

GOVERNING AND RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL REGIMES

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The World Summit on Sustainable Development (WSSD) in Johannesburg attracted 45,000 people from over 180 countries. Sustainable development is clearly a world priority. But it appears that sustainable is still hard to implement in a straightforward way.

This is not surprising. Sustainable development is a global goal rather than just one project or regulation. From formulation to implementation and monitoring, in law and in policy, three interrelated international spheres of action – economic, environmental and social – are shaped by the sustainable development objective. This conceptual challenge has a very practical result. Systems of governance and international cooperation for sustainable development are incredibly complex, and not very coherent. For sustainable development to be realised, there must be better accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection.

This chapter contains a short summary of existing sustainable development governance structures, based on the 2002 Johannesburg Declaration and Johannesburg Plan of Implementation, highlighting several specific aspects of the institutional arrangements for sustainable development that are relevant to international law. It then briefly discusses the dispute settlement forums where international sustainable development related disputes are currently resolved. It closes by proposing elements of a ‘principled’ legal test that international or

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domestic law-makers and judges might use when seeking to reconcile social, economic and environmental policies and laws in the interest of sustainable development.

In particular, this chapter examines the international regimes that currently govern accommodation, reconciliation and integration between the three substantive ‘pillars’ of sustainable development, considering how they could intersect in international policy and law. Two aspects of these regimes are particularly relevant.

First, if possible, it is best to avoid substantive international policy conflicts by ensuring coordination and coherence between the initiatives of international organisations with overlapping mandates. As such, the chapter examines the current international institutional architecture of sustainable development, to see how existing policy-making systems can accommodate, reconcile and integrate international social, economic and environmental objectives related to sustainable development. Second, when international disputes do arise, it is important that accommodation, reconciliation and integration can take place in a peaceful way. This author suggests that when such reconciliation is done among parties that share a commitment to sustainable development, not only must the stakeholders or parties come to a just resolution, but also, the relevant objectives of all three fields of law should be at least accommodated, if not reconciled or integrated. Hence, the chapter briefly examines different international courts and tribunals in which economic, environmental and social priorities have recently come to a head, considering recent jurisprudence from the perspective of reconciliation and integration between economic, social and environmental policies.

Further legal research is imperative to permit a comprehensive analysis of the legal aspects of reconciliation between overlapping and conflicting social, economic and environmental obligations, from the perspective of sustainable development law. This chapter is only able to pose initial questions. It presents an overview of two particular aspects of sustainable development governance, in order to propose elements of a ‘legal test for sustainable development’, and to inspire further legal research.

Sustainable Development Governance and the Results of the 2002 WSSD

The 2002 World Summit for Sustainable Development sought, through intensive negotiations over the course of two years, to define and clarify global systems of sustainable development governance.² The Johannesburg Plan of Implementation (JPOI) attempted, in Chapter XI on the ‘institutional

² The World Summit on Sustainable Development was mandated by the United Nations General Assembly, see “Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development” UNGA Res A/RES/55/199 20 Dec 2000.

framework for sustainable development', to encourage greater coherence.³ In the WSSD negotiations, government officials, experts and NGOs struggled to review existing, rather inchoate international governance structures within and outside the United Nations, gaining a detailed understanding of their interrelations. Several key proposals to improve sustainable development governance were debated and accepted.⁴ While the final text of the JPOI did not make as much progress as many had hoped,⁵ much of the existing sustainable development governance system was indeed clarified, and certain important steps were taken.

The 2002 JPOI serves to shed some light on the current global institutional⁶ architecture for sustainable development.

In its chapter on governance, the JPOI suggests that international institutions whose mandates relate to sustainable development, must be linked by some kind of governance system, inasmuch as they are jointly responsible for the implementation of the 1992 Agenda 21⁷ and the 2002 WSSD outcomes. These institutions are led by the United Nations itself, and serve to identify and address emerging sustainable development governance challenges. They also have roles in implementing other internationally agreed development goals, such as the objective of the 2000 *United Nations Millennium Declaration*, the 2002 *Monterrey Consensus on Financing for Development*,⁸ and the relevant outcomes of other major UN conferences and international agreements.⁹

According to the JPOI, there is a need for all of these actors to strengthen commitments to sustainable development, and integrate the economic, social

³ See the Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, Johannesburg (South Africa) (4 Sept. 2002) UN Doc. A/CONF.199/20:

<http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>

⁴ See "Sustainable Development Governance" (Paper prepared by the World Summit for Sustainable Development Governance Working Group Vice-Chairs Ositadinma Anaedu and Lars-Goran Engfeldt). Available online: <www.johannesburgsummit.org/html/documents/prepcom3docs/governance30.3.rev1.doc>.

⁵ UN University, *Sustainable Development Governance: The Question of Reform: Key Issues and Proposals*. (Tokyo: United Nations University Institute for Advanced Studies, 2002).

⁶ In this book, an institution is defined as 'a network of organisations and other actors that are working towards a common mandate, supported by a common organisational structure.' This definition encompasses the goals and rules, those devising them, and the coordination mechanisms and structures that are used to achieve the goals within the rules. See UNDP, *Capacity Development for Governance for Sustainable Human Development* (New York: UNDP, 1996). See also M. Lovei, and P. Pillai, *Assessing Environmental Policy, Regulatory and Institutional Capacity: A World Bank Policy Note* (Washington, D.C.: World Bank, 2003).

⁷ *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874. [Hereinafter *Agenda 21*]. References to Agenda 21, in the JPOI, also include the 1992 *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 (1992) and the 1997 *Programme for the Further Implementation of Agenda 21* GA Res. A/RES/S-19/2, UN GAOR, 19th Sess., UN Doc. A/Res/S-19/2 (1997).

⁸ Further information on the International Conference on Financing for Development, held in Monterrey, Mexico from 18-22 March, 2002, can be found at the ECOSOC website, online: <<http://www.un.org/esa/ffd>>.

⁹ Further information on the international series of conferences from 2002 can be found at the ECOSOC website, online: <<http://www.un.org/esa>>.

and environmental dimensions of sustainable development in a balanced manner. There is also a need to enhance implementation of Agenda 21,¹⁰ to strengthen coherence, coordination and monitoring; to better promote the rule of law and strengthen governmental institutions. The JPOI highlights several priorities for governance. These include the need to increase effectiveness and efficiency;¹¹ to enhance participation and effective involvement of civil society and other relevant stakeholders;¹² to strengthen capacities for sustainable development at all levels;¹³ and to strengthen international cooperation.

To meet these wide-ranging objectives, the JPOI defines an international sustainable development governance system. It sets out an international framework that is meant to enhance and link the work of different institutions dealing with economic, social and environmental issues. This global framework for sustainable development governance is complex and multi-tiered. It can be described as an inter-linked system of institutions, and the international, regional and national regimes in which they operate. This regime is shaped on three principal levels:

- international (including the United Nations General Assembly, the United Nations Economic and Social Council (ECOSOC), and the United Nations Commission for Sustainable Development (UNCSD),¹⁴ but also other agencies and international organisations),
- regional (including the UN Regional Commissions and other regional and sub-regional bodies, including the regional development banks) and
- national (which includes local authorities).¹⁵

Economic, social and environmental pillars of sustainable development governance:

Integration was recognised as an essential element of global sustainable development governance. Many institutions have been established, on several levels, to implement mandates from all three pillars of sustainable development. The JPOI recognizes the need to strengthen and better integrate the social, economic and environmental dimensions of sustainable development into policies and programmes at all these levels. As such, sustainable development

¹⁰ This includes the mobilization of financial and technological resources as well as capacity-building programmes, particularly for developing countries.

¹¹ This can be done, in part, by limiting overlap and duplication of activities of international organizations, both within and outside the United Nations system, based on their mandates and comparative advantages.

¹² As well as promoting transparency and broad public participation, to further implement Agenda 21, *supra* note 7.

¹³ Including the local level, in particular those of developing countries.

¹⁴ Further information on the United Nations Commission on Sustainable Development and its relationship to other international organisations can be found at the UN CSD website, online: <<http://www.un.org/esa/sustdev/csd.htm>>.

¹⁵ Further information on the United Nations Commission on Sustainable Development and its relationship to other international organisations can be found at the UN CSD website, online: <<http://www.un.org/esa/sustdev/csd.htm>>. Further information on the broader United Nations system of agencies, and their relationship to other international organisations, can be found at the UN website, online: <<http://www.un.org>>.

governance is not simply about international environmental governance - indeed, those discussions were carried out prior to, and outside, the WSSD and they continue to this day.¹⁶ Rather, in the new sustainable development governance system, it was recognised that all three fields of sustainable development law and policy – economic, social and environmental – needed to be strengthened. And where there is overlap or intersection between the fields, including for cross-cutting or emerging issues, several forums have been charged to facilitate more coordinated and coherent implementation activities.¹⁷

First, the JPOI identifies a clear need for further collaboration between the WTO and the United Nations Conference on Trade and Development (UNCTAD), the International Labour Organisation (ILO), the United Nations Development Programme (UNDP), the UNEP and other relevant organisations and agencies. The exact nature of these links, as well as calls for trade and financing institutions to take sustainable development goals more seriously, were highly controversial points in negotiations leading up to the WSSD. In the international economic area, debates centred on the need to further enhance the contribution of trade and finance institutions to sustainable development. There were strong claims, especially from developing countries, to go beyond the provisions of the Monterrey Consensus for more concrete commitments on financing for sustainable development.

The JPOI calls for trade and financial agencies to enhance the integration of sustainable development goals into their activities and take full account of national programmes to achieve sustainable development. It also calls on countries to take concrete action to implement the *Monterrey Consensus* at all levels. It further indicates the need to ensure a ‘dynamic and enabling international economic environment’ and the importance of promoting global economic governance through ‘addressing the international finance, trade, technology and investment patterns that have an impact on the development prospects’ of developing countries.¹⁸ As such, in the international economic pillar, three priorities emerge. There is a need to re-focus trade and financial policies toward sustainable development, to deliver on commitments made in Monterrey on financing for development, and to deal with international

¹⁶ See UNEP/GCSS.VII/6, Annex I. The United Nations Environment Programme Governing Council, the Global Ministers of Environment Forum, and the international environmental governance (IEG) process are discussed earlier in this book, at Part I – The Foundations.

¹⁷ This is particularly important for developing countries with newly designed national development strategies (including those for economic growth, or poverty reduction). These countries are often facing simultaneous pressures from international agencies, different treaty commitments and global markets.

¹⁸ In this respect, the JPOI recommends that the international community ensure support for structural and macroeconomic reform, a comprehensive solution to the external debt problem and increasing market access for developing countries. It also observes that efforts to reform the international financial architecture need to be sustained with greater transparency and the effective participation of developing countries in decision-making processes. Finally, it is stated that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development.

finance, trade, technology and investment patterns that have impacts on (or block) development prospects.

The JPOI also recognises that the social dimension of sustainable development needs to be strengthened. It recognises the need to promote the full integration of sustainable development objectives into programmes and policies of bodies that have a primary focus on social issues. It also emphasizes the need to strengthen follow-up to the outcomes of the World Summit for Social Development and its five-year review, and take into account their reports. In the negotiations, it was important to several developing countries that the social agenda be recognised as broader than simply labour rights, and that the work of the ILO¹⁹ was placed in the broader context of social development. The consensus, in the end, to refer to ‘bodies that have a primary focus on social issues’ proved to bridge this gap.

International environmental governance is carried out through the implementation of the outcomes of UNEP’s Governing Council Seventh Special Session, Decision I: International Environment Governance (IEG).²⁰ This decision was the result of a ministerial-level intergovernmental process, established by the UNEP governing council, addressing issues and options for strengthening international environmental governance.²¹ In the negotiations for the JPOI, some actors sought to re-open the IEG process. As environmental governance is only one part of sustainable development governance (and as the IEG decision had been the result of very difficult negotiations), this idea was rejected. The IEG process clarified and streamlined the global system of environmental governance, helped to stabilise UNEP financing arrangements through a modified system of assessed contributions, recognised the Environmental Management Group within the UN system, helped to ‘group’ MEAs along programmatic lines, and re-focused attention on the UNEP Governing Council / UNEP Global Forum of Environment Ministers as the hub of a global network of environmental institutions. As did the IEG, the JPOI left one controversial point for resolution in the United Nations General Assembly. Specifically, it invited the ‘General Assembly... to consider the important but complex issue of establishing universal membership for the Governing Council/Global Ministerial Environment Forum’ (GMEF). Universal membership in the GMEF may be the first step toward the establishment of a global environmental organisation or mechanism.

¹⁹ Further information on the International Labour Organisation can be found at the ILO website, online: <<http://www.ilo.org>>.

²⁰ Further information on the United Nations Environment Programme, and the international environmental governance negotiations, can be found at the UNEP website, online: <<http://www.unep.org/IEG>>.

²¹ See also M.C. Cordonier Segger, A. Khalfan, M. Gehring, *International Environmental Governance for Sustainable Development: A Legal Brief* (Montreal: CISDL, 2001) available online: <<http://www.cisd.org>>.

The role of the international community in sustainable development governance

On the international level, according to the JPOI, a cooperative system is centred on the role of the broader international community and three specific international institutions: the United Nations General Assembly (UNGA), the United Nations Economic and Social Council (ECOSOC), and the United Nations Commission for Sustainable Development (UNCSD), and linked to other international organisations.

Collaboration, according to the JPOI, must be encouraged within and between the UN system, the International Financial Institutions, the Global Environment Facility and the World Trade Organisation (WTO). To do this, a rather complex grouping of institutions, including the United Nations Chief Executive Board (CEB), the UN Development Group and the Environment Management Group (EMG) and other inter-agency coordinating bodies, are directed to coordinate.²² This cooperation does not is not meant to take place through additional meetings- rather, it is to be mainly operational, in partnership with others at all levels.

In three slightly new points, the JPOI also mentions the need for timely completion of negotiations on a comprehensive *United Nations Convention against Corruption*,²³ recommends that the international community promote corporate responsibility and accountability,²⁴ and encourages multi-stakeholder dialogue. There was a trade-off between an explicit recognition of the U.N. and international law, very much desired by the EU, many developing countries and others, and global support for an Anti-Corruption Convention, very much desired by the USA. Interestingly, in the end, it appears that both groups achieved their goal. The JPOI emphasizes that “a vibrant and effective United Nations system is fundamental to the promotion of international cooperation for sustainable development and to a global economic system that works for all.” It notes the importance of a firm commitment to “the ideals of the United Nations, the principles of international law and those enshrined in the Charter of the United Nations” (a clear recognition that the principles of international law have evolved beyond those specifically mentioned in the Charter). It also commits to strengthening the United Nations system and other multilateral institutions and promoting the improvement of their operations.

²² Further information on the United Nations system of agencies, and their relationship to other international organisations, can be found at the UN CSD website, online: <<http://www.un.org/esa/sustdev/csd.htm>>.

²³ Including the question of repatriation of funds illicitly acquired to countries of origin and promoting stronger cooperation to eliminate money laundering.

²⁴ For further proposals on how this could be done, see M.C. Cordonier Segger, “Sustainability and Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda” (2003) 12:3 *R.E.C.I.E.L.*

The role of the UN General Assembly, ECOSOC and the CSD:

The General Assembly of the United Nations (UN GA) was recommended to adopt sustainable development as a key element of the overarching framework for UN activities, particularly for achieving the internationally agreed development goals, including those contained in the *Millennium Declaration*. It is also to give overall political direction to the implementation of Agenda 21 and its review. This sets a global mandate in place, so that all other UN Agencies will support sustainable development objectives.

But on the international level, the UN GA's Economic and Social Council (ECOSOC)²⁵ and its Commission on Sustainable Development (UN CSD)²⁶ will play key roles.

First, the JPOI grants a stronger role to the UN ECOSOC, especially in matters of coordination. ECOSOC is mandated to increase its role in overseeing system-wide coordination and the balanced integration of economic, social and environmental aspects of United Nations policies and programmes aimed at promoting sustainable development. It is to organize periodic consideration of sustainable development themes in regard to the implementation of Agenda 21, including the means of implementation. It is to make full use of its high-level, coordination, operational activities and its general meetings to take into account all relevant aspects of the work of the United Nations on sustainable development.²⁷ It is also to promote greater coordination, complementarity, effectiveness and efficiency of activities of its functional commissions (such as the Commission on Sustainable Development, the Commission on Social Development, and others) and other subsidiary bodies; and ensure that there is a close link between the role of the Council in the follow-up to the Summit and its role in the follow-up to the Monterrey Consensus.²⁸ It is requested to intensify its efforts for gender mainstreaming.²⁹

²⁵ Explicit provisions regarding the United Nations Economic and Social Council (ECOSOC), and the General Assembly Resolutions 48/162 and 50/227, reaffirmed ECOSOC as the central mechanism for coordination of the UN system in this aspect, and its specialised agencies and supervision of subsidiary bodies, in particular its functional commissions (such as UN CSD). See *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7. See also *Agenda 21*, *supra* note 11. Further information on the United Nations Economic and Social Council can be found at the UN ECOSOC website, online: <<http://www.un.org/esa/coordination/ecosoc>>.

²⁶ The role, functions and mandate of the United Nations Commission on Sustainable Development (UN CSD) were set out in *Agenda 21*, *supra* note 11, and adopted in General Assembly Resolution 47/191. Further information can be found at the UN CSD website, online: <<http://www.un.org/esa/sustdev/csd.htm>>.

²⁷ In this context, the Council is directed to encourage the active participation of major groups in its high-level segment and the work of its relevant functional commissions, in accordance with the respective rules of procedure.

²⁸ To that end, the Council is asked to explore ways to develop arrangements relating to its meetings with the Bretton Woods Institutions and the World Trade Organization, as set out in the Monterrey Consensus.

Second, the JPOI also recognizes the UN CSD, as a Commission of the ECOSOC, will continue to be the high-level forum within the UN system for consideration of issues related to integration of the three dimensions of sustainable development. The UN CSD is only one agency among many involved in sustainable development law and policy,³⁰ but - as the focus for the UN System on these issues – it remains an important one. It is directed to place more emphasis on actions that enable implementation at all levels, including promoting and facilitating partnerships involving Governments, international organizations and relevant stakeholders for the implementation of Agenda 21. Implementation means more work for policy bodies, but a different kind of work.

To understand how this changes sustainable development governance, a little history is needed. The role, functions and mandate of the UN CSD were set out in Agenda 21 and adopted in General Assembly Resolution 47/191.³¹ In the 1992 Earth Summit preparatory process, a follow up mechanism was needed for the United Nations to track progress toward sustainable development. In the end, it was agreed that a new functioning Commission would be set up, under the auspices of the United Nations ECOSOC.³² At Chapter 38, Agenda 21 states that “...to ensure the effective follow-up of the Conference, as well as to enhance international cooperation and rationalization the intergovernmental decision making capacity for the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 at the national, regional and international levels, a high level Commission on Sustainable Development should be established in accordance with Article 68 of the Charter of the UN.”³³

After the Earth Summit in 1992, the UN General Assembly agreed that the ECOSOC would establish a high level Commission as a functional council body, and elect representatives of 53 states to serve for up to three-year terms. As such, the UN CSD is made up of 53 members, a third of which are up for election each year.³⁴ One of the interesting aspects of elections to the UN CSD is that these have been actively pursued by countries, unlike many other UN

²⁹ The JPOI also streamlined a little - the Committee on Energy and Natural Resources for Development was terminated, and its work transferred to the UN CSD.

³⁰ According to the JPOI, the UN CSD continues to be the high-level commission on sustainable development within the United Nations system. It serves as a forum for consideration of issues related to integration of the three dimensions of sustainable development. The JPOI recognizes that although the role, functions and mandate of the Commission set out in Agenda 21, *supra* note 7, and adopted in the UN General Assembly Resolution 47/191 continue to be relevant, the UN CSD needs to be strengthened and other relevant institutions and organizations taken into account.

³¹ Further information on the United Nations Commission on Sustainable Development can be found at the UN CSD website, online: <<http://www.un.org/esa/sustdev/csd.htm>>.

³² *Supra* note 29.

³³ *Agenda 21*, *supra* note 11 at Chapter 38. See also the *Charter of the United Nations*, *supra* note 29, at Art. 68.

³⁴ The allocation of seats is 13 from Africa, 11 from Asia, 6 from Eastern Europe, 10 from Latin America and the Caribbean and 13 from Western Europe and North America.

Commissions. Between 1992 and 2002, the UN CSD met once a year for two or three weeks, as a functional ECOSOC Commission with a full time secretariat based in New York, and it was given a clear identity within the UN system. The Secretariat is located within the Department for Social and Economic Affairs (DESA). DESA also has secretariats for the Commissions on Population, Status of Women and Social Development, offering a good opportunity for collaboration. Relevant intergovernmental organizations and specialized agencies (UNEP, WHO, UNDP and others, including financial institutions) designated representatives to advise and assist the Commission, serving as focal points between sessions. The 1992 Earth Summit had also seen an unprecedented involvement of stakeholders in the preparatory process and the Summit itself. Agenda 21 contains nine chapters dealing with the role of Major Groups.³⁵ In its first ten years of work, the UN CSD established innovative formal and informal procedures which gave major groups extremely high involvement in their work, and excellent access to deliberations.

The UN CSD's mandate was originally fairly broad.³⁶ The UN CSD did not negotiate treaties. If an issue required a stronger legal framework, initial discussions took place at CSD, but were then designated to an appropriate body to negotiate legally binding actions. In the years between 1992 and 2002, several critiques were raised by developing countries and others.³⁷ However, the CSD also developed a track record of certain achievements for international sustainable development policy, as a 'soft law' forum.³⁸ In international law on

³⁵ The Major Groups in Agenda 21 are Youth, Women, Farmers, NGOs, Local Government, Business, Academics, Indigenous People, and Trade Unions. See *Agenda 21*, *supra* note 7, at ch. 24 – 32.

³⁶ See UNGA Resolution 1993/207. UN CSD was to monitor progress on the implementation of *Agenda 21* and activities related to the integration of environmental and developmental goals by governments, NGOs, and other UN bodies; to monitor progress towards the target of 0.7% GNP from developed countries for Overseas Development Aid; to review the adequacy of financing and the transfer of technologies as outlined in *Agenda 21*; to receive and analyse relevant information from competent NGOs in the context of *Agenda 21* implementation; to enhance dialogue with NGOs, the independent sector, and other entities outside the UN system, within the UN framework; and to provide recommendations to the General Assembly through the Economic and Social Council (ECOSOC).

³⁷ They had expected the UN CSD to provide an effective body to monitor progress towards the target of 0.7% GNP, ensuring adequate financing and the transfer of sustainable-development related technologies, but this was not perceived to have happened. The UN CSD looked at finance and technology transfer themes in isolation from issues that might have enabled an effective argument for new funds. In addition, while occasionally development, transport, energy or agriculture Ministers would attend if their sector was being discussed, UN CSD was rarely attended by Ministers with budgets to deliver additional financing for sustainable development. Other critiques were also raised.

³⁸ According to F. Dodds, these have included recommendations to codify Prior Informed Consent procedures (1994); the establishment of an Inter Governmental Panel on Forests (1995) and an International Forum on Forests (1997); supporting the Washington Global Plan of Action on protecting the marine environment from land-based activities (1996), agreeing to the replenishment of Global Environmental Facility (GEF) (1997); setting a firm date of 2002 for governments to produce their National Sustainable Development Strategies (1997); establishing a new process in the General Assembly to discuss oceans (1999); agreeing that new consumer guidelines would include sustainable development (1999); and developing an International Work Programme on Sustainable Tourism (1999). See F. Dodds, "Reforming the International Institutions" in *Earth Summit 2002: A New Deal*, F. Dodds, ed., (London: EarthScan, 2002), online: <<http://www.earthsummit2002.org/es/issues/Governance/governance.htm#Sustainable%20Governance>>.

sustainable development, such soft law instruments³⁹ are common. Mainly, the UN CSD provided space for dialogue, coordination and eventual cooperation which leads to international instruments. The involvement of major groups at the CSD has increased each year, with formal and informal procedures being developed.⁴⁰

The new mandate of the UN CSD will focus on reviewing and monitoring the progress in implementation of Agenda 21, and fostering coherence of implementation, initiatives and partnerships. The UN CSD will still develop recommendations, but negotiations will be limited to every two years, and the number of themes addressed in each session will be constrained. As such, the UN CSD has been limited to a few clarified and strengthened functions.

It will review and evaluate progress, address new challenges and opportunities, and promote further implementation of sustainable development. It will focus on the cross-sectoral aspects of specific issues, provide a forum for policy integration.⁴¹ In relation to its role in facilitating implementation, the UN CSD is directed to emphasize various aspects. It will review progress and promote the further implementation of Agenda 21, identifying constraints on implementation and making recommendations to overcome those constraints. It will also serve as a focal point for the discussion of partnerships that promote sustainable development, including sharing lessons learned, progress made and best practices. In addition, it will review issues related to financial assistance and transfer of technology for sustainable development, as well as capacity-building. This was a significant point for developing countries – many felt that members of UN CSD had not lived up to their UNCED commitments on development assistance. It will provide a forum for analysis and exchange of experience on measures that assist sustainable development planning, decision-making and the implementation of sustainable development strategies. Finally, it will take into account significant legal developments in the field of sustainable development, with due regard to the role of relevant intergovernmental bodies

³⁹ The 1972 *Stockholm Declaration*, the 1992 *Rio Declaration* and the 2002 *Johannesburg Declaration* are all non-binding instruments, as are the 1992 *Forest Principles* adopted at UNCED. While not binding in the traditional sense, many statements of principles, guidelines, and codes of practices are influential international instruments. For example, the 2002 *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of their Benefits*, the 1990 *FAO Guidelines on the Operation of Prior Informed Consent*.

⁴⁰ These included access and speaking privileges in formal and informal meetings (1993); questions during national presentations (1994); Dialogue Sessions (1997); interventions in Heads of State meeting of the UN General Assembly Special Session (1997); and inclusion of outcomes in Ministerial discussion and official UN CSD Intersessional records (1999). The involvement of civil society organisations and Major Groups in the WSSD process has been unprecedented, with concrete steps being taken to ensure participation at each level. See F. Dodds, *supra* note 38. The 1992 Earth Summit had also seen an unprecedented involvement of stakeholders in the preparatory process and the Summit itself. *Agenda 21* contains nine chapters dealing with the role of major groups. The Major Groups in *Agenda 21* are Youth, Women, Farmers, NGOs, Local Government, Business, Academics, Indigenous People, and Trade Unions. See *Agenda 21*, *supra* note 7, at Ch. 24.

⁴¹ Including through interaction among Ministers dealing with the various dimensions and sectors of sustainable development through the high-level segments.

in promoting the implementation of Agenda 21 relating to international legal instruments and mechanisms.⁴²

The CSD's new work program is mandated to reflect these developments.⁴³ At its eleventh session, the Commission on Sustainable Development decided that its multi-year programme of work beyond 2003 would be organized on the basis of seven two-year cycles, with each cycle focusing on selected thematic clusters of issues. In 2004 – 2005, the CSD addresses Water, Sanitation and Human Settlements. In 2006 – 2007, it addresses Energy for Sustainable Development, Industrial Development, Air Pollution / Atmosphere and Climate Change. In 2008 – 2009, it addresses Agriculture, Rural Development, Land, Drought, Desertification and Africa. In 2010 – 2011, it addresses Transport, Chemicals, Waste Management and Mining, and a Ten Year Framework of Programmes on Sustainable Consumption and Production Patterns. In 2012 – 2013, it addresses Forests, Biodiversity, Biotechnology, Tourism and Mountains. And in 2014-2015, it addresses Oceans and Seas, Marine Resources and Small Island Developing States.

In each of these areas, it takes into account significant legal developments in the field of sustainable development. In each cycle, the thematic clusters of issues are addressed in an integrated manner with regard to the economic, social and environmental dimensions of sustainable development. The Commission further agreed that means of implementation should be addressed in every cycle and for every relevant issue, action and commitment. Linkages to other cross-cutting issues are also to be addressed in every cycle.⁴⁴ Finally, the CSD is also mandated to share best practices and lessons learned in sustainable development, using contemporary methods of data collection and dissemination, especially information technologies.

⁴² For a proposal on sustainable development governance, the role and future mechanisms for the UN CSD to facilitate implementation and take into account significant legal developments in the field of sustainable development, see M. C. Cordonier Segger, "Significant developments in sustainable development law and governance: A proposal" (2004) 28:1 *U. N. Natural Resources Forum* 61–74.

⁴³ The work program was directed to continue to provide for more direct and substantive involvement of international organisations as well as major groups in its work; give greater consideration to the scientific contributions to sustainable development; further the contribution of educators to sustainable development including, where appropriate, in the activities of the UN CSD; and promote best practices and lessons learned in sustainable development, as well as use of contemporary methods of data collection and dissemination, including broader use of information technologies. In regard to the practical modalities and work program of UN CSD, specific decisions were made later, in the UN CSD 11 Meeting, when the Commission's thematic work program was elaborated.

⁴⁴ These include: Poverty eradication, Changing unsustainable patterns of consumption and production, Protecting and managing the natural resource base of economic and social development, Sustainable development in a globalizing world, Health and sustainable development, Sustainable development of SIDS, Sustainable development for Africa, Other regional initiatives, Means of implementation, Institutional framework for sustainable development, Gender equality, and Education.

The roles of other international institutions

In terms of the role of other international institutions, the new sustainable development governance framework stresses the need for international institutions both within and outside the UN system to enhance their contribution to sustainable development.⁴⁵ The Secretary-General of the United Nations is encouraged to use the Chief Executives Board for Coordination to further promote system-wide inter-agency cooperation and coordination on sustainable development, to take appropriate measures to facilitate exchange of information, and to keep ECOSOC and CSD informed of different actions being taken to implement Agenda 21. A report by the Secretary-General on the "Follow-up to Johannesburg and the Future Role of the CSD"⁴⁶ shed some clarity on this constellation of actors, and outlined new roles for various different aspects of the system.⁴⁷ Myriad other roles were also recognized in the JPOI, and it refers directly to the contributions of different UN Agencies to sustainable development.⁴⁸ The need to streamline and open the international sustainable development governance system was also recognised.⁴⁹

Other international aspects of the new sustainable development governance agenda should also be highlighted. The JPOI agreed to strengthen UNDP capacity building programmes for sustainable development. It committed to strengthen cooperation among UNEP and other UN bodies and specialized agencies, the Bretton Woods Institutions and the WTO, within their mandates. The UNEP, UN-Habitat, UNDP and UNCTAD were also requested to strengthen their contribution to sustainable development programmes and the implementation of Agenda 21 at all levels, particularly in the area of promoting

⁴⁵ These include international financial institutions (IFIs), the World Trade Organisation (WTO) and the Global Environment Facility (GEF), and the JPOI directs them to enhance, within their mandates, their cooperative efforts to promote effective and collective support to the implementation of Agenda 21 at all levels. This is to be done with enhanced collaboration, not only on Agenda 21 but also for the outcomes of the World Summit on Sustainable Development, relevant sustainable development aspects of the Millennium Declaration; the Monterrey Consensus; and the outcomes of the Fourth WTO Ministerial Meeting (Doha).

⁴⁶ 18 February 2003 E/CN.17/2003/2.

⁴⁷ It purports a shift in focus from reporting and supporting normative discussions to implementation with a greater emphasis on specific thematic areas and goals/objectives; support for the follow-up mechanisms by other UN Conferences held during the last decade; promotion of stronger linkages between global intergovernmental deliberations and implementation measures at a country level; institution of more flexible, action-oriented, innovative and inclusive approaches with UN Agencies and non-UN actors; and promotion of overall integration of the three components of sustainable development. The report also points to the need for strengthening the UN CSD and expanding its resources so as to enable it to fulfill its original mandate of a coordinating body within the UN system and its new post-Johannesburg mandate for implementation of the WEHAB agreements.

⁴⁸ The JPOI stresses that UNDP has capacity building programmes for sustainable development. It commits to strengthen cooperation among UNEP and other UN bodies and specialized agencies, the Bretton Woods Institutions and the WTO, within their mandates. The UNEP, UN-Habitat, UNDP and UNCTAD are also expected to strengthen their contribution to sustainable development programmes and the implementation of Agenda 21 at all levels, particularly in the area of promoting capacity building. Johannesburg Plan of Implementation, *supra* note 7.

⁴⁹ Governments also agreed to streamline the international sustainable development meeting calendar in favour of more time spent on practical matters related to implementation. They will encourage partnership initiatives for implementation by all relevant actors.

capacity building. Finally, in a welcome step, governments established that the 1994 *United Nations Convention to Combat Desertification and Drought*, like other Rio Conventions, will have a dedicated, specific and permanent financial mechanism. To follow up from this decision, land degradation was indeed recognised as a GEF focal area, through the decisions of the GEF Second Assembly in October 2002.

Sustainable development governance at the regional (and sub-regional) levels

According to the JPOI, regional sustainable development governance must also be strengthened. The United Nations Regional Commissions, as well as other regional and sub-regional institutions and bodies, are given a special role in the implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development.⁵⁰ Their role, in particular, is to facilitate and promote a balanced integration of the economic, social and environmental dimensions of sustainable development into the work of regional, sub-regional and other bodies. They will facilitate exchange of experiences related to best practices, case studies and partnerships. They will also assist in the mobilization of technical and financial assistance, as well as facilitate the provision of adequate financing for sustainable development programmes and projects, including those related to poverty eradication. They will also continue to promote multi-stakeholder participation and encourage partnerships to support implementation of Agenda 21 at the regional and sub-regional levels. Finally, the JPOI specifically recognises the need to support the sustainable development programmes of certain groups.⁵¹

Sustainable development governance at the national, sub-national and local levels.

Sustainable development governance also has a very important national dimension. According to the JPOI, countries will promote coherent and coordinated approaches to institutional frameworks for sustainable development, strengthening domestic authorities and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws. Countries also committed to take immediate steps to make progress in the formulation and elaboration of national strategies for sustainable development, and to begin implementing these strategies by 2005.⁵² In WSSD negotiations,

⁵⁰ This includes improving intraregional coordination and cooperation on sustainable development the regional commissions, United Nations Funds, programmes and agencies, regional development banks and other regional and sub-regional institutions and bodies. It also includes support for development, enhancement and implementation of agreed regional sustainable development strategies and action plans, reflecting national and regional priorities.

⁵¹ For example, the New Partnership for Africa's Development (NEPAD) and the inter-regional aspects of the globally agreed Barbados Programme of Action for the Sustainable Development of Small Island Developing States.

⁵² To this end, as appropriate, strategies should be supported through international cooperation, taking into account the special needs of developing countries, in particular the least developed countries. Such strategies, which, where applicable, could be formulated as poverty reduction strategies that integrate economic, social

this concrete target was viewed as a significant step forward by most countries.⁵³ Each country has the primary responsibility for its own sustainable development, reiterated the JPOI, they should promote sustainable development at the national level by, *inter alia*, enacting and enforcing clear and effective laws. Countries were encouraged to strengthen governmental institutions, including by providing necessary infrastructure, by promoting transparency and accountability, and fair administrative and judicial institutions.

In addition, all countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes,⁵⁴ according to the JPOI. Governments called for support for developing country (and economy in transitions) efforts to enhance national and local institutional arrangements for sustainable development,⁵⁵ highlighting the need to enhance the role and capacity of local authorities, and to link with the 1996 *United Nations Conference on Human Settlements (UN Habitat II) Agenda*.

As such, the implementation of international law on sustainable development has been directly strengthened in three ways. First, the UN CSD has a new mandate to take into account significant legal developments in the field of sustainable development. Second, international organizations from each 'pillar' of sustainable development are mandated to focus on coherence, coordination and cooperation in their policies and operations, and many international institutional mechanisms are set in place or strengthened to encourage this. Third, national governments are specifically charged to enact clear and effective domestic laws, to promote fair administrative and judicial institutions, and to provide access to information on legislation and regulations.

Participation of major groups

Governments and inter-governmental agencies will not be alone in their efforts. The JPOI recognized the need for governments to enhance partnerships between governmental and non-governmental actors, including all major groups, as well as volunteer groups, on programmes and activities for the achievement of sustainable development at all levels. It appears that Stephen

and environmental aspects of sustainable development, should be pursued in accordance with each country's national priorities.

⁵³ The delegation of Norway was aware that such a statement could also weaken earlier Agenda 21 commitments, and worked to strengthen these and other commitments.

⁵⁴ It commits to foster full public participation in sustainable development policy formulation and implementation, and to ensure that women can participate fully and equally in policy formulation and decision-making. It also mentions sustainable development councils and/or coordination structures, and multi-stakeholder participation.

⁵⁵ This could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging participatory approaches and enhancing policy analysis, management capacity and implementation capacity, including mainstreaming a gender perspective in all those activities.

Toope and others were correct in observing that international law and policy is being broadened to include actors other than States as norm-generating actors.⁵⁶ Non-state actors now help to develop, implement and comply with norms. An important factor has been the emergence of international and regional organisations within which government officials and experts, as well as non-governmental individual and group actors, interact and consider alternative policy options to address emerging problems.⁵⁷ These emerging international regimes consist of networks, partnerships between States and these non-state actors (including inter-governmental organisations, civil society and private sector associations). The JPOI also acknowledged the need to further consider the relationship between environment and human rights, including the right to development (with full and transparent participation of Member States of the United Nations and observer States). And it commits to promote and support youth participation in programmes and activities relating to sustainable development.⁵⁸

International Settlement of Sustainable Development Related Disputes

Several important international disputes related to sustainable development have arisen in recent years. Only an extremely small percentage of sustainable development related disputes actually arise between two or more states, and are subject to the jurisdiction of an international court or tribunal. An even smaller percentage are of such importance, for the countries involved, as to be brought to an expensive and lengthy international court or tribunal proceeding. Indeed, it is almost surprising that in recent years, so many such disputes have filtered up into formal international dispute settlement processes.

It is important for the international order that accommodation, reconciliation and integration of sustainable development issues can take place in a peaceful way.⁵⁹ Not only must the stakeholders and parties to the dispute find a just resolution, but also, for sustainable development, the substantive social, economic and environmental priorities should be reconciled, in order to ensure that the resulting actions contribute to development that can last in the interests of both present and future generations.

⁵⁶ See J. Brunée and S.J. Toope "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39(1) *Col. J. Trans'l. Law* 19 at 48. The writers refer to lawmaking as a mutually generative activity, and the dual function of States as both makers and observers of international law.

⁵⁷ On the role of international organisations as sites of interaction and arenas for coalition building at the international level, see H. Breitmeier, "International Organizations and the Creation of Environmental Regimes" in O. Young, ed., *Global Governance: Drawing Insights From the Environmental Experience* (Cambridge: MIT Press, 1997) at 87-114.

⁵⁸ For example, supporting local youth councils or their equivalent, and encouraging their establishment where they do not exist.

⁵⁹ See, in general, J. Collier & V. Lowe, *The Settlement of International Disputes: Institutions and Procedures* (Oxford: Oxford University Press, 1999). And see L. Caflisch, *The Peaceful Settlement of Disputes Between States: Universal and European Perspectives* (Leiden: Martinus Nijhoff, 1998). See also P.G. Carrozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 *American Journal of International Law* 38.

Proliferation of international mechanisms for cooperation appears to be a key characteristic of globalisation. In recent years, many learned scholars have analysed the growing complexity of the international system of courts and tribunals.⁶⁰ Due to the limits of space, this section will simply survey a few different international courts and tribunals in which economic, environmental and social priorities have recently come to a head, highlighting the places in an international governance system where such disputes can be addressed by an adjudicatory body.

i. Sustainable Development in the International Court of Justice

The World Court, or the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), remains the only judicial forum before which States can bring virtually any legal dispute, whether it arises out of the alleged violation of an international agreement or out of customary international law. The ICJ is one of the six principal organs of the United Nations. It is the principal judicial organ of the cardinal international organization the only one with universal scope and membership. The ICJ's function is twofold: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions submitted by duly authorized international organs and agencies.⁶¹

All members of the UN are parties to the Court's Statute, which is an integral part of the UN Charter, though the Court is competent to hear a case only if the States concerned have accepted its jurisdiction (hence the criticism of impracticability). Such jurisdiction can be accorded through an ad hoc agreement to submit the dispute to the Court, the jurisdictional clause of a treaty, or the reciprocal effect of optional declarations. The Court also has advisory jurisdiction, as UN organs and UN specialized agencies can request opinions of the Court, and in principle these opinions are consultative in character, not binding as such on the requesting bodies. Certain instruments or regulations can, however, stipulate in advance that the advisory opinion shall be binding. The ICJ may also exercise appellate jurisdiction, for example, as the court of appeal of the International Labour Organisation (ILO) Administrative Tribunal.⁶²

⁶⁰ See, in particular, the Project on International Courts and Tribunals, available online: <<http://www.pict-pcti.org/>>. The descriptions of courts and tribunals in this section are based primarily on the excellent comparative materials of the PICT. See also C. Romano, "The Proliferation of International Tribunals: Pieces of the Puzzle" (1999) 31:4 *N.Y.U. J. Int'l. L. & Pol.* 709. And see J. I. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals" (1999) 31:4 *N.Y.U. J. Int'l. L. & Pol.* 697. See also, as cited by C. Romano, C. Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction" in *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium* (Max-Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht, 1987) at 285-416; G. Guillaume, "The Future of International Judicial Institutions" (1995) 44 *Int'l & Comp. L.Q.* 848. See also T. Buergenthal, "Proliferation of International Courts and Tribunals: Is it Good or Bad" (2001) 14 *Leiden Journal of International Law* 267-275.

⁶¹ *Ibid.*

⁶² *Ibid.*

Several advisory opinions and contentious cases have recently arisen in the World Court which required the reconciliation of competing social, economic and environmental priorities, and legal claims. While the limits of space do not permit an analysis here, three leading cases bear specific mention. First, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁶³ touched upon the social and environmental consequences and impacts of the use of nuclear weapons, with leading judges expressing particular concern for effect upon future generations. Second, the *Case Concerning the Gabčíkovo-Nagymaros Project*⁶⁴ and its much commented extraordinary Separate Opinion of Judge C. G. Weeramantry⁶⁵, specifically noted the need for reconciliation between environment and development with respect to an international dam project, in which the Vice-President of the Court raised various points related to the status of sustainable development in international law. Third, the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁶⁶ which addressed the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and specifically commented upon the rights to work, to health, to education and to an adequate standard of living of those impeded by the wall. Several other cases and advisory opinions have also addressed these issues, and would merit further study from the perspective of sustainable development law.⁶⁷

ii. Sustainable Development in the World Trade Organisation Dispute Settlement Mechanism

The World Trade Organization (WTO) deals with the promotion and regulation of international trade at a global level, in order to help trade flow as freely as possible, to achieve further liberalization gradually through negotiation, and to provide an impartial means of settling disputes. As has been discussed elsewhere in this volume, it was established in 1994 to replace the less structured system of the 1948 *General Agreement on Tariffs and Trade* (GATT). The 1994 *Agreement Establishing the WTO* introduced an Annex on dispute settlement, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), which created a Dispute Settlement Body (DSB) and a Standing

⁶³ [July 8 1996] I.C.J. Rep. 226.

⁶⁴ (Hungary v Slovakia), [1997] I.C.J. Rep. 7.

⁶⁵ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), (Separate Opinion of Judge C. G. Weeramantry), [1997] I.C.J. Rep. 7.

⁶⁶ [July 9 2004] I.C.J. List 131 (Advisory Opinion).

⁶⁷ See, for example, the *Case Concerning Nuclear Tests (New Zealand and Australia v. France)*, [1974] I.C.J. Rep. 457; the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua / U.S.A.)* [June 27, 1986] I.C.J. Rep. 14 (Judgment on Merits); the *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy), [1989] I.C.J. Rep. 15; the *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Austl.)* [June 26, 1992] I.C.J. 240 (Preliminary Objections); the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), [1993] I.C.J. Rep. 38; and the *Case Concerning Kasikili / Sedudu Island (Botswana/Namibia)* [December 13 1999] I.C.J. Rep. 14. There are also several cases which have not yet been decided by the court.

Appellate Body (AB). The DSB is a political body comprising representatives of all WTO members, which administers the WTO dispute settlement system.⁶⁸

If a dispute arises between members of the WTO over their respective obligations, a consultation process is the first step. If these fail, other dispute settlement procedures (for example, mediation, good offices, etc.) are available. If these also fail, the complaining party may request the DSB to establish an *ad hoc* Panel. Panels conduct hearings on the dispute, issue a report on the merits of the case, and the recommendations become binding after their adoption by the DSB. Adoption by the DSB is automatic unless all WTO members agree to reject it, and an additional procedure is needed for enforcement. The Panel report may be appealed, but only on legal grounds before the AB, a permanent body composed by seven individuals. The appeal is heard before a three-person division of the AB, who may uphold, modify or reverse the findings of the panel. The report of the AB is then to be adopted by the DSB and has binding force unless it is unanimously rejected.⁶⁹

Several important decision of the WTO Panel and Appellate body have addressed competing social, economic and environmental claims, particularly in the area of overlap between trade and the environment, generating a tremendous body of scholarly debate and literature.⁷⁰ While the limits of space do not permit an analysis here, certain leading cases, also summarized elsewhere in this volume, bear specific mention.⁷¹

First, the *US-Gasoline*⁷² (1996) was a GATT challenge to US measures that addressed urban motor vehicle pollution, in which the AB found that these standards were arbitrary discrimination and a disguised restriction on international trade. Second, the *EC-Hormones*⁷³ (1998) involved an SPS challenge to EC measures banning imports of hormone-treated beef without being sufficiently based on risk assessment, debating (but not resolving) the status of the precautionary principle in international law.

⁶⁸ The DSB supervises the process of consultation between disputing members; establishes panels to settle disputes, adopts or rejects panel or AB recommendations; maintains surveillance of implementation of rulings and recommendations, and eventually authorizes retaliatory measures in cases of non-implementation of recommendations. See J. H. Jackson, "Fragmentation or Unification Among International Institutions: The World Trade Organization" (1999) 31 *N.Y.U. J. Int'l L. & Pol.* 823.

⁶⁹ *Supra* note 60.

⁷⁰ See M. Stillwell, in this volume. See also F. Francione, *Environment, Human Rights and International Trade* (Oxford: Hart, 2001); and see D. Esty, *Greening the GATT: Trade, Environment and the Future* (Washington: Institute for International Economics, 1994), for an overview. For a review of recent cases, from a civil society perspective, see S. Porter & H. Mann, *State of Trade and Environment Law* (Winnipeg: IISD, 2003).

⁷¹ See M. Stillwell, in this volume. And see M. Gehring & M. C. Cordonier Segger, eds., *Sustainable Developments in World Trade Law* (The Hague: Kluwer Law International, 2005). The following summary of cases is based on such analysis.

⁷² *United States – Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (1997). (Appellate Body Report).

⁷³ *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R (1998). (Appellate Body Report).

Third, the *US-Shrimp*⁷⁴ (1998) involved a GATT challenge to US measures banning shrimp caught using methods that threatened endangered species of sea turtles from import. The Panel and AB found that the measures treated similarly placed countries differently, lacked flexibility and due process, and did not involve serious multilateral negotiations for sea turtle protection, and thereby constituted arbitrary and unjustifiable discrimination under Article XX. In a later case, *US-Shrimp 21.5*⁷⁵ (2001), there was an unsuccessful challenge to US measures to implement the first decision in *US-Shrimp*, as these were found to be justified under Article XX, subject to certain requirements, including that the US continue to seek a negotiated solution to protect sea turtles.

In a fourth case, *Australia-Salmon*⁷⁶ (1998), an SPS challenge of an Australian import ban on uncooked salmon (to protect against invasive species), the link with sufficient risk assessment was again found to be a concern, and the measures were held to constitute arbitrary or unjustifiable distinctions. In *Japan-Varietals*⁷⁷ (1999), the SPS Agreement was also used to find that Japanese measures banning imports of certain fruit crops to address the risk of invasive species were maintained without sufficient scientific evidence and raised concerns about objective risk assessment, and were not (as provisional measures) reviewed within a reasonable period. In a fifth case, *EC-Asbestos*⁷⁸ (2001), there was an unsuccessful challenge under the TBT Agreement and the GATT to a French ban on imports of white chrysotile asbestos fibers and products containing them. The AB found that based on the differences between the products, asbestos and its substitutes could not be considered 'like-products' under the GATT, and that the French measure was justified as a necessary measure for the protection of human life or health.⁷⁹

iii. Sustainable Development in the International Tribunal on the Law of the Sea (ITLOS)

Established in 1982 by the United Nations Convention on the Law of the Sea (UNCLOS), the International Tribunal for the Law of the Sea (ITLOS) became operational in 1996 when the UNCLOS entered into force. The ITLOS is one of four possible means available to the parties of UNCLOS to settle disputes,

⁷⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R (1998). (Appellate Body Report).

⁷⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, AB-2001-4, WT/DS58/AB/RW (2001). (Appellate Body Report).

⁷⁶ *Australia – Measures Affecting Importation of Salmon*, AB-1998-5, WT/DS18/AB/R (1998). (Appellate Body Report).

⁷⁷ *Japan – Measures Affecting Agricultural Products*, AB-1998-8, WT/DS76/AB/R (1999). (Appellate Body Report).

⁷⁸ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11, WT/DS135/AB/R (2001). (Appellate Body Report).

⁷⁹ For further analysis from a sustainable development perspective, see, e.g., M. Gehring and M.C. Cordonier Segger, "The WTO Asbestos Cases and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute" (2003) 15 *Oxford J. Env. L.* 289. See also M.C. Cordonier Segger & M. Gehring, "Precaution, Health and the World Trade Organisation: Moving toward Sustainable Development" (2003) 29 *Queen's L. J.* 133.

others include International Court of Justice, arbitration under Annex VII of the Convention, and special arbitration under Annex VIII. With several exceptions, the ITLOS does not, in principle, have jurisdiction over a dispute unless both parties have agreed to it, by way of ad hoc declaration, special agreement or previous optional declaration. It functions in a way similar to the ICJ. However, unlike the ICJ (and more similar to the European Court of Justice), the ITLOS is endowed with a permanent special chamber with compulsory jurisdiction over a particular category of dispute. The 11-member Seabed Disputes Chamber (SBDC) hears disputes concerning activities in the seabed, ocean floor and subsoil beyond the limits of national jurisdiction (the area managed by the International Seabed Authority, which was established pursuant to the UNCLOS). Locus standi before the SBDC is different from the one before the full Tribunal. States and the International Seabed Authority have standing before the Chamber, as do companies and individuals of States parties.

This feature distinguishes the ITLOS from other international judicial bodies with universal membership and scope, like the ICJ and the World Trade Organization dispute settlement system, where non-state entities are not allowed to bring claims (to a certain extent this applies also to the International Criminal Court). Unlike most international judicial bodies, which decide cases virtually solely on the basis of international law, the SBDC can reach outside those limits. The SBDC can apply the UNCLOS; principles of international law; the rules, regulations and procedures of the International Sea-bed Authority; as well as terms of contracts concerning activities in matters relating to them.

Many of the cases addressed by the ITLOS in recent years relate to balancing or reconciliation of competing social, economic and environmental priorities. While the limits of space do not permit an analysis here, three leading cases bear specific mention.

First, the provisional measures determination in the *Southern Bluefin Tuna (New Zealand and Australia v. Japan)*⁸⁰, addressed the need for limits for the sustainable use of tuna fisheries stocks, though the final decision in this case found no jurisdiction. The separate opinion of a leading tribunal member is particularly enlightening with regard to the meaning and status of the precautionary principle in international law. Second, the *MOX Plant Case (Ireland v. United Kingdom) Provisional Measures*⁸¹ addresses concerns about potential environmental and other consequences of the construction of a downwind nuclear plant. This issue continues to be debated in the European context. Finally, in the initial proceedings of the *Case concerning the Conservation and Sustainable Exploitation of*

⁸⁰ *Provisional Measures* (1999), Case 3 and 4, (International Tribunal of the Law of the Sea), online: ITLOS <http://www.itlos.org/start2_en.html>.

⁸¹ (2001), Case 10 (International Tribunal of the Law of the Sea), online: ITLOS <http://www.itlos.org/start2_en.html>

*Swordfish Stocks in the South-Eastern Pacific Ocean*⁸² a concern for the sustainable use of natural resources, in this case, swordfish stocks, launched two international cases which provide a fascinating illustration of the need to better reconcile international social, economic and environmental legal regimes.⁸³

Several other cases and advisory opinions have also addressed these issues, and would merit further study from the perspective of sustainable development law.⁸⁴

iv. Sustainable Development in Investment Arbitrations

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1965 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (which has been ratified to date by 136 states), to facilitate the settlement of disputes arising between states and foreign private investors by way of arbitration and conciliation.⁸⁵ The Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Procedures (Additional Facility), which enables use of ICSID arbitration and conciliation facilities by states not parties to the ICSID Convention (or nationals of such states), extends its reach and provides a fact-finding capacity. ICSID, as part of the World Bank Group, is a permanent administrative structure supporting and facilitating ad hoc dispute settlement procedures, maintaining a list of potential arbitrators and conciliators for parties to choose from; and providing registry and secretariat services.

⁸² (*Chile/European Community*) (2001), Case 7 – Order 2001/1, (International Tribunal of the Law of the Sea), online: ITLOS <http://www.itlos.org/start2_en.html>. See also *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* (2003), Case 7 – Order 2003/2, (International Tribunal of the Law of the Sea), online: ITLOS <http://www.itlos.org/start2_en.html>.

⁸³ At first, the *EC - Chile Swordfish Dispute* appeared as two cases, according to M. Gehring. “The first was initiated before the WTO against provisions in Chilean Fisheries Law that prohibited port entry of EU vessels carrying swordfish. According to the European Communities, this restriction violated GATT Article V on the freedom of transit and GATT Article XI, which prohibits quantitative restrictions. The other case was filed by Chile in a special Chamber of the International Tribunal of the Law of the Seas (ITLOS) in Hamburg. Chile alleged that the EC’s swordfish fishing practices violated UN Convention on the Law of the Sea (UNCLOS) Articles 116 to 119 on the conservation of living resources in the high seas, as well as UNCLOS Article 64 on the failure to co-operate with the coastal state in case of highly migratory species.” However, he notes, the “underlying issue in these international charges was identical. Large trawlers from countries of the European Union fished swordfish right outside Chile’s Exclusive Economic Zone.” Legal limits were needed on fish size, for conservation of the stocks, and by-catch consisted of sharks, turtles and other endangered marine species. Chile adopted conservation measures aimed at protecting not just of the species but also of traditional fishing methods. But European vessels, using non-sustainable practices, still wanted to unload their fish in Chilean ports for transshipment to the United States. After the Chileans filed the case in ITLOS, negotiations began. The ITLOS special Chamber suspended proceedings, and the process for the constitution of a WTO panel on *Chile Measures affecting the transit and importation of swordfish* was also suspended. Both were put on hold after Chile and the EC reached an ‘arrangement’ on 25 January 2001. See M. Gehring, “Sustainable Development Angles to the Swordfish Dispute” (2001) *Bridges J. ICTSD* 5:7 at 13 – 15.

⁸⁴ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures* (2003), Case 12 – Order of 8 October 2003, (International Tribunal of the Law of the Sea), online: <http://www.itlos.org/start2_en.html>.

⁸⁵ *Supra* note 60.

Commitments to 'ICSID arbitration' are often found in investment contracts between governments of member countries and investors from other member countries.⁸⁶ More than 20 investment laws and over 1000 bilateral investment treaties also contain advance consent by governments to submit investment disputes to ICSID arbitration, which has led to an increasing number of cases using ICSID procedures. To date, more than 70 cases have been submitted to ICSID (mostly for arbitration), involving over 34 different governments. Foreign private investors are normally plaintiff against a state, often a developing country. Many address claims over such events as civil strife, alleged expropriation or denials of justice, and actions of the state political subdivisions (e.g., regions or federated states). There is neither space nor scope, in this chapter, to analyse the many ICSID claims which involve competing social, economic and environmental priorities and laws. However, it is important to note that these arbitrations, particularly when an investor raises a claim against a state in a confidential setting concerning non-transparency, discrimination or expropriation subject to compensation for a state's social or environmental measures, can directly address underlying issues of sustainable development. Often, the threat of an expensive claim being brought to an arbitral tribunal can assist an investor in convincing a state not to enact such laws.

v. Sustainable Development in the Regional Courts and Tribunals

Investment arbitration is part of the provisions of the North American Free Trade Agreement and several new bi-lateral trade treaties modeled upon it, which also contain various international trade dispute resolution mechanisms, and parallel environmental and social 'factual-reporting', 'complaints' and 'clearing-house' mechanisms.⁸⁷

In addition to the International Criminal Court, consideration of which is beyond the scope of the present chapter, there are many regional human rights tribunals that are increasingly being called upon to address human rights obligations of great relevance to sustainable development, particularly in the realm of social, economic and cultural rights, and the collective rights of indigenous peoples, as well as the more typically analysed right to a clean and healthy environment. These courts and tribunals include the Inter-American

⁸⁶ Recourse to conciliation and arbitration under the ICSID Convention is, in principle, voluntary. However, once the parties have consented, including through treaties, they are bound to carry out their undertaking. All contracting states, whether or not parties to the dispute, are required to recognize awards rendered pursuant to the ICSID Convention as binding and enforce them. Such awards are not subject to appeal or other remedy, except those agreed in the Convention, such as the remedy of annulment. See ICSID, available online: <www.worldbank.org/icsid/>.

⁸⁷ M.C. Cordonier Segger & M. Leichner Reynal, *Beyond the Barricades: An Americas Trade and Sustainability Agenda* (Aldershot: Ashgate, 2004). J. Kirton, and V. Maclaren, eds., *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges* (Aldershot: Ashgate, 2002). See also, more generally, A. Kiss, D. Shelton & K. Ishibashi *Economic Globalization and Compliance with International Environmental Agreements* (New York: Kluwer Law International, 2003).

Court of Human Rights, addressed elsewhere in this volume, the European Court of Human Rights, also discussed in this volume, and the African Court of Human Rights.

Similarly, other regional courts and tribunals, such as the Andean Court of Justice, the European Court of Justice, and the new Caribbean Court of Justice, a discussion of which would (and does) fill many volumes of analysis, can become forums for the resolution of claims which require the accommodation, reconciliation and integration of social, economic and environmental regimes.

Elements of a ‘Principled’ Juridical Test to Reconcile Social, Economic and Environmental Priorities, Policies and Laws

Though important efforts have been undertaken in the United Nations and in the World Summit for Sustainable Development to encourage coherence and coordination, the international institutional architecture for sustainable development remains diffuse and fragmented. A proliferating number of international courts and tribunals are being called upon to address increasing numbers of disputes related to sustainable development, as their jurisdictions are extended, and as they continue to develop bodies of decisions that are either binding or provide persuasive authority. Are there elements of a ‘legal test’ for sustainable development that could be developed,⁸⁸ to assist in the accommodation, reconciliation or integration of competing social, economic and environmental claims?

While it is beyond the scope of this preliminary discussion to provide a comprehensive answer to this question, given the global importance of the topic and the great diversity of potential conflicts, it is hoped that such an answer can be developed. As a conclusion to this chapter, two questions will be raised and discussed, and a proposal will be made, to encourage future legal research. First, the question of a legal definition for sustainable development will be briefly canvassed. Second, the nature of sustainable development, in international law, will also be discussed. Third, certain elements will be proposed that a judge or jurist might take into account, when seeking to reconcile competing social, economic and environmental claims.

i. A juridical definition of sustainable development?

After two decades of scholarly debates and practical experience, there is remains the need to clearly define sustainable development, in the law. Significantly, neither the ‘soft law’ 1992 *Agenda 21*, nor the 2002 *Johannesburg*

⁸⁸ The author would like to thank Hon. Mr. Justice Georg Ress, European Court of Human Rights, Professor Nico Schrijver, Free University of Amsterdam, Dr. Duncan French, Sheffield University and Dr. Ximena Fuentes, Chile, for their guidance and substantive intellectual contributions to this conversation, particularly at the International Law Association 2004 in Berlin and following meetings in Santiago of Chile.

Plan of Implementation provide an agreed definition of sustainable development.⁸⁹ However, as mentioned elsewhere, it is likely that initially, the very vagueness of this concept is one of the reasons that it has been so broadly adopted, as a treaty objective and a policy goal.⁹⁰ As for other universal concepts, such as self-determination, justice or democracy, many definitions are possible.

Certain international guidance has been provided. *Our Common Future*, the 1987 *Brundtland Report*, sought for parallel problems of global environmental degradation and global lack of social and economic development to be addressed together.⁹¹ In the *Brundtland Report*, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁹² The 2002 *Johannesburg Declaration*, at para. 5, specifically commits to “assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels.”

Such definitions might be useful in policy circles, and indeed, have been widely adopted in international declarations and domestic policy statements. However, they are not particularly helpful to determine the parameters of an international treaty commitment to ‘sustainable development’ or the precise normative content of sustainable development in international law. As has been noted by Vaughan Lowe, how can one determine the needs of present generations? Are these needs also rights or entitlements? And how can one predict what will be the exact needs of generations to come?⁹³ In addition to jurists, many economists, ecologists, as well as other scientists and development scholars have devoted much effort to developing the necessary indicators and instruments to answer these questions. But for deeper exploration of the meaning of sustainable development, it is necessary to turn to a different, more precise but also more treacherous part of the global debates: international law.

One definition of sustainable development, in international law, has recently been agreed in one regional treaty between developing countries, the 2002

⁸⁹ It is noteworthy that it was possible to hold a ‘World Summit on Sustainable Development’, with the participation of over one hundred heads of state and more than 25,000 delegates, without such a definition having been clearly set out.

⁹⁰ B. Simma, “Foreword” in N. Schrijver & F. Weiss, eds., *International Law and Sustainable Development* (Leiden: Martinus Nijhoff, 2004). See also M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004).

⁹¹ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

⁹² *Ibid.* (“The members of the World Commission on Environment and Development came from 21 very different nations. [...] We are unanimous in our conviction that the security, well-being, and very survival of the planet depend on such changes, now.”).

⁹³ 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) at 27.

Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific. In Art. 3(1)(a), the parties adopted a definition which states that sustainable development means:

“[Sustainable development is:] the process of progressive change in the quality of life of human beings, which places them as the centre and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.”⁹⁴

The original treaty language is Spanish, and a straightforward translation cannot do justice to the central concepts of the agreed definition. With relation to ‘development’, it focuses on a human-scale, human-centred process of progressive change in quality of life for human beings. With relation to ‘sustainability’, it calls for economic growth which respects social equity, carried out through the transformation of production methods and consumption patterns, in such a way that there is respect for the ecological balance and life support systems of the region. (In this context, the ‘region’ refers to Central America and the regional sea in question). It also provides for other elements: respect for diversity, public participation, peaceful coexistence with nature, and inter-generational equity.

How to distil such a poetic, all-encompassing definition into an English-language formulation that can be used each day, with a plain and ordinary meaning, by jurists and others, without tautological repetitions? The following proposed meaning for the concept may serve to continue the discussion:

The concept of sustainable development, in international law, refers to the balanced reconciliation or integration of economic growth, social justice and environmental protection, towards participatory improvement in collective quality of life that can meet the needs of the present without compromising the needs of future generations.

In short, the concept actually means ‘development’ that can be ‘sustained’ – a socially, environmentally and economically sound collective process of change that can last over time.

Such a definition is in harmony with the definition proposed in the 2002 *Northeast Pacific Treaty*. It emphasizes the three ‘pillars’ highlighted in the

⁹⁴ The 2002 *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* 18 February 2002, City of Antigua, Guatemala. (Translation provided by author). Available online: http://www.cep.unep.org/services/nepregseas/Convention_English_NEP.doc

Johannesburg Declaration. It considers the need to “reconcile economic development with protection of the environment...” which the I.C.J., in its most relevant majority decision on this issue to date, has found “is aptly expressed in the concept of sustainable development”.⁹⁵ It also recognises the need for “integration” highlighted by the WTO Appellate Body in its most relevant decision.⁹⁶ It describes development as ‘participatory improvement our collective quality of life’. It recognises the inherent uncertainties from dealing with the future – requiring states and other bodies to seek options that *can*, rather than *will*, be able to last over the long term. And it addresses the concept of inter-generational equity, the requirement that development be able to meet the needs of both present and future generations.

ii. What is the status of sustainable development in international law?

A commitment to sustainable development appears, often as an objective or preambular reference, in almost all international treaties related to environmental, social and economic issues since the 1992 Rio de Janeiro Earth Summit. Indeed, over 300 treaties are specifically referenced in the 2002 *Johannesburg Plan of Implementation* from the World Summit on Sustainable Development. As observed by Judge Weeramantry in his Separate Opinion in the *Case Concerning the Gabčíkovo-Nagymaros Dam*,⁹⁷ there is “wide and general acceptance by the global community” of sustainable development. Sustainable development has also been innovatively applied by judges in domestic courts around the world.⁹⁸ However, it is also important to consider the normative status of sustainable development in international law. Is sustainable development a binding principle of international customary law? Is it simply a broad policy goal, without specific meaning? Or is it something else?

It is not clear that ‘sustainable development’ can be accurately characterized as a principle of customary international environmental law.⁹⁹ There are two reasons that this is problematic.

⁹⁵ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep. 7 at 140.

⁹⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R (1998). (Appellate Body Report).

⁹⁷ (Hungary/Slovakia) [1997] I.C.J. Rep. 7.

⁹⁸ National cases applying the concept of sustainable development include: *Vellore Citizens Welfare Forum v. Union of India* (1996, Supreme Court of India) and *Bulankulame v. Secretary, Ministry of Industrial Development and Others* (the Eppawela Case) (2000, Supreme Court of Sri Lanka). In *Rajendra Parajuli and Others v. Shree Distillery Pvt. Ltd. & Others*, the Supreme Court of Nepal (Writ No. 3259, 1996) stated that sustainable development means “every industry has an obligation to run its development activities without creating environmental deterioration. The environment should not be viewed narrowly. It is imperative for any industry to be cautious towards the environment while it is in operation.” In this instance, the Court ordered the company to comply with a prior agreement to keep the environment free of pollution in the affected area.

⁹⁹ Customary international law as a recognised source of international law, from the *Statute of the International Court of Justice*, 26 June 1945, T.S. No. 933, 59 Stat. 1055, 3 Bevans 1179., as discussed in *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, [1969] I.C.J. Rep. 3. International environmental law as comprehensively documented and summarized in P. Sands, *Principles of International Environmental Law*, 2nd ed. (Cambridge: Cambridge University Press, 2003), in A. Kiss & D. Shelton, *International Environmental Law* (New York: Transnational Publishers, 2000) and in D. Hunter, D.

First, the goal of international environmental law is, broadly, ‘protection of the international environment.’ But this is not the goal of sustainable development, a concept that focuses principally on improving collective human quality of life in a way that can last. Sustainable development law is complementary to environmental law. It has an important environmental component, in that it recognizes that to be sustainable, development cannot exceed the limits of the environment. But it is not primarily focused on the protection of environmental integrity, or on the preservation of nature for its intrinsic worth.

Second, it is unlikely that sustainable development has the ‘fundamentally normative character’ required to be a principle in itself. As noted by David Freestone and Alan Boyle, there does not appear, as yet, to be a customary international legal principle that requires States to ‘develop sustainably.’¹⁰⁰ As Vaughan Lowe has observed, in his interpretation of Judge C. G. Weeramantry’s visionary Separate Opinion in the *Gabčíkovo-Nagymaros case*, sustainable development is more likely to have an interstitial normative character, in international law.¹⁰¹ Indeed, as proposed above, sustainable development may serve as a special type of norm in its own right,¹⁰² one that facilitates and requires a balance between conflicting legal norms relating to environmental protection, social development and economic growth. Sustainable development, when applied in treaty negotiation or dispute settlement, can be considered a “meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.”¹⁰³ This characterisation appears to be in accordance with the majority decision of the World Court on this issue.¹⁰⁴

Zaelke, & J. Salzman, *International Environmental Law and Policy* (New York: Foundation Press, 2002). It is notable that Hunter, Zaelke & Salzman also call to question, in their second edition, the characterization of sustainable development as a customary norm of international environmental law.

¹⁰⁰ A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999).

¹⁰¹ 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) at 30.

¹⁰² V. Lowe, “The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?” in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) at 214-215.

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) at 31.

¹⁰⁴ At para 140, in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep. 7, the majority stated that “It is clear that the Project’s impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable. In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of

While there is doubt that a legally binding ‘principle of sustainable development’ exists at present, a growing body of ‘international law in the field of sustainable development’ or ‘sustainable development law’ can be identified, analysed and implemented.¹⁰⁵ “Even if there is no legal obligation to develop sustainably, there may nevertheless be, through incremental development, law ‘in the field of sustainable development’.”¹⁰⁶

The recognition of sustainable development as a field of law is supported by many references made by governments in agreed consensus statements. In the 1992 *Agenda 21*, governments committed to the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns.”¹⁰⁷ Governments also recognized the “need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries...”¹⁰⁸ *Agenda 21* emphasizes the need to ensure that developing countries can participate in “treaty making in the field of international law on sustainable development.”¹⁰⁹ The 1997 *Plan of Further Implementation of Agenda 21*,

reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.” Due to the specific facts of this case, only procedural requirements were imposed by the use of the concept.

¹⁰⁵ Sustainable development law is further defined in M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004). On the process of development of international law in this manner, see J. Brunnée & S.J. Toope “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39(1) *Col. J. Trans'l. Law* 19. See also M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, OUP, 2000).

¹⁰⁶ P. Sands, ‘International Law in the Field of Sustainable Development’ (1994) 65 *B. Y. Int'l. L.* 303.

¹⁰⁷ *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874, especially at Chapter 39, on international law. See also *Río Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), 31 I.L.M. 874 (1992), especially at Principle 27 on international law.

¹⁰⁸ *Ibid.*

¹⁰⁹ At Chapter 39, entitled International Legal Mechanisms and Instruments, at para 39.1, a basis for action is identified. It states that... “the following vital aspects of the universal, multilateral and bilateral treaty-making process should be taken into account: (a) The further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns; (b) The need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries; (c) At the global level, the essential importance of the participation in and the contribution of all countries, including the developing countries, to

similarly, states that “it is necessary to continue the progressive development and, as and when appropriate, codification of international law related to sustainable development.”¹¹⁰ And the 2002 *Johannesburg Plan of Implementation* requests the United Nations Commission on Sustainable Development to track, and take into account, “significant legal developments in the field of sustainable development, with due regard to the role of relevant intergovernmental bodies in promoting the implementation of Agenda 21 relating to international legal instruments and mechanisms.”¹¹¹

It is beyond the scope of this chapter to discuss the emerging principles, international instruments or disputes which are part of this area of law.¹¹² Such topics are covered elsewhere in this volume, and in other studies.¹¹³ But it is important to note that recognition of sustainable development law is not just a change in semantics. It is a conceptual shift, one that facilitates and may even require legal scholarship and judicial analysis that can balance between three intersecting systems of international law: international economic, human rights and environmental law.

iii. Elements of a legal test for sustainable development?

For the purposes of this analysis, sustainable development can be defined as ‘the procedural and substantive requirement to accommodate, reconcile or

treaty making in the field of international law on sustainable development. ... (e) Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission; (f) Any negotiations for the progressive development and codification of international law concerning sustainable development should, in general, be conducted on a universal basis, taking into account special circumstances in the various regions.” Agenda 21 continues, at 39.10, stating that “In the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement. This may include mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other States in the field of sustainable development and for effective peaceful means of dispute settlement in accordance with the Charter of the United Nations, including, where appropriate, recourse to the International Court of Justice, and their inclusion in treaties relating to sustainable development.”

¹¹⁰ In particular, at para 109, it states that “Taking into account the provisions of chapter 39, particularly paragraph 39.1, of Agenda 21, it is necessary to continue the progressive development and, as and when appropriate, codification of international law related to sustainable development. Relevant bodies in which such tasks are being undertaken should cooperate and coordinate in this regard.” See G. A. res. S-19/2. U.N. GAOR, 19th Special Sess. (1997). A/RES/S-19/2.

¹¹¹ *Plan of Implementation*, Report of the World Summit on Sustainable Development, A/CONF.199/20 Johannesburg, South Africa, August 26-September 4, 2002 at para 148.

¹¹² See the “ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development”, reproduced in this volume. And see N. Schrijver and F. Weiss, eds., *International Law and Sustainable Development* (Leiden: Martinus Nijhoff, 2004) at 699.

¹¹³ See, e.g., M. C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004). See also M.C. Cordonier Segger, “Significant Developments in Sustainable Development Law and Governance: A Proposal” (2004) *U.N. Natural Resources Forum* 28:1. And see FAO, *International Law and Sustainable Development Since Rio* (Rome: FAO, 2002). See also M.C. Cordonier Segger, A. Khalfan, M. Gehring & M. Toering, “Prospects for Principles of International Sustainable Development Law after Johannesburg: Common but Differentiated Responsibilities, Precaution and Participation” (2003) 12:3 *R.E.C.I.E.L.* 54.

integrate economic growth, human rights and environmental protection, for participatory, equitable improvement in our collective quality of life that can last over the long term.’ In international law, sustainable development is conceived as an objective of many international treaties, and as an interstitial norm, one which can assist judges and decision-makers to balance between other, competing norms, such as the imperative to realise a human right, the duty to protect the environment, or a treaty commitment to free trade rules. As such, the substantive aspect of this ‘interstitial norm’ is the requirement that all three sets of priorities be reflected in the substantive outcomes of a given dispute or conflict.

What would be the juridical test for such an objective? How could judicial reasoning determine that a particular decision, or course of action, will contribute to sustainable development? Three particular elements might be proposed, in this regard, for a ‘principled approach.’

First, the jurist would need to clearly define the interests at stake, in terms of the relevant legal rights and duties of the parties, in terms of the general social, economic and environmental interests of the broader community (in accordance with the principle of good governance), and in terms of the time scale involved. If the dispute has extensive implications for domestic or international levels, both present and future public interests might need to be taken into consideration, with special attention to the needs of the most vulnerable (in accordance with the principle of equity, which includes both inter-generational and intra-generational equity). This definition of interests will be specific to each case, but could be done clearly at the outset of reasoning.

Second, the jurist would need to seek ways to accommodate between, or reconcile, the competing interests. Three particular principles of sustainable development law would be particularly relevant here. First, the jurist might inquire as to whether there is a particular renewable resource or common concern at stake, such as a particular fishery or forest, upon which societies, economies and ecosystems depend (the duty to ensure sustainable use of natural resources). Related to this, it may also be necessary to determine whether all parties have complied with their duty to notify each other of the proposed uses, to consult with environment and development decision-makers in each country, and to negotiate solutions in good faith. Second, the jurist might inquire as to whether a science-based, objective impact assessment has determined a certain threshold of exploitation beyond which the resource cannot be sustained, and where the science is uncertain, to determine whether precautionary measures been contemplated, so that the lack of certain science is not used as a basis for postponing measures to mitigate or compensate for serious or irreversible damage (the principle of the precautionary approach to human health, natural resources and ecosystems). Third, public participation, including through consultation of all stakeholders, is essential in determining

whether a society and economy depend on sustainable use of a resource. As such, the jurist might inquire as to whether appropriate levels of consultation and participation have been undertaken (the principle of public participation, access to information and justice).

Third and finally, often, sustainable development conflicts are not very straightforward, and do not simply involve shared management of one natural resource. As such, two other fundamental principles might come into play to assist in a process of reconciliation, at the moment of double-checking a solution proposed by the application of the other principles and the earlier two steps. First, the jurist could consider whether the resolution imposes burdens on countries or actors that have traditionally suffered from disadvantages, and have not benefited from past unsustainable practices. If it does, exceptions might need to be created for these countries or parties (in accordance with the principle of common but differentiated responsibilities), or the resolution reconsidered. Second, the jurist might need to specifically turn their mind toward the inter-relations and interdependence of the social, economic and environmental aspects of the dispute. Essentially, the jurist would seek to ensure that neither the economic, nor the environmental, nor the social priorities had been completely ignored. While there are few clear bright lines, and no hard and fast rule, as each factual situation is different, it would not 'sustainable' to allow one or the other dimension of sustainable development to be completely excluded (the principle of integration).

The ultimate test of this reasoning would be, of course, whether the resolution leads to improvement in the collective quality of life that can last over the long term – ie, whether it contributes to sustainable development.

Such a principled approach, which is both substantive and procedural, might assist jurists, including treaty negotiators, judiciaries and arbitrators, in using an interstitial concept of sustainable development to accommodate and reconcile competing social, economic and environmental interests.