



# A CISDL LEGAL BRIEF

## STRENGTHENING ENVIRONMENTAL GOVERNANCE & LAW FOR GLOBAL SUSTAINABLE DEVELOPMENT

For the Global Ministers of the Environment Forum  
Cartagena, Colombia, 12 February – 13 February, 2002

### **International environmental governance is founded in law – But which, and where?**

Law provides a subtle but important baseline for the international governance agenda. Strong international environmental regimes are essential and necessary. They develop, implement and monitor the solutions to global and regional environmental problems. The United Nations Environment Programme is at the core, as the principal environmental authority of the United Nations. But how to best govern ten years of extensive progress? And how does this link to sustainable development?

First, sustainable development was never meant to replace the environment as a priority. Neither was environmental law and policy meant to provide the only answer for problems which reach far beyond this field. Rather, environmental protection and restoration is necessary in its own right, and sustainable development can help other areas of law (trade, investment, social development) to address environmental challenges. Integrated instruments provide valuable legal guidance at the intersections.

To understand how the international environmental governance (IEG) exercise relates to sustainable development governance, it is necessary to explore how IEG relates to other aspects of the UN system whose work impacts on sustainable development. With a strong report coming forward from a process of inter-governmental meetings on IEG, the WSSD has the unique chance to set broad directions for global sustainable development governance. Core pillars representing the three bottom line concerns would be IEG, International Social and International Economic Governance. While the latter benefit from strong, significant international organisations, there is not yet a specialised agency for the environment. This imbalance makes sustainable development governance less likely to achieve, and justifies a special focus on the environmental pillar. As such, perhaps one key question for ‘sustainable development governance’ can be asked. How can IEG support and link authoritatively with other regimes for sustainable development? The CISDL concentrates on the legal aspects of this agenda. So we ask what is international sustainable development law (ISDL), and how can stronger IEG contribute to it? This legal brief<sup>1</sup> will survey ISDL and draw basic conclusions for a stronger IEG which supports sustainable development governance.

### **The Roots and development of ISDL**

In the past 10 years, there have been startling advancements in international sustainable development law (ISDL). The need for stronger international law for sustainable development was

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<sup>1</sup> The Centre for International Sustainable Development Law (CISDL), based in Montreal, Canada, is a new legal institution which examines areas of intersection between environmental, social and economic law. This brief was prepared by CISDL Commission Director Marie-Claire Cordonier Segger of Canada, and CISDL Commission Director Ashfaq Khalfan of Kenya. The CISDL Commission gratefully acknowledges advice from Cairo Robb of the UK, and Markus Gehring of Germany.

identified in the 1992 *Agenda 21* at Chapter 38. Governments committed to the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns.” Governments also recognised 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.”<sup>2</sup>

## What is International Sustainable Development Law (ISDL)?

ISDL is still vague and in a process of further definition in many contexts.<sup>3</sup> But a growing *corpus* of legal provisions and instruments can be identified which integrate international environmental, social and economic law. In governance structures, particularly with regard to the environment, consensus is just developing on which legal principles (and in the end which values) will provide orientation for this integration. Based on prior work by the United Nations Commission for Sustainable Development and many legal experts,<sup>4</sup> the International Law Association *Committee on the Legal Aspects of Sustainable Development* has elaborated a set of ‘Principles of International Law for Sustainable Development.’<sup>5</sup>

A recent CISDL survey of international treaty and customary sources of international law, including soft law international judgements demonstrates that these principles have been widely adopted into economic, social and environmental law.

## How can ISDL be Implemented?

Many national laws and judgments have fully acknowledged a connection between environmental protection, economic development and human rights.<sup>6</sup> And on the international level, in binding treaties and international judgments, in ‘soft law’ declarations and state practice, governments, judges and panel members increasingly perceive these objectives as complementary rather than unrelated or opposing disciplines. Recognition of integration is key to the implementation of ISDL. The need for integration of development and environment policy permeates international law.<sup>7</sup> But not all economic or social law requires environmental expertise, nor vice versa.<sup>8</sup> Only certain instruments in each regime need to integrate others, in practice. A strengthened IEG will make it possible to determine which aspects of the environmental agenda must be deepened, and which should be done in partnership with social or economic institutions and legal structures.

## How can stronger IEG support broader sustainable development governance?

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<sup>2</sup> *Agenda 21*, 1992 Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev. 1, (1992) 31 I.L.M. 874 at Chapter 38.

<sup>3</sup> One of the most compelling explanations for this lack of clarity was presented by C. D. Stone, “Deciphering Sustainable Development” (1994 Symposium on Ecology and the Law) (1994) 69 Chi.-Kent L. Rev. 977. “The term sustainable development is not merely vague - a masker of failed consensus - the way key terms in the U.S. Constitution are vague and require case by case elaboration. ‘Sustainable development’ functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language ... than a poignant tussle between, roughly, Rich and Poor. The indigenous native who extinguishes a species for food is not trapped in orthodox semantics of conventional pre-materialist *homo economus* cost-benefit analysis. He is trapped in hunger (just as we, the rich, are so often trapped in moral blindness). There is no reason to suppose that killing off a species pains him less than it does us.”

<sup>4</sup> Including studies by environmental legal experts, such as *No. 31 Draft International Covenant on Environment and Development Commission on Environmental Law of IUCN - The World Conservation Union in cooperation with ICEL - International Council of Environmental Law*, 1995. Second Edition: Updated Text, 2000. IUCN Environmental Law and Policy Series.

<sup>5</sup> *Report of the Expert Group on Identification of Principles of International Law for Sustainable Development* (London: ILA, 1995). See also International Law Association (ILA), *Report of the Sixty-Second Conference* (Seoul: ILA, 1987) at 1-11, 409-87.

<sup>6</sup> For example, Indian cases such as *Charan Lal Sadhu v. Union of India* AIR 1990 SC 1480 and *Koolwal v. Rajasthan* AIR 1998, Raj.2, address environmental pollution as an issue affecting the human right to life. See also *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council*, 81 LGERA 270 (1993) (NSW Land and Environment Court, Australia); *Vellore Citizens Welfare Forum v. Union of India* [1996] 5 SCC 647 (Supreme Court, India); *Balankulama v. The Secretary, Ministry of Industrial Development, SAER*, Vol 7(2) June 2000 (Supreme Court, Sri Lanka [Supreme Court of the Democratic Socialist Republic of Sri Lanka]

<sup>7</sup> *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), reprinted in 31 I.L.M. 874 (1992) at Principle 4. See also the *Stockholm Declaration* (1972) at Principle 13.

<sup>8</sup> This means that not all aspects of international environmental law are international sustainable development law. For example, animal rights, the conservation of ‘charismatic mega-fauna’, and trans-boundary environmental disputes do not necessarily address sustainable development problems. A. Boyle & D. Freestone, “Past Achievements and Future Challenges” in W. Lang, *supra* note 6 at 6.

A stronger IEG can support the integration of sustainable development at all appropriate levels. Each aspect of the IEG agenda has a role to play in the context of sustainable development. It is advised that the IEG consider the following points:

1. The **Global Ministers of Environment Forum** (GMEF) can provide a meeting place for environmental law and policy makers and strengthened partnerships with civil society and the private sector. It must be open to observers from economic and social institutions, to promote integrated decision-making. Its role can not be to replace the UNCSD but rather strengthen the environmental pillar of sustainable development. Universal membership will allow it to address problems of environmental degradation of global importance.

2. If **Multilateral Environmental Agreements** can form closer collaboration around their respective substantive solutions, these clusters can designate particular secretariats or jointly select experts to advise partners from social and economic fields, and act as observers to other inter-governmental bodies.

3. If an authoritative **Environmental Management Group** is constituted, this will contribute to coherence and efficiencies among environmental institutions. Such co-ordination could develop informed, realistic proposals for the GMEF, and forward to the United Nations Commission on Sustainable Development.

4. Environmental governance needs stronger, reliable and increased funding. The role of the **Global Environmental Facility** (GEF) in this respect is key. Without a strong environmental pillar, sustainable development cannot be achieved. Innovative measures also include new international mechanisms for raising funds (taxes, specific appeals) and partnerships with civil society and private actors. UNEP's partnerships with economic and social development institutions provide good examples for further integration..

5. Sustainable development governance, and inter-generational equity, requires a long term perspective. It appears clear that the evolution of a **specialised environmental agency** for the environment, to many actors from the 'Rio Generation' is necessary and inevitable. The questions are when and how. Such an endeavour must be built upon consensus, and necessary political will takes time to develop. The WSSD provides one forum for increased dialogue and political debate, and will hopefully help to move proposals forward.

6. In accordance with an IEG that is sensitive to the sustainable development principle of equity, and the importance of technology transfer to overcome the digital divide at all levels, strengthening the **United Nations Office at Nairobi** (UNON) is necessary. The development of a specialised agency holds potential to increase support for the UNON.

7. **Increased capacity building** is necessary for environmental legislators, jurists, authorities and civil society organisations, to implement environmental law and policy. Capacity building is also critical for social and economic actors at the national, regional and global level, to facilitate implementation of international sustainable development law. All countries and diverse institutions, including the UNEP, the UNDP, and many expert civil society institutes, have much to offer to fill the urgent need, especially in the regional context where common cultural or geographical conditions exist.

8. Innovative mechanisms have been developed in the last ten years and should be more widely used. In particular, integrated assessment (**sustainability impact assessment**) is a new mechanism in ISDL which can provide integration of economic, social and environmental law and policy. There is a role for this tool in environmental law and policy bodies, but also as a mechanism to ensure public participation and environmental expertise in social and economic intergovernmental bodies, so to include a respective intergovernmental panel in IEG appears a self-enforcing.

As such, a stronger IEG should be addressed in the context of sustainable development. The United Nations Environment Program, and other aspects of the IEG system, might benefit from an exercise

to clarify common sustainable development objectives. However, other aspects of the United Nations system and other international actors, particularly those with economic and social mandates, must also engage in a similar exercise, and their efforts would do much to eliminate potential impacts. The 1972 UN conference on the Human Environment defined some of the key problems, and laid structures in place to seek solutions. The 1992 UN Conference on Environment and Development attracted world attention to the problems, and launched groundbreaking processes for international cooperation. The 2002 World Summit for Sustainable Development must focus on priorities, concrete deliverables, and instruments to implement the sustainable development agenda in partnership with all actors.

The Centre for International Sustainable Development Law (CISDL) commission is based in the McGill University Faculty of Law (founded in Montreal, Canada, in 1849), works in cooperation with the McGill School of the Environment, the Université de Montreal Faculty of Law, and the Université de Québec à Montreal, with guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund). Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

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