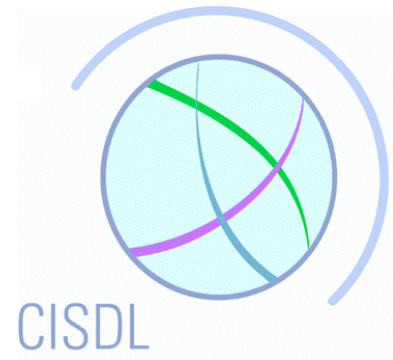


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Opening Keynote
June 13, 2002, Montreal

~ 2002 Conference on International Sustainable Development Law ~

**Keynote Address by the Honourable Ms Cheryl Gillwald,
Deputy Minister for Justice and Constitutional Development
of the Republic of South Africa.**

Montreal, Canada, June 2002

**Ministry of Justice and Constitutional Development
Private Bag X9135
Cape Town
8001
South Africa**

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Ladies and Gentlemen,

Thank you for the opportunity to address you at the opening of this Conference on International Sustainable Development Law, otherwise known as Sustainable Justice 2002. We are all grateful to the organisers, the Centre for International Sustainable Development Law, the World Bank and the United Nations Environment Programme. I also wish to thank the McGill University Faculty of Law for hosting this event.

I have been asked to welcome you here today, in my capacity as the Representative of the Government of the Republic of South Africa. As you probably know, our country will co-host the World Summit on Sustainable Development (WSSD) that is to be held in Johannesburg, South Africa from 26 August - 4 September 2002, roughly ten weeks from today.

Our Conference here in Montreal also takes place just a few days after the final phase of the PREPCOM for the WSSD that was held in Bali from 5 - 8 June 2002. It is, therefore, in that context, the context of the WSSD, and the PREPCOMS which have taken place to date, that Sustainable Justice 2002 has been arranged.

Ten years ago, the nations of this world adopted Agenda 21, a plan of action designed to arrest the assault on our environment, alleviate poverty and redress the pitiable conditions under which so many billions of the world's population have to live. My own government has made good progress in implementing Agenda 21. Its efforts to do so have not been carried out in isolation from the good work other countries on the African continent have been doing, but rather, where appropriate, in conjunction with those countries.

Let's go back for a moment to contextualise our Conference here within the overall international objectives enumerated by Agenda 21. Our immediate purpose is of course to examine ways in which the implementation of international development law can strengthen and support environmental, social and economic law in their sectoral applications. In this, we should also understand the extent to which they may overlap or

even conflict and we should propose solutions for how international development law is able to mitigate the impact of these overlaps and conflicts.

In our implementation efforts on Agenda 21 issues, our approach has included a focus on the relevance of our Constitution, the supreme law of our country and its widely acclaimed Bill of Rights. It may interest you to know that our Constitution is one of the few Constitutions in the world that includes environmental rights in its Bill of Rights.

Please indulge me as I briefly refer to section 24 on our Bill of Rights in our Constitution that provides as follows:

Everyone has the right —

- a) to an environment that is not harmful to their health or well-being; and*
- b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —*
 - (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

In addition to the above, the fundamental tenet that should drive this discussion is the right to human dignity and the expectation that this right should be respected and protected. Furthermore, in its preamble our Constitution undertakes to improve the quality of life of all its citizens and *to free the potential of each person.*

These three principles give shape and form to the entire sustainable development debate in our country. They form the basis of Government's approach to addressing the enormous development backlogs faced by the majority of our citizens, backlogs that have been caused by the intentional and active denial of the very rights we now seek to respect and protect.

But we cannot regard ourselves, simply due to this background, as unique. We have come to recognise that these acute development challenges also have strong regional imperatives. We have therefore engaged closely with our SADC partners and this has proven crucial to developing an overall strategy that interlocks with the development needs of our region. This holistic and integrated development approach has furthermore shaped our understanding of the impact of globalisation on development in its broadest sense and this, in turn, has culminated in the recent production of an architecture that seeks to sustain and support a proactive, progressive and holistic approach to the

development of all the people of Africa. I am referring, of course, to the New Partnership for African Development (NEPAD), a process that was spearheaded and driven by our President, Mr Thabo Mbeki.

As Africans, we have become acutely aware that the past few decades of structural adjustment, as well as the aid-for-aid s-sake approach characteristic of so many development programmes in the past, have together had far less than the intended impact on the quality of life of the millions of people that inhabit our Continent. In fact, poverty levels in Africa today show an upward trend. Sadly, this trend is indicative of the negative impact of colonialism, post-colonial aid programmes and fundamental market and trade inequities that have characterised the development arena over the past half century. Despite recent improvements, these factors continue to dominate the global development agenda today.

In fact, a cursory analysis of development trends over the past few decades should lead one quite simply to the conclusion that it is not development that is unsustainable, but poverty itself. This apparently paradoxical observation is in fact quite straightforward. Poverty in its many manifestations weighs heavily on the domestic budgets of individual countries and the fallout is evident in the huge and unsustainable collective debt burden that these countries now bear. The international community can simply not afford it. If we continue to address the symptoms of poverty — avoidable disease, hunger, lack of shelter, environmental degradation — and not the problem itself; it will never be overcome. The toll on total global resources of subsidising the effects of poverty rather than addressing them programmatically through sustainable development plans of action has become too burdensome for the entire international community — both in developed and developing countries.

The only response to poverty can be to eliminate it by developing our global community in such a way that the potential in each person, each community, each institution and therefore each country is optimised. Developing people is about developing their capacity to engage opportunity. It s about developing their capacity as individuals, communities and nations to become proactive agents of change. This approach to development recognises the desire of developing countries to be active participants in the development process rather than passive recipients of pre-structured aid packages.

This approach also presupposes the need for innovative partnerships in which the strengths of the collaborating parties are optimised and the weaknesses are eliminated through mutual cooperation and unity of purpose. From this approach to development will flow a pattern of achievement and progress that constantly reinforces the collective good.

Fortunately, there is a growing global acceptance that, in order to remain relevant, development programmes have to be rights-based. Furthermore, these programmes should be informed and motivated by the need to realise — to make real — the whole gamut of rights that make sustainability achievable and contextually relevant. We must satisfy ourselves when implementing development programmes that, over and above the obvious political rights that need to be addressed, social, economic, gender and environmental rights should also be mainstreamed into the development agenda.

If this is true for the international development community, it must be even more applicable to the international legal community as it responds to the need to develop an international jurisprudence in sustainable development law that reflects a progressive, rights-based character, especially where it interfaces with social, environmental and economic aspects of law. And the acid test of relevance here will be the degree to which the rights of the poorest and most needy are recognised and realised — again, made real — in the law and in its application.

President Thabo Mbeki has stressed that the success of NEPAD too depends, to a large extent, on good governance, the promotion of the rule of law and an independent judiciary. This is true also globally for the purposes of achieving best practice in respect of sustainable development. The Rio Declaration itself affirmed the importance of law as a critical tool for sustainable development. It recognises that, in its simplest terms, sustainable development is indeed a matter of social justice. The fact that we are dealing here with the inalienable rights of human beings focuses attention on the pivotal position of international development law as a tool for achieving sustainable development within a social justice framework.

The Rio Declaration also highlighted the principle of intra- and inter-generational equity. In this it observed that while sustainable development is at heart a matter of social justice, it is not time bound. In other words social justice must not only prevail in the current context, we must ensure that we give what is due to each and every member of society in the future. Unfortunately, it is clear from the so far ineradicable issues of global poverty that the application of intra-generational social justice mores has been largely inadequate in respect of sustainable development.

On the 14th of May this year, His Excellency Mr Kofi Annan, Secretary General of the United Nations, stated in a paper delivered on his behalf by Mrs Nane Annan, that the Earth Summit held in Rio almost a decade ago had hoped to bring a paradigm shift in the way in which countries approach issues related to the environment. It was hoped, he said, that Environmental Protection would no longer be considered a luxury accessible only to an elite few, but that environmental matters would be integrated into economic and social issues and become central to the decision-making process. He went on to observe that developed countries had benefited from modernisation and that in many ways this had been a wasteful and hazardous process. These countries, he hoped, would play a leading role in assisting developing countries to combat poverty through a programme of development that would not result in further degradation of our environment.

More recently, the object of the Bali deliberations was to examine the commitment of governments throughout the world to improving the socio-economic conditions under which the majority of the people on this planet live and ameliorating the impact of their lifestyles on the delicate ecosystems that sustain these billions of individuals. The Ministerial discussions that took place in Bali will form the basis of the Political Declaration that Heads of State or Government will consider in August this year at the WSSD.

Various meetings have been held in different parts of the world in preparation for the WSSD and a veritable plethora of workshops, conferences and seminars have been arranged by interested stakeholders to prepare for the big event.

The growing body of knowledge that we have built on environmental degradation has brought us all to the very sobering conclusion that the world cannot afford for the so-called Third World to repeat the mistakes made by developed countries during the Industrial Revolution and subsequent years of economic expansion.

Economic expansion has after all been the backcloth against which recent environmental issues have become a global concern. An increasing number of environmental problems, previously within the domain of individual nations, now demand international solutions. Serious international environmental disputes have already arisen and others are likely to occur in the future. To illustrate my point, I need only to refer to the 1984 Bhopal chemical plant accident in India, the 1989 Chernobyl nuclear accident in Russia and the 1989 Exxon Valdez oil spill off Alaska. Arising from war rather than economic activity, the burning of oil wells in the Persian Gulf the following year were nonetheless catastrophic. These disasters still continue to have a global impact and have played a part in accelerating the development of international environmental law.

The depletion of the ozone layer and climate change, trans-boundary air pollution, waste pollution on land and at sea, transport of hazardous waste, bio-piracy and depletion of biodiversity (such as in the rain forests of the Amazon, Africa and Asia), desertification, deforestation and drought have become the bill of fare for international development law agendas. In addition social issues such as the growing size and number of mega-cities, the increasing role of civil society in influencing public policy and the transition towards a knowledge-based information society, are all examples of environmental issues that transcend political boundaries, the ramifications of which are felt globally.

Sustainable development is a complex and relative concept involving potentially conflicting interests: economic progress, on the one hand, and intangible human-centred values such as equity and quality of life on the other. From this perspective, environmental law appears to have a dual function; constraining the excesses of the

markets and protecting the rights of those who are marginalised by them. This is especially true for developing countries.

Environmental issues will become more and more pronounced as political boundaries and sovereignty wane in significance against the international backdrop of globalisation. Arguably, environmental issues may well become the very essence of global survival. The collective challenge will not only be to mitigate the environmental and social damage of the last thousand years, we will also be required to preserve what remains of our natural lifeline, so that future generations are able to survive. The environmental uncertainties facing humankind are a challenge to the legal system because environmental degradation is often irreversible. There is undoubtedly a global need to sufficiently protect the environment, wisely and effectively.

Environmental law reform should develop an institutional mandate that cannot be challenged. Currently a number of countries do not recognise any environmental authority as higher than their own, yet they are not ideally positioned to guarantee a balanced legal management of their own environmental problems. This attitude challenges the ability of the international legal system to cope with uncertainty to effectively prevent man-made environmental harm (as opposed to simply attempting to repair it) and to take account of trans-boundary causes and implications of environmental degradation.

The ideal model of a global institutional mandate would provide a basis for improved coordination between the authority of governments and the environmental activities of international governance structures such as the United Nations. In this way, countries could mutually establish the terms of common responsibility and how they will implement common protocols in their national legislation.

The management and control of environmentally sustainable development transcends the scope of domestic legal systems, and calls for complementary or at least harmonised action at the supranational level, whether bilateral, multilateral, regional or global.

In recent years the world has seen the adoption of various international environmental instruments. Declarations, recommendations, resolutions and policy statements are constantly added to the over 170 environmental treaties currently in existence. While most of these instruments represent soft law, these compacts play a vital role not only in global governance, but also in the development of national environmental governance policy and law. In some instances soft law has hardened into binding multilateral commitments or protocols.

The harmonisation between sustainable development and international sustainable development law is an enormous task that demands a global, national and regional approach, especially in respect of the current disparity between international conventions and national regulation in many countries. It is inevitable that international sustainable development law will be of limited use unless it is implemented at regional and national levels.

More and more countries are looking to environmental conventions and agreements to guide their own policies and law reform processes. There is a definite need to clarify and strengthen the relationship between existing international instruments in the field of environment and those that are relevant to social and economic development. Courts hearing environmental legal actions should draw on the jurisprudence of other countries around the world to assist them in handing down fair and informed judgements.

At the global level, it is essential that all countries contribute to international treaty development in the field of international law on sustainable development. Many of the existing international legal instruments and agreements on the environment have been developed without adequate participation and contribution by developing countries, and thus may require review in order to reflect the concerns and interests of developing countries and to ensure balance in the governance of such instruments and agreements.

It is heartening to note that governments around the world are now, more than ever, demonstrating a growing commitment to developing specific legislative and institutional regimes to protect the global environment and natural resources, beginning with the

formulation of appropriate environmental policies, incorporation of environmental principles into national constitutions and the integration of environmental planning into the overall national socio-economic planning models, through to the strengthening of legal and institutional frameworks. Strengthening the capacity of countries, especially developing countries, through sharing knowledge about international best practice will concretely contribute to protecting our common environment. This can arguably only be achieved through the development and adoption of a globally accepted environmental and sustainable development legislative regime.

Ladies and Gentlemen, United Nations Secretary General, Kofi Annan, once said:-

Above all, there has been a revolution in the awareness of the environment's importance for the very existence of the human race. Today, more than ever, there is a global appreciation of the fact that to ensure an acceptable quality of life for ourselves and our children, we must act as responsible stewards of our air, our water and our land. But much remains to be done...

So this Conference has a singular and awesome task. We have a unique opportunity to affirm the spirit of sustainable development. And at the same time we must recognise the integral relationship between the environmental failings of our present world and the social and economic stresses that have resulted from these failings. Our task is thus to make proposals for finding a way to respond with effective legal frameworks that do not permit the mistakes of old. The role of international sustainable development law has become an essential component in ensuring the necessary global standards of excellence in the governance of sustainable development.

In the run-up to the Johannesburg Summit, we should all be quite clear that there is only one platform upon which the success of this Summit can be guaranteed: and that is an unconditional acknowledgement of our common humanity. We will not reach consensus without addressing the structural causes of poverty and disempowerment. Our challenge now is to identify and cultivate a socio-economic and political common ground within a framework of widely ranging jurisdictional, cultural and national identities.

Since 1994 South Africans have sought to build a common platform of unity to take us forward along the path of democracy. In this we have found new symbols to reflect the breadth of our various cultural heritages and experiences.

I believe that the inscription on South Africa's post apartheid Coat of Arms - the highest visual symbol of our new democracy - can guide us in this new era. The motto, *!ke e: /xarra //ke*, is written in the *Khoisan* language of the */Xam* people, the oldest known inhabitants on the southern tip of Africa. It means literally: diverse people unite. It calls for unity in diversity and the recognition of a common humanity regardless of race, class or gender.

Inclusivity and consensus will be critically important if we are to achieve success at the Johannesburg Summit. As decision makers and opinion shapers you will all have an important role to play in achieving this.

Once again I would like to express my gratitude to the Conference Secretariat for inviting me to this important event and to the important contribution this Conference will make in the success of the upcoming EnviroLaw 2002 Conference in South Africa later this year. Your efforts here today will also have a bearing on the Johannesburg Summit. May I also take this opportunity to invite you all to our beautiful country and encourage you to come and experience the warmth and beauty of Africa.

I thank you.

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