in preparation for the 2006 ILA Conference

Dear Colleagues

ILA Committee on the International Law on Sustainable Development

Introduction

At Toronto 2006, the ILA Committee on the International Law on Sustainable Development will present its second report. At Berlin 2004, the committee decided that it would primarily focus its next report on the principle of integration.

In light of that decision, the following text has already been provided to the organisers of ILA Toronto as setting out, in general terms, the broad framework of the second report.

"This is the second report of the Committee. It focuses upon the role, current status and further implementation of the principle of integration as the cornerstone of international law in the field of sustainable development. The principle of integration, so clearly established in the 1992 Rio Declaration, has always been accepted as fundamental to the achievement of the many goals of sustainable development. Significantly, the principle of integration can be understood both substantively and in institutional terms. The report of the Committee considers the diversity of means by which the principle is manifested at the international level; these include the incorporation of sustainable development considerations within treaty regimes, the internalisation of such concerns within the programmes and policies of international organisations (World Bank, WTO, EU etc.), and the use of the principle as a reasoning tool to ensure more coherent judicial decision-making. The Committee, nevertheless, notes the lack of a systematic and "principled" understanding of the relationship between the principle of integration and sustainable development. The report also documents and comments critically on recent developments in the legal implementation of sustainable development, including through treaty law, partnership agreements and judicial decisions."

Commentary

If there is one principle that is pivotal to both the further clarification and implementation of sustainable development, it is the principle of integration. As both a procedural tool and a substantive characteristic of the international law-making process in the field of sustainable development, the principle of integration must be at the core of any attempt to further operationalize sustainable development. If, ultimately, sustainable development is concerned with the bringing together and in some way reconciling environmental, developmental and social considerations, the principle of integration must be fundamental.

Principle 4 of the 1992 Rio Declaration states that '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. This remains a key provision, but in the twelve or more years since UNCED, our understanding of the notion of integration has become significantly broader.

It is now generally accepted that integration not only operates at the project level, but also has substantial implications for domestic law, the incorporation of sustainable development considerations within and between treaty regimes, changes in national/regional/global institutional practices and procedures, and judicial decision-making, to name but a few.

A central issue is that when one talks about integration, does one actually mean integration (in terms of a process of considering all relevant factors, but the decision may not in itself be considered as 'integrated' when seen in isolation), or does one actually mean synthesis (the objective of achieving an 'integrated' result)? In other words, is integration an obligation of process or a normative obligation of

result? Professors Birnie and Boyle argue that the decision of the International Court of Justice in *Gabcikovo-Nagymaros* implicitly supports the view that it is 'the process of decision-making [that is] the key legal element in sustainable development, rather than the nature of the development'.¹²⁴ But is this necessarily the case?

The first report of the ILA Committee on the International Law on Sustainable Development, presented at Berlin in 2004, stated: 'a key feature of the approach of this committee should be its reliance on the principle of integration...It is the principle of integration that both brings together the many challenges confronting the international community and, at the same time, provides the most realistic chance of their resolution. Nonetheless, the principle of integration itself remains inchoate and is in need of further study. In particular, this committee is well placed to assess the legal implications of current State practice and the further implementation of the integration principle. It is therefore suggested that out of the seven legal principles put forward in the ILA New Delhi Declaration, the principle of integration should be the focus of the most concerted attention'.

In now taking this discussion forward, it is important to analyse in much more detail:

- (i) the various forms of integration;
- (ii) the mechanisms through which integration occurs;
- (iii) the expectations of integration (as noted above, is it an obligation of conduct or of result?);
- (iv) the practice of integration within other areas of law (eg. EU law and other regional trade agreements, international fisheries law, international trade law, international investment law);
- (v) the relationship between integration and sustainable development;
- (vi) the relationship between integration and other principles of international law relating to sustainable development;
- (vii) political difficulties / practical problems in the further implementation of the principle of integration.

There is much State practice to consider, as well as broader conceptual problems to grapple with.

As the first step in drafting the second report, the Chair and co-rapporteurs would ask that all members consider the variety of issues relating to the principle of integration and, if at all possible, provide a short commentary of their views. Kindly use the list of items as above as a point of reference for your commentary (due to ILA word limitations, it would be preferred if members could summarise their thoughts in no more than 1,000 words). If possible, would colleagues please email their thoughts to one of us no later than the end of February.

On receiving these commentaries, the co-rapporteurs will prepare a detailed composite second report, which will be circulated for further comment prior to final submission to ILA HQ in plenty of time before the conference in Toronto.

Best wishes

Duncan French, Ximena Fuentes and Nico Schrijver

23 January 2006

¹²⁴ A. Boyle and D. Freestone, *International Law and Sustainable Development* (Oxford: Oxford University Press) (2nd edn, 1999) 17.

Annex II

Elements of the Principle of Integration in WTO Jurisprudence: Another Look at the *Shrimp* Cases

A Comment prepared for the International Law Association's Committee on the Law of Sustainable Development

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1. Introduction

The purpose of this comment is to discuss the degree and manner in which elements of the Principle of Integration formulated in Principle 4 of the 1992 Rio Declaration¹²⁵ may be discerned in World Trade Organization ("WTO") jurisprudence, focusing primarily on the *US-Shrimp* Appellate Body ("AB") Report ("*Shrimp I*"),¹²⁶ and to lesser extent on the *US-Shrimp* AB Compliance (Article 21.5 DSU) Report ("*Shrimp II*").¹²⁷

The *Shrimp* cases are now five years old and more, yet they remain the most comprehensive judicial discussion of the relationship between a pure form of environmental protection (i.e., one that is not simultaneously a measure related to human health or other non-trade concerns) and international trade law. It is therefore worth revisiting the cases in an attempt to contribute to the achievement of a greater specification of the Principle of Integration. In so doing, this comment begins with general observations on the formal status and potential scope of the Principle of Integration in the WTO. Subsequently, the comment offers an analysis of the *Shrimp* cases as reflective of the Principle of Integration. This will be followed by a more forward looking discussion of generalized implications of this analysis, and brief conclusions.

2. Preliminary Observations on the Status and Scope of the Principle of Integration in the WTO

First, a general note on the status of the Principle of Integration in WTO law. Strictly speaking, WTO law has not expressly incorporated or directly applied the Rio Declaration, in general, or the Principle of Integration, in particular, as such. Indeed, *Shrimp I* did make significant use of the Rio Declaration in its interpretative efforts, including one explicit reference to the Principle of Integration.¹²⁸ However, the present comment will not restrict itself to formal aspects such as direct incorporation or application, and will rather adopt a broader exploratory and explanatory approach, emphasizing readings of aspects of WTO law as assimilating and reflecting the Principle of Integration, and describing the manner in which the AB has in practice adopted judicial interpretations of both WTO and non-WTO law that are tantamount to a guarded application of the Principle of Integration, all the while remaining within the bounds of basic tenets of WTO law such as the WTO Agreement preamble and Article XX GATT.

In this sense the position of the Principle of Integration in WTO law (in its relation to environmental protection), may be conceptually analogous to the status of the Precautionary Principle (regarding human, animal and plant life and health, and environmental concerns, particularly with respect to the WTO Agreement on Sanitary and Phytosanitary Measures ("SPS")), as constructed by the AB in the

¹²⁵ See *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June, 1992, Annex I, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I). The Principle of Integration reads as follows: '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.

¹²⁶ See WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R, 12 October, 1998.

¹²⁷ See WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia, WTO Doc. WT/DS58/AB/RW, 22 October, 2001.

¹²⁸ See *Shrimp I*, at fn. 147.

EC–Beef Hormones case ("*Hormones*")¹²⁹ and as subsequently followed by the Panel in the recent *EC-GMOs* case).¹³⁰ In both normative instances – the Precautionary Principle and the Principle of Integration – the non-WTO principle has not been formally applied in an independent manner in the WTO, but in practice, WTO law has been interpreted and applied in reserved conformity with it. The actual status of the Principle of Integration in the WTO, however, may currently be understood as somewhat preferred to that of the Precautionary Principle. This is because the relation between the Precautionary Principle and WTO rules has been discussed by the AB in what may be viewed as part of the *ratio decidendi* of *Hormones*, as well as by the *EC-GMOs* Panel, concluding that the relevance of the Precautionary Principle in the WTO, regardless of its status as a norm of international law, is in any case restricted (at least in the sense that it does not "override" SPS provisions).¹³¹

In contrast, the WTO-relevance of the Principle of Integration has not, thus far, been directly addressed by the AB, let alone restricted, in such an explicit manner. Indeed, as I argue in the next section of this comment, WTO jurisprudence in the *Shrimp* cases is very much in harmony with the Principle of Integration. There is therefore still room to argue that the Principle of Integration is essentially applicable – and that it has indeed been indirectly applied or followed – in WTO jurisprudence.

Furthermore, looking beyond the WTO itself, it is possible that WTO law and practice (although it does not rely on the Principle of Integration as an applicable rule of international law), may be construed as evidence of state practice as well as legal obligation that may contribute to arguments establishing the Principle of Integration as a general principle of international law, or even a customary rule of international law, either as already established or at some formative stage of acquiring such a normative status.¹³² In other words, while searching for confirmation of the Principle of Integration as a tributary of WTO law, the converse normative flow might be at least as valid and probable, and perhaps more significant in the long run.

Second, a general observation on the limits of the potential scope and effect of the Principle of Integration in WTO law within the broader context of development. Properly and ordinarily construed, the Principle of Integration deals with the analytical relationship between three substantive components. It mandates:-

- the integration of: (i) *environmental protection*;
- as a part of (ii) the "*development process*";
- with the purpose of attaining (iii) *sustainable development*.

Moreover, while the goal of sustainable development has been expressly incorporated into the WTO Agreements,¹³³ WTO law is not concerned with a comprehensive ordering of the "development process" writ large, but rather more restrictively with the regulation of a particular economic activity – international trade – that indeed has far reaching implications as an important component of the "development process", but is nevertheless only a single component thereof, among several.

¹²⁹ WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, 16 January, 1998.

¹³⁰ See WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/INTERIM, 7 February, 2006 (this is an interim report; the final report may differ in some respects).

¹³¹ See *Hormones*, at para. 30.

¹³² Compare with Canada's position on the status of the Precautionary Principle in *Hormones*, at para. 27: "the 'precautionary approach' or 'concept' is 'an emerging principle of law' which may in the future crystallize into one of the 'general principles of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*".¹³²

¹³³ See WTO, *Marrakesh Agreement Establishing the WTO*, First Preamble Recital: "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development," (emphasis added).

Hence, an examination of the implementation of the Principle of Integration in the WTO as undertaken here should from its outset not anticipate conclusions on the integration of environmental protection concerns *into* the "development process", but only on the Principle of Integration as informing the *balance* between environmental protection, on one hand, and international trade, on the other, both as complementary and/or competing components *of* the "development process". Therefore, considerations that are neither trade-related nor environmental, but nonetheless might be considered as integral parts of the "development process", such as governance, fiscal policy, investment protection, political rights, and social and economic rights, should not be expected to figure highly in this discussion, even though they should rightly be deemed relevant to the Principle of Integration. This is because such considerations do not normally emerge in the WTO's law and jurisprudence, that relates primarily to international trade, only peripherally to environmental aspects of sustainable development, and only rarely to other non-trade interests.

Thus, before examining the role of the Principle of Integration in the *Shrimp* cases, it should be borne in mind that the full impact of an implementation of the Principle of Integration is much broader than what can reasonably be expected to be reflected in WTO jurisprudence.

3. The Principle of Integration as Reflected in the Shrimp Cases

In *Shrimp I*, the AB was tasked with deciding the WTO consistency of United States ("US") measures¹³⁴ barring imports of shrimp and shrimp products from WTO members who had not adopted and enforced national programs for the protection of sea turtles from by-catch during shrimp harvesting, with Turtle Extracting Devices ("TEDs"). The *Shrimp* dispute is therefore prototypical of the "trade and environment" nexus. However, the case has not been analyzed from the particular perspective of the Principle of Integration. When this perspective is adopted, the integration of environmental protection as a legitimate concern to be balanced with trade, for the purpose of sustainable development, can be discerned in many aspects of the AB Report in *Shrimp I*, as set out below:

- Explicit recognition of the "objective of sustainable development" as informing all of WTO law, based on the preamble of the 1994 WTO Agreement, and application thereof in the interpretation of Article XX(g) GATT and the *chapeau* of Article XX GATT. This can be seen both as an *act* of integration evidencing the practice of the Principle of Integration, and, indirectly, as an acceptance of the Principle of Integration as a *legal principle*. Importantly, the objective of sustainable development was referred to by the AB in two separate legal instances: first, for the purpose of interpreting the Article XX(g) exception as substantively concerned with environmental protection (para. 129); and second, for the purpose of accepting environmental protection as the basis for a trade restriction that is not "unjustifiable or arbitrary discrimination" under the *chapeau* of Article XX GATT (paras. 152 *et seq.*). In other words, environmental protection for the purpose of sustainable development was adopted as the baseline for examining whether the US legislation was an abuse of the environmental exception, in the sense that it overstepped the "line of equilibrium" between the right of one Member to invoke the exception and the substantive trade rights of other Members (para. 159). This balance of rights and exceptions informed by the objective of sustainable development is concordant with the Principle of Integration: environmental protection is integrated with other development factors, and is not considered in isolation from them.
- Interpretation of the Article XX(g) GATT term "exhaustible natural resources" to include living resources rather than merely non-living resources. This interpretation was based upon contextual analysis of non-WTO treaty sources such as UNCLOS and CBD, but also upon the logic that "one lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities".¹³⁵ This is an example of integrating an environmental protection concern with trade law, based upon the goal of sustainable development, and hence exemplifies an implementation of an integrative approach that could have been derived from the Principle of Integration.

¹³⁴ Section 609 of Public Law 101-162, 16 United States Code (U.S.C.) §1537.

¹³⁵ See *Shrimp I* at para. 128.

- The finding that the internationally accepted condition of sea turtles as species threatened with extinction (*inter alia*, in CITES) characterizes them as "exhaustible natural resources"). This is an illustration of integrating factual determinations and substantive agreements encapsulated in non-WTO sources, that are related to environmental protection, with the requirements of the WTO (para. 132).
- The evaluation of the relevant US legislation as "related" to the goal of environmental protection (paras. 140-141) Here it could be said that the AB went a step beyond integrating environmental protection into WTO law, and undertook an assessment of the degree of integration of environmental protection in the US domestic legislation under review. This examination was formally based on the language of Article XX GATT, but was in essence in conformity with the Principle of Integration.

More precisely, the Principle of Integration, taken on its own, might have mandated that national legislation *must* integrate environmental protection. In contrast, such a degree of mandatory integration is not a positive requirement of WTO law, and Article XX(g) GATT would appear to merely *allow* national legislation to integrate environmental protection. This permission is conditional, requiring compliance with the *chapeau* of Article XX GATT. Thus, it might be said that Article XX GATT as applied by the AB (and as discussed with some more detail below) is in fact *a rule of integration*, setting out the conditions under which environmental protection is to be integrated with trade law. This is not necessarily the rule of integration that would have been reached in an environmental treaty; but it is a rule of integration nevertheless. In both cases – a direct application of the Principle of Integration, on one hand, and an application of Article XX GATT, the national legislation would be deemed inappropriate if it did not reach an adequate degree of integration of environmental protection. The main differences are in jurisdiction, causes of action and applicable law, i.e., the AB could not consider an action against domestic legislation based solely on the claim that it was not integrative enough on the basis of the Principle of Integration alone. Furthermore, the Principle of Integration itself lacks sufficient specification to lay out how integration is to be achieved. Arguably, however, the degree and manner of integration, is in substance the same in both scenarios: the domestic legislation is judged by the extent to which it integrates environmental concerns, with the overarching objective of sustainable development in mind.

- Consideration of the mandate of the WTO Committee on Trade and the Environment ("CTE") as indicative of the balance to be struck between free trade and environmental protection. In considering the compatibility of the US legislation under review with the *chapeau* of Article XX GATT, the AB turned to the WTO Ministerial Decision on Trade and the Environment,¹³⁶ the preamble of which provides:

"Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other".

This text, which frames the mandate of the CTE, can and should be understood as a reflection and embodiment of the Principle of Integration. The consideration that there "should not be... any policy contradiction" between trade disciplines and environmental protection is substantively equivalent to a harmonization of trade and environmental concerns, in the service of sustainable development – in line with the Principle of Integration; and it was described by the AB as "the most significant" of certain developments that "help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment" (para. 154). Significantly, in citing this reference, the Appellate Body noted two principles of the Rio Declaration: Principle 3, which is the formulation of the concept of sustainable development; and Principle 4, which is the Rio formulation of the Principle of Integration (footnote 147). This implies that the AB was aware, if not more concretely of the

¹³⁶ Adopted by Ministers at the Meeting of the Trade Negotiations Committee at Marrakesh, 14 April 1994.

view, that the Ministerial Decision was in fact an expression of the Principle of Integration. The consequence of this interpretation, it may be argued, is a *de facto* adoption of the Principle of Integration as a guiding principle in WTO law.

- Environmental grounds for rejection of the US legislation as unjustified and arbitrary discrimination. Ultimately, in *Shrimp I* the AB denounced the US legislation as "unjustified and arbitrary discrimination" incompatible with the *chapeau* of Article XX GATT. It was this finding, with the result of determining the US legislation as WTO inconsistent, that was perceived by many at the time and today as well, as symbolic of the danger posed by the WTO to environmental concerns. However, a re-reading of the relevant part of the *Shrimp I* Report reveals that the finding of "unjustified and arbitrary discrimination" was based largely on environmental considerations as integrated into the trade law framework, and as such, may be seen as an expression of the Principle of Integration. Indeed, it is arguable that the same result would have been reached had the US legislation been reviewed as an environmental measure, exclusively under the Principle of Integration. When the non-integrative flaws in the US legislation were corrected, the AB approved of them in *Shrimp II*.

In *Shrimp I*, the US legislation was rejected by the AB as unjustifiably discriminatory due to its unilateralism and insufficient lack of flexibility. In effect, the US legislation stipulated the sole way in which the goal of sea turtle preservation could be pursued in order to gain access to the US shrimp market (para. 162). By excluding other possible ways to reach the same environmental result, the US legislation was deemed excessively trade-restrictive. Moreover, it appears that on the same basis the US legislation was also insufficiently integrative of environmental considerations, insofar as the same or similar environmental preservation results could be achieved by other, perhaps more practical or less costly methods. Similarly, the AB explained that the problem of preservation of sea turtles, due to the migratory nature of the species, requires concerted and cooperative international efforts (para. 168). In this context the AB also referred to Principle 12 of the Rio Declaration and to Agenda 21. The Principle of Integration would certainly have to take into account these sources' requirements of multilateralism, just as the AB did, even if trade restrictions were not involved. There is little doubt that a multilateral solution taking into account the interaction of environmental protection with trade and development needs would be more integrative than rigid unilateral ban imposed by the US – if it were attainable. The AB in *Shrimp II* acknowledged that such 'best case' solutions are not always achievable, in which case unilateral solutions are legitimate.

In *Shrimp I*, the AB was also critical of the short "phase-in" periods for the effect of the restrictive legislation and of disparate efforts to transfer TED technology to other Members (para. 175). These elements are problematic from a trade restriction perspective, but no less so from a purely environmental viewpoint, inasmuch as longer phase-in periods and increased technology transfer would be required for the successful dissemination of the method of preservation implemented by the US.

In sum, if the Principle of Integration has not been "written in" to WTO law, it can definitely be "read in". In most of its aspects, the *Shrimp I* Report and its follow-up in *Shrimp II* can be read as stimulating, pragmatic applications of the Principle of Integration in the context of trade. It now remains to see what generalized observations on the Principle of Integration can be extracted from this analysis.

3. Discussion and Generalized Implications for the Principle of Integration

On the basis of this analysis of the *Shrimp* cases, I would suggest the following observations, corresponding to the first three points on the list of queries provided by the Committee Chairs. Responses to the rest of the queries can be found, I believe, in the above analysis of the *Shrimp* cases. At any rate, these are really just tentative thoughts, some of which may be worth further discussion and elaboration:

(viii) The various forms of integration;

It is evident that integration can take on several different forms. It is tempting to think of the Principle of Integration as a *first-order*, substantive rule. However, the Principle of Integration itself lacks independent positive normative substance, relying instead upon the substantive

concepts of environmental protection, the development process and sustainable development, and so the Principle of Integration appears to be more in the nature of a rule of *implementation*, a *second-order* rule aimed at implementing the overarching objective of sustainable development and its subsidiary rules. It acts as a rule of implementation for pre-existing norms, in this case, by regulating the integration of environmental protection and other elements of the "development process", such as trade, as discussed in section 2 *supra*.

Moreover, insofar as the Principle of Integration is indeed a second-order rule, it may be more easily transferable between and among substantive fields of international law, than a first-order rule would be. In other words, it may not need to be expressly incorporated into a given body of international law to be valid, just as other second-order rules, such as rules of interpretation or responsibility, need not be specifically incorporated, given their general and pervasive nature. The *Shrimp* experience, in which the Principle of Integration was effectively applied without actually being relied upon, demonstrates this.

In this regard, at least to some extent it may be useful to consider the Principle of Integration as a rule of *interpretation* – certainly in the WTO this would be most effective, in that customary rules of interpretation are unquestionably incorporated into WTO by Article 3.2 DSU, while the status of non-WTO substantive rules is debatable. This conclusion is not necessarily exclusive – the Principle of Integration may be both a rule of interpretation and a more general rule of implementation at the same time. Moreover, as a rule of interpretation, additional thought needs to be given to the question of whether the Principle of Integration qualifies as a rule of *conflict* – determining which norm prevails in case of conflict – or a rule of *incorporation* – injecting environmental protection as an interpretative consideration even when it is not expressly incorporated.

Additionally, it would then be necessary to consider whether the Principle of Integration was a *permissive* or *mandatory* rule, i.e., does it require the integration of environmental protection into other disciplines or does it merely allow it. The language of the Principle of Integration would suggest the latter, while the practice of the WTO AB in *Shrimp* would promote the former.

(ix) The mechanisms through which integration occurs;

The *Shrimp* episode suggests at least four mechanisms through which integration can occur, regardless of the form it takes. Most briefly, these mechanisms include the following:

- Teleological interpretation (as in the acknowledgement of sustainable development as a WTO objective, and the interpretative use made of the Ministerial Decision on Trade and Environment);
- Contextual interpretation (as in reference to the Ministerial Decision on Trade and Environment and to several non-WTO treaties);
- Specific balancing rules (such as Article XX, both sub-section (g) and the *chapeau*);
- International Negotiation and Multilateralism (as mandated by the AB in the *Shrimp* cases; negotiations are seen as a procedure of integration, with the assumption that the result will be more integrative and pro-sustainable development than un-negotiated, unilateral measures).

(x) The expectations of integration;

The central question posed by the Committee Chairs, is whether the Principle of Integration is "an obligation of conduct or of result?". The *Shrimp* experience is somewhat inconclusive in this regard, demonstrating elements of both process (e.g., the mechanics of integration described above) and of result (such as the ultimate outcome of the cases, in which revised US legislation was approved by the AB as sufficiently sensitive to both environmental concerns and trade concerns). Moreover, I would argue that the teleology of sustainable development as applied by the AB is such that process alone is insufficient, and that integrative, pro-sustainable development legal results are required to satisfy the Principle of Integration as pursued in practice by the AB. This is quite clear from the application of environmental grounds in the assessment of US legislation

under the *chapeau* of Article XX GATT in both *Shrimp* cases, i.e., at no stage was it deemed sufficient that the legislation under review was adopted through appropriate procedures taking into account both trade and environmental considerations. For example, consider the question of international negotiation towards the adoption of a trade-restrictive, environmental measure. While the absence of negotiations was key in the AB's ruling against US legislation in *Shrimp I*, the existence of international negotiations was not sufficient to find in favor of the US in *Shrimp II*. Thus I would argue that the Principle of Integration establishes requirements of both process and result.

Annex III

Contribution to the ILA Report on Integration in Sustainable Development through interlinkages with other international treaties

Professor Joyeeta Gupta

1. Integration in two case study areas

One way to observe how integration is being pursued in international environmental law is to look in particular at how such integration is being sought and established in the areas of climate change and water law. The climate change problem is closely linked to almost all aspects of life and to that extent is an excellent case study for integration. Water as a basic necessity as well as a key resource in economic growth through the agricultural, industrial, transport, recreation and tourism industry is another good case study for analysing how integration is taking place. While the climate problem is one that has only recently reached the international arena, the water problem has been on the agenda since the start of civilisation and water law to deal with these problems has a long history. The following section first examines the climate change issue¹³⁷ and then moves on to look at water.

2.1 Integration in climate change

Climate change is caused by the emissions of greenhouse gases as a result primarily of industrial production and changes in land-use patterns. As its name suggests, the United Nations Framework Convention on Climate Change (UNFCCC)¹³⁸ was essentially a framework that laid out a number of policy options. However many of these policies were subject to other national and international policy arenas and agreements. In recent years, there is a huge amount of research to promote links between different sectoral initiatives as well as to report on existing initiatives that try to link the agreements on climate change with that of policy initiatives in other sectors.¹³⁹ The key links identified thus far are links with poverty, land-use, air pollution regimes and health, energy, trade and finance, and other policy areas.

Climate change is closely associated with poverty in that the poorest are likely to be the most vulnerable to climate change and because many of the activities of the poor may, in turn, lead to the emissions of greenhouse gases. The causes of poverty may lie at the micro level (households and individuals), meso level (socio-economic groups and communities, macro level (monetary policy and fiscal policy) and international level (trade and debt policy). Addressing poverty calls for creating opportunity, empowerment and security for the poor through the development of assets, livelihoods strategies and dealing with vulnerability. The key links that are being pursued in the literature and in law development are with respect to mainstreaming climate change in aid policies and aid strategies in other policy areas, the promotion of poverty reduction strategy papers in the context of the Millennium Development Goals and in order to access debt relief. Countries are also expected to prepare National Adaptation Plans of Action (NAPAs). The Clean Development Mechanism under the Kyoto Protocol¹⁴⁰ is also expected to provide some funding for adaptation on the one hand, as well as contribute to sustainable development through project development on the other hand. The Special Climate Change Fund, the Least Developed Country Fund and the Kyoto Protocol Adaptation Fund need to be closely aligned to poverty related policies and law, the goals and policies of development agencies and banks and the Millennium Development Goals¹⁴¹ if they are to be effective.

¹³⁷ Harro van Asselt, Joyeeta Gupta, and Frank Biermann, 'Advancing the Climate Agenda: Exploiting Material and Institutional Linkages to Develop a Menu of Policy Options', 14 RECIEL (2005) 255-264; Harro van Asselt, Frank Biermann and Joyeeta Gupta, Interlinkages of Global Climate Governance, in Marcel T.J. Kok, and Heleen C de Coninck (eds.), *Beyond Climate: Options for Broadening Climate Policy*, Netherlands Research Programme On Climate Change: Scientific Assessment and policy Analysis, report no. 500036 001, Bilthoven, pp. 221-246.

¹³⁸ United Nations Framework Convention on Climate Change, (New York) 9 May 1992, in force 24 March 1994; 31 I.L.M. 1992

¹³⁹ See, inter alia, Jacob Werksman, Kevin A Baumer and Navroz K Dubash, 'Will International Investment Rules Obstruct Climate Protection Policies', 3 INEA (2003) 59 - ...

¹⁴⁰ Protocol to the Framework Convention on Climate Change (Kyoto), 37 ILM (1998) 22, in force 16 February 2005.

¹⁴¹ UN Doc. A.Res/55/2. www.un.org/millennium/declaration/ares552e.htm

In the area of land-use, a Collaborative Partnership on Forests (CPF) was established in 2001. By including members from the UNFCCC, the UN Convention on Biological Diversity (CBD)¹⁴² and the Convention to Combat Desertification (CCD)¹⁴³, this Forum aims to promote effective interlinkages between these three different treaties and the United Nations Forum on Forestry (UNFF)¹⁴⁴. Another initiative in 2001, was the establishment of the Joint Liaison Group (JLG) which is a cooperative effort of the secretariats of the FCCC, CBD and the CCD to ensure synergy between the policies being developed in all three fields. The Secretariat of RAMSAR¹⁴⁵ attends the meetings as an observer. These links are needed primarily because although at the level of principles and general goals there are synergies between the treaties, at the level of the design and operation of the implementing mechanisms, problems may arise. For example, the design of the Clean Development Mechanism may lead to mono-culture plantations if only the cost-effectiveness principle is implemented.

In relation to air pollution and health, the World Health Organization provides the subsidiary body on science and technology with periodic reports to provide clear links between the two bodies. Joint meetings are occasionally held between the UNFCCC and the Vienna Convention to promote collaboration.

In the area of energy, there are greater substantive links, since climate change is essentially focused on improving energy regimes. However, apart from observer status granted to IEA and IAEA at the international climate change negotiations, very few formal links have been made between these related regimes. The recently developed International Partnership on a Hydrogen Economy is also not formally linked to the climate treaties. A number of policy options are being explored in the literature including the opportunity for developing an International Partnership on Sustainable Energy Policy and clear links with the Development Banks and the Aid and Export Credit Agencies of the developed countries to promote sustainable energy.

If the climate change problem can be essentially defined as a problem of investment, then closer interaction with a number of investment, trade and finance regimes becomes important. At present there is close interaction with the Global Environment Facility through a 1996 Memorandum of Understanding between the two bodies; however much more can be done. This includes a joint WTO/FCCC working group and finding ways and opportunities for mainstreaming climate policies in foreign direct investment strategies and investment agreements at international level.

There are few formal collaborative forums for promoting collaboration between the climate change treaties and other areas such as the treaties on fresh water, oceans and seas, the international transport regime including the ICA and IMO and the UN Centre for Human Settlements; but such linkages are being explored in the literature. At the same time, the US is exploring a number of bilateral and multilateral agreements with other countries in the world that are in some way or other substantively related to climate change, but there are no formal links with the climate agreements.

2.2 An assessment

While climate change is closely linked to a number of other issues, the formal links between the climate agreements and other multilateral agreements and organisations are still in the process of being identified and implemented. The primary vehicle for integration is via the process of creating joint forums for discussion between two regimes so that issues can be discussed, synergies explored and potential contradictions identified, understood and if possible avoided.

3.1 The water regime

International policies and laws on water, unlike in the case of climate change, are less concentrated and more complicated to identify and integrate. The scale of water issues is difficult to objectively identify, as water issues manifest themselves at local through to global levels and while the subsidiarity principle calls for managing water at the lowest possible level, the river basin concept calls for managing water at river basin level. At the present moment, we have one global UN Law on the Non-Navigable Uses of International Watercourses (1997)¹⁴⁶, that is not yet in force, UNECE treaties on International Watercourses¹⁴⁷, several hundred regional agreements on water¹⁴⁸ and more than 23 UN

¹⁴² Convention on Biological Diversity, 31 ILM (1992), 818, in force 29 December 1993.

¹⁴³ Convention to Combat Desertification, 33 ILM (1994) 1014, in force 26 December 1996.

¹⁴⁴ For details on the UNFF see <<http://www.un.org/esa/forests/about.html>>

¹⁴⁵ Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force on 21 December 1975, 11 ILM 1971.

¹⁴⁶ Convention on the Non-Navigational Uses of International Watercourses, 36 ILM (1997) 719, Not in force.

¹⁴⁷ UNECE Convention on Transboundary Watercourses and Lakes 31 ILM 1312, 1992.

agencies dealing with water issues. The World Water Development Report was produced for the first time by the World Water Assessment Programme,¹⁴⁹ a joint programme of these UN agencies, in 2003, as an attempt to integrate the work of the UN agencies in the area of water. This effort tries to assess the current state of water affairs, presents key case studies and develops management strategies and capacity building activities in order to help governments the world over deal with the key water challenges and prepare themselves for achieving the Millennium Development Goals. This Report is then provided to the World Water Forums that have been taking place every three years since 1997, and are organized by the World Water Council. The World Water Council is a multi-stakeholder platform that was established in 1996 and organises the key efforts globally to integrate water science and policy.

3.2 An Assessment

The integration process in the water area is being undertaken through multi-stakeholder discussions and debates in a multi-disciplinary setting leading to policy recommendations that may or may not be adopted by the Ministerial Conference at the end of each of the World Water Forums. What is clear is that in the area of water law, the quest for sustainable development and the increasing understanding of the complicated links between water and human life, livelihoods and economies, lifestyles and ecosystems is such that law is only one of the disciplines needed. Key to the future of sustainable development is the notion that the goal of environmental law should be to ensure the legality, legitimacy, transparency and accountability of the increasingly complicated policymaking process.

4. Some preliminary conclusions

The perception that international law is fragmented and international secretariats are spread all through the world¹⁵⁰; leading to ad hoc and competitive law making as opposed to integrated law making has led some to study the potential for clustering international environmental treaties, while others are pursuing the idea of promoting a hierarchic global environmental organization¹⁵¹. The political realities may however be major obstacles to such comprehensive integrative exercises, and the benefits for developing countries are also questionable.¹⁵²

¹⁴⁸ Oregon State University (2002). Atlas of International Freshwater Agreements, UNEP, Nairobi.

¹⁴⁹ See for more details <<http://www.unesco.org/water/wwap/index.shtml>>

¹⁵⁰ See e.g. ILC 'Report of the Study Group on Fragmentation of International Law' (18 July 2003) UN Doc A/CN.4/L.644.

¹⁵¹ See, for example, the various positions of authors in Frank Biermann and Steffen Bauer (eds.) *A World Environment Organization: Solution or Threat For Effective International Environmental Governance*, Global Environmental Governance Series, Ashgate Publishers (2005).

¹⁵² Joyeeta Gupta, *Global Environmental Governance: Challenges for the South from a Theoretical Perspective*, in Frank Biermann and Steffen Bauer (eds.) *A World Environment Organization: Solution or Threat For Effective International Environmental Governance*, Global Environmental Governance Series, Ashgate Publishers, (2005), pp. 57-83.