



## **DRAFT WORKING PAPER**

# **The Principle of Good Governance**

*N. Chowdhury, with C.E. Skarstedt*

A Legal Working Paper in the CISDL “Recent Developments in International Law Related to Sustainable Development” Series<sup>1</sup>

**OPEN DRAFT FOR REVIEW**

**March 2005**  
**Oxford, United Kingdom**

*The author gratefully acknowledges the generous support provided for this research by Foreign Affairs Canada.*

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<sup>1</sup> In order to advance academic and policy debates, this Legal Working Paper explores the principle of good governance with respect to recent developments in international law in relation to sustainable development law. This research also seeks to investigate the International Law Association’s *2002 Principles of International Law Related to Sustainable Development*. This Legal Working Paper is designated as a scholarly legal research initiative, and accordingly, is not intended to be construed as legal advice for any country. Furthermore, the views expressed herein remain those of the author, and as such, do not reflect the official position of the Centre for International Sustainable Development Law (CISDL).

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Directors: Marie-Claire Cordonier Segger, [mcsegger@cisdl.org](mailto:mcsegger@cisdl.org) | Ashfaq Khalfan, [akhalfan@cisdl.org](mailto:akhalfan@cisdl.org)  
Centre for International Sustainable Development Law, 3661 Peel St. McGill Law Faculty, Montreal,  
Quebec H3A 1X1 Canada Tel: 001 514 398 8918 / Fax 001 514 398 8197  
[www.cisdl.org](http://www.cisdl.org)

# The Principle of Good Governance

By N. Chowdhury, with C.E. Skarstedt<sup>2</sup>

This paper explores the contention that the concept of “good governance” is emerging as a principle of international law. As such, a chief component of this analysis will focus on establishing the normative parameters of the meaning of “good governance”. The paper will explore i) whether or not there exists a consensus in terms of the meaning of the concept; ii) the context in which the principles and values are linked to the concept and; iii) the rights-duties framework that is subsumed within the concept of good governance.

The paper is divided into six sections. In an effort to clarify the *entente* of the concept of “good governance”, Section I establishes a broad definition and draws upon key perceptions and aspects of the principle in question. The initial section also traces the development of the concept of “good governance” from the 1989 *World Bank Report*<sup>3</sup> up until its formal enunciation in the *Johannesburg Plan of Implementation (JPOI)*.<sup>4</sup> Using international texts, Section II focuses on the international legal meaning of the principle of “good governance” in terms of its normative content. In addressing the origin and emergence of the concept of good governance, Section II explores the variable contexts of the concept’s usage and its cumulative effect --- not only in terms of its substantive contents --- but also its reception across other forums globally. Section II will also explore the legal underpinnings of the concept in terms of its structural implications, for instance, i) whether there exists a right to good governance; ii) whether it is a positive or a negative right; iii) the types of legal obligations involved; and iv) the types of actors that form part of its operation. Through the analysis of international treaties, Section III seeks to clarify the scope of the concept of good governance in terms of the various legal actors involved in its operation. Of note, while the concept of good governance has evolved through domestic politics, the primary push for the introduction of its concept derives *vis-à-vis* international agency. Section IV focuses exclusively on the currency of the principle of good governance in the context of international case law, including the actions of inter-governmental organisations (IGOs). It provides a systematic overview of the way in which the concept is applied in the context of regional entities like the European Union (EU). Accordingly, the EU is a suitable example since it demonstrates how good governance corresponds to the imperative response to the legitimacy crisis. A spillover of semantics has also occurred via an international sustainable development policymaking paradigm. The evolution of the concept of

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<sup>2</sup> Nupur Chowdhury, B.A. (Hons) (Lady Shri Ram College, University of Delhi), LL.B (Faculty of Law, University of Delhi), CISDL Legal Researcher, authored this paper. He holds a Diploma in Environmental Law from the Centre for Environmental Law (World Wildlife Foundation [WWF], India). Mr. Chowdhury is an Area Convenor for the Centre for Global Agreements, Legislation and Trade, Policy Analysis Division, The Energy and Resource Institute (TERI). He is an Adjunct Faculty Member at the Department of Natural Resources (TERI School of Advanced Studies). Corinne Elizabeth Skarstedt, B.A. (Concordia), B.A. (Hons) (Carleton), M.A. Candidate, Legal Studies (Carleton) is Publications Officer of the Centre for International Sustainable Development Law (CISDL). She served as a reviewer and editor of this Legal Working Paper.

<sup>3</sup> World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington: World Bank, 1989) [World Bank, Africa].

<sup>4</sup> See *Johannesburg Plan of Implementation*, Report of the *World Summit on Sustainable Development*, Johannesburg, South Africa, 4 September 2002, UN Doc. A/CONF.199/20, online: UN <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)> [JPOI].

good governance has occurred in conjunction with the emergence of an international constituency,<sup>5</sup> which has assumed the political form of the international community, i.e. the recognition of a ‘community value system’. Thus, in the larger framework of political governance, the principle of good governance is a superior example of a key substantive norm of international constitutional law that is common to national and international law.<sup>6</sup> It also represents a paradigm shift from a dualistic representation of the division between international and domestic policymaking to that of a continuum within a uniform, multilevel governing mechanism. Section V addresses the nature, scope and currency of the application of good governance in terms of soft law (or legally non-binding or incompletely binding norms). Finally, Section VI establishes a broad hypothesis on the legal standing of the principle of good governance in international law. This section will determine whether or not there exists a right to good governance in international law.

It is anticipated the foregoing analysis will provide academics and others with some clues to the currency of the concept of “good governance”, including the structural paradigm within which it is used. In undertaking this investigation, it is anticipated that a theoretical hypothesis will be established to confirm that the concept of “good governance” is indeed emerging as a principle of international law.

## **I Definition of the Principle**

In general, good governance is perceived as a normative principle of administrative law, which obliges the State to perform its functions in a manner that promotes the values of efficiency, non-corruptibility, and responsiveness to civil society.<sup>7</sup> It is therefore a principle that is largely associated with statecraft. While the government is not obliged to substantively deliver any public goods, it must ensure that the processes for the identification and delivery of such goods are concrete in terms of i) being responsive to public demands; ii) being transparent in the allocation of resources and; iii) being equitable in the distribution of goods. The principle of good governance has also been espoused in the context of the internal operations of private sector organisations. In this way, corporate decision-making strategies integrate the principle of good governance and ensure that shareholder interests (i.e. public limited companies) and employees are taken into account.

## **II International Legal Meaning of the Principle**

### *Origin and Emergence of the Concept of Good Governance*

The use of the term “good governance” was initially articulated in a 1989 World Bank publication.<sup>8</sup> Therein, the concept of good governance was identified as a structural necessity for market reform. In 1992, the Bank published a report entitled, *Governance and Development*,<sup>9</sup> which explored the concept further and its application to the Bank’s activities.<sup>10</sup> In 1997, the Bank redefined the concept

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<sup>5</sup> The evolution of the concept of good governance has also taken place within the context of an international legal framework.

<sup>6</sup> A. Nollkaemper, C. Romano & J.K. Kleffner, eds., *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*. (Oxford: Oxford University Press, 2004).

<sup>7</sup> Compare J.N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997).

<sup>8</sup> See World Bank, *supra* note 3.

<sup>9</sup> World Bank, *Governance and Development* (Washington: World Bank, 1992).

<sup>10</sup> G. Hayden and M. Bratton, eds., *Governance and politics in Africa* (Boulder: Lynne Rienner Publishers, 1993).

and underlined the need for an effective state apparatus in association with “good governance” as a necessary precondition for development. Other international financial institutions (IFIs), such as the International Monetary Fund (IMF) and the Organisation of Economic Cooperation and Development (OECD), have also contributed to the World Bank’s policy dialogue, including bilateral development agencies like the British Overseas Development Agency (BODA) and the Danish Development Agency (DDA).<sup>11</sup>

The concept of good governance in international law has also been well received under the rubric of human rights. Increasingly, in international development literature, the concept of good governance parallels a normative (rule-setting) formulation, which reflects the degree to which it promulgates the universality of civil, cultural, economic, political and social rights.<sup>12</sup> The United Nations High Commissioner for Human Rights (OHCHR) identifies five key attributes of good governance as follows: 1) transparency; 2) responsibility; 3) accountability; 4) participation and; 5) responsiveness (to the needs of the people).<sup>13</sup>

Resolution 2000/64 expressly links good governance with an enabling environment that promotes the enjoyment of human rights and “prompt[s] growth and sustainable human development.”<sup>14</sup> The resolution not only represents an attempt to establish a rights-based framework towards development and good governance, but also a mechanism to achieve “the right to development”.

The United Nations *Millennium Declaration*,<sup>15</sup> adopted by the General Assembly on the eve of the new millennium, expressly notes that:

[s]uccess in meeting these objectives [in this case development and poverty eradication] depends, *inter alia*, on good governance within each country. It also depends upon good governance at the international level and on transparency in the financial, monetary and trading systems. [The General Assembly is] committed to an open, equitable, rule based, predictable and non-discriminatory multilateral trading and financial system.<sup>16</sup>

Thus good governance is envisaged as a multilevel continuum of national policymaking and cross-cutting international regulatory frameworks. Additionally, the *Millennium Declaration* provides for a set of actions and resolutions under the broad heading, “Human rights, democracy and good governance”, thereby strengthening the semantic link between the dual themes of good governance and human rights. The *Declaration* states in no uncertain terms that, “no effort shall be spared to promote democracy and strengthen the rule of law and respect for internationally recognised human rights and fundamental freedoms, which includes the right to development.”<sup>17</sup> The *Millennium Declaration* also explicitly reiterates the importance of capacity building of individual countries in implementing principles of democracy and especially minority rights.<sup>18</sup> The identification of specific

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<sup>11</sup> See T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

<sup>12</sup> Office of the High Commissioner for Human Rights, *Development - Good Governance*, online: OHCHR <<http://www.ohchr.org/english/issues/development/governance/>> (accessed on 15<sup>th</sup> May 2005).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *United Nations Millennium Declaration*, GA Res. 55/9, UN GAOR, 2000, ch. III [*Millennium Declaration*], online: OHCHR <<http://www.ohchr.org/english/law/millennium.htm>> (date accessed: 1 October 2005).

<sup>16</sup> *Ibid.* at para. 13.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

components of democratic goals *vis-à-vis* minority rights is also an attempt to substantiate the concept of “good governance” in terms of normative values.

The OHCHR recently followed up on the *Millennium Declaration* through Resolution 2001/72, which refers to the “role of good governance in the promotion of human rights.”<sup>19</sup> The relationship between good governance and human rights has been reiterated in several proclamations, and as a result thereof, has marked a clear shift in contemporary discourse. To begin with, Resolution 2001/72 emphasises that:

*the strengthening of good governance at the national level, including through the building of effective and accountable institutions for promoting growth and sustainable human development, is a continuous process for all Governments regardless of the level of development of the countries concerned [emphasis mine].*<sup>20</sup>

Secondly, Resolution 2001/72 notes that:

*good governance practices necessarily vary according to the particular circumstances and needs of different societies, and that the responsibility for determining and implementing such practices, based on transparency and accountability, and for creating and maintaining an enabling environment conducive to the enjoyment of all human rights at the national level, rests with the State concerned [emphasis mine].*<sup>21</sup>

Thirdly, Resolution 2001/72 affirms:

*the need for enhanced cooperation at the international level between States and through the [UN] system to ensure that States needing external inputs in order to improve good governance activities have access, if and when required, to the necessary information and resources [emphasis mine].*<sup>22</sup>

And finally, Resolution 2001/72 recognises that:

*transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a sine qua non for the promotion of human rights, including the right to development [emphasis mine].*<sup>23</sup>

In essence, transparency, participation and responsible governance are all attributes of good governance. Also, the right to development is embedded within the discourse of human rights. In many ways, Resolution 2001/72 reflects a shift towards the larger political discourse on good governance, and focuses primarily on procedural aspects of good governance, such as transparency, accountability and access to information. In a deliberate effort to placate nation States, Resolution 2001/72 is flexible in that it enables individual governments to autonomously determine their own normative goals of good governance. However, the structural and procedural characteristics of the administrative framework carried out in the achievement of such goals are preordained in the resolution itself.

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<sup>19</sup> Office of the High Commissioner for Human Rights, *The role of good governance in the promotion of human rights*, Commission on Human Rights resolution 2001/72 (78<sup>th</sup> Mtg., 25 April 2001), online: OHCHR <[http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2001-72.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2001-72.doc)> (date accessed: 2 October 2005).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

According to Segger and Khalfan, the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* “have clear resonance in emerging treaty regimes, decisions of tribunals and in the Johannesburg outcomes themselves.”<sup>24</sup> The *Declaration* also stipulates that the principle of good governance “is essential to the progressive development and codification of international law relating to sustainable development.”<sup>25</sup> The *Declaration* commits States and international organisations to:

- (a) adopt democratic and transparent decision-making procedures and financial accountability;
- (b) take effective measures to combat official or other corruption;
- (c) respect the principle of due process in their procedures and to observe the rule of law and human rights; and
- (d) implement a public procurement approach according to the WTO Code on Public Procurement.<sup>26</sup>

The above-noted *Declaration* embodies an inclusive, participatory framework, which recognises that “[c]ivil society and [NGOs] have a right to good governance by States and international organi[s]ations.”<sup>27</sup> The *Declaration* also notes that “[n]on-state actors should be subject to international democratic governance and to effective accountability.”<sup>28</sup>

The *Ulaanbaatar Declaration*<sup>29</sup> centers on democracy, good governance and civil society, and symbolises the pledge of the international community towards the ideals of transparency, responsibility, accountability, participation and responsiveness. In the context of the struggle against terrorism, the *Ulaanbaatar Declaration* attests that: “democracy, human rights, good governance, development [...] are important in creating just, equitable, stable and secure societies.”<sup>30</sup>

The pledge towards “good governance” from new or restored democracies is consequential, since it forms part of a growing consensus towards greater legitimacy from the international community. Thus the concept of good governance is being adopted by nation States as a touchstone for establishing their status as legitimate governments.

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<sup>24</sup> M.-C. Cordonier Segger & A. Khalfan, “Principles of International Law Relating to Sustainable Development” in M.-C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices, & Prospects* (New York: Oxford University Press Inc., 2004). The authors are careful to note, however, that such principles “are as yet emerging [and that] precise analysis of their normative (rule-setting) formulations and above all, evidence of acceptance as binding custom by States, is still required to make a convincing case for their normative, binding character” at 171.

<sup>25</sup> International Law Association (ILA) Resolution 3/2002: “New Delhi Declaration of Principles of International Law Relating To Sustainable Development” in ILA, *Report of the Seventieth Conference*, New Delhi (London: ILA, 2002), available online: ILA <<http://www.ila-hq.org>>.

<sup>26</sup> *Ibid.* at para. 6(1).

<sup>27</sup> *Ibid.* at para. 6(2).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ulaanbaatar Declaration*, The Fifth International Conference of New or Restored Democracies, 10-12 September 2003, *Democracy, Good Governance and Civil Society*, 58<sup>th</sup> Sess., UN Doc. A/58/387 (2003), available online: UN <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/530/96/PDF/N0353096.pdf?OpenElement>> (date accessed: 2 October 2005).

<sup>30</sup> *Ibid.*

A recent United Nations General Assembly Resolution<sup>31</sup> remarks that:

support and recognition of the international community deserve to be extended to efforts made by a considerable number of societies in achieving their social, economic and political goals through democrati[s]ation, good governance practices and the reform of their economies.<sup>32</sup>

Resolution 58/13 also affirms the importance of the role of the United Nations in supporting the above-noted efforts to achieve the goals of good governance and democratisation.

Nonetheless, the aforementioned proclamations also serve to reinforce the ambiguity of the UN's construction of the concept of good governance as a normative (rule-setting) goal. Moreover, a substantial set of values under an administrative (or procedural) apparatus must necessarily be deployed in order to achieve the realisation of social, economic and political goals. Herein lies the dilemma of whether good governance represents a means to a justified end or an end unto itself. The former calls upon the application of "good governance practices" and seemingly suggests that good governance should be perceived as an administrative tool, whereas the latter confirms that the "goal of good governance" strongly supports the second construction, i.e. an end unto itself.

In May, 2002, ECOSOC's Committee of Experts on Public Administration issued *The critical report of public administration and good governance in implementing the United Nations Millennium Declaration: Institutional capacity development*.<sup>33</sup> The report underlines the crucial role played by effective public administration systems, including good governance in general, in the implementation of the *Millennium Development Goals* (MDGs). It also discusses the widest possible definition of "governance" from the narrow frontiers of political governance. In terms of structures *per se*, "governance" is referred to not only in a political context, but also to the economic and administrative authority required in the management of a country at all levels. As well, the concept of governance is not only limited to the state apparatus, but it also extends to private and civil society organisations. Substantively, governance refers to (i) the ability to manage the economy; (ii) the mobilisation of resources; (iii) the assurance of a degree of social justice; (iv) the promotion of an enabling environment for individual pursuits; and (v) the pledge of peace and security. The report also identifies State capacity as an imperative factor in implementing such goals. More crucially, the report makes a direct link to democracy and good governance. For instance, democracy requires good governance, which in turn relies upon inclusive participation, transparency, accountability and the promotion of the rule of law. The report contributes to the discourse on good governance mainly in two ways. First, it extends the concept to include the private sector and civil society. And second, it establishes a normative linkage between good governance and democracy, thereby requiring the mutual interdependence of each other.

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<sup>31</sup> *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, GA Res. 58/13, UNGAOR (2003).

<sup>32</sup> *Ibid.*

<sup>33</sup> UN ESC, Committee of Experts on Public Administration, *The critical role of public administration and good governance in implementing the United Nations Millennium Declaration: institutional capacity development*, UN ESCOR, 1st Sess., UN Doc. E/C.16/2002/4 (2002), online: UN <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan003535.pdf>> (date accessed : 29 September 2005).

The concept of good governance has also gained ascendancy in various governance-related reports across sectors and at all levels. For instance, in one of its resolutions,<sup>34</sup> the Commission on Narcotics Drugs (CND) explicitly requests the United Nations International Drug Control Programme to “present substantive, concise and timely briefings and [...] reports to all Member States, such as the progress report on management reform entitled “Commitment to good governance”.”<sup>35</sup> The UNDP has also identified a set of characteristics of good governance, which include: participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability and strategic vision.<sup>36</sup> Again, these principles are interrelated and dialectic in nature, since the successful application of each requires the application of the other.

Increasingly, good governance practices have also been implemented by intergovernmental regional entities such as the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE). Both entities are striving to redefine their mandates and administrative structures. In the *Bucharest Declaration*,<sup>37</sup> the OSCE’s parliamentary assembly passed a resolution on the 25<sup>th</sup> Assembly of the *Helsinki Final Act*.<sup>38</sup> The resolution addresses a host of issues which are addressed in a report entitled, *Good Governance: Regional Cooperation, Strengthening Democratic Institutions, Promoting Transparency, Enforcing the Rule of Law and Combating Corruption*.<sup>39</sup> At the outset, this implies that good governance is understood by the OSCE to include the realisation of multiple objectives from regional cooperation and the promotion of transparency and combating corruption. While the OSCE Member States never envisaged the Helsinki process to culminate in the formulation of legally binding documents,<sup>40</sup> some scholars have, however, interpreted the treaties’ texts as obligatory provisions rather than mere voluntary standards.<sup>41</sup>

The Commission of the European Communities has contributed to the discourse on good governance through a publication entitled, *European Governance: A White Paper [the White Paper]*.<sup>42</sup> The *White Paper* represents a response to the growing acceptance that the “Union is often seen as remote and at the same time too intrusive.”<sup>43</sup> The immediate prelude to this was the Irish “no”

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<sup>34</sup> UN ESC, United Nations Office on Drugs and Crime, *Strengthening the United Nations International Drug Control Programme and the role of the Commission on Narcotic Drugs as its governing body*, CND Res. 46/8, 1234<sup>th</sup> Mtg. (15<sup>th</sup> April 2003), online: UNODC <[http://www.unodc.org/unodc/es/resolution\\_2003-04-15\\_8.html](http://www.unodc.org/unodc/es/resolution_2003-04-15_8.html)> (date accessed: 15 February 2005).

<sup>35</sup> *Ibid.* at para. 4.

<sup>36</sup> See M.-C. Cordonier Segger & A. Khalfan, *supra* note 22 at 170. See also United Nations Development Program, *Governance Policy Paper* (New York: UNDP, 1997) at 1 [UNDP, *Governance Policy Paper*].

<sup>37</sup> Council of Europe, *The Bucharest Declaration - South East Europe Conference on Employment* (SEE-EC) Bucharest, 30-31 October 2003, online: Council of Europe <[http://www.coe.int/T/E/Social\\_cohesion/Strategic\\_review/Publications/Employment\\_Network/020\\_The\\_Bucharest\\_Declaration\\_doc.asp](http://www.coe.int/T/E/Social_cohesion/Strategic_review/Publications/Employment_Network/020_The_Bucharest_Declaration_doc.asp)> (date accessed: 15 February 2005).

<sup>38</sup> Organisation for Security and Co-operation in Europe, *Conference on Security and Co-operation in Europe: Final Act*, online: OSCE <[http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf)> (date accessed: 15 February 2005). The *Helsinki Final Act*, which was prepared during Stage II of the Helsinki negotiations, lasted from September 1973 to July 1975, and was duly signed by 35 States at the Helsinki Summit (Stage III of the Helsinki negotiations).

<sup>39</sup> Council of Europe, *supra* note 37.

<sup>40</sup> See A.C. Kiss & M.F. Dominick, “The International Legal Significance of Human Rights Provisions of the Helsinki Final Act” (1980) 13 Vand. J. Transnat’l L.

<sup>41</sup> INSERT FOOTNOTE (scholars)

<sup>42</sup> Commission of the European Communities, *European Governance: A White Paper*, Brussels, 25.7.2001 COM(2001) 428, online: EUROPA <[http://europa.eu.int/comm/governance/white\\_paper/en.pdf#search='Brussels%2C%2025%2F7%2F2001%20and%20white%20paper%20and%20COM%20%282001%29%20428%20final'](http://europa.eu.int/comm/governance/white_paper/en.pdf#search='Brussels%2C%2025%2F7%2F2001%20and%20white%20paper%20and%20COM%20%282001%29%20428%20final')> (date accessed: 2 October 2005).

<sup>43</sup> *Ibid.* at 3.

vote, which brought home the point that the EU had increasingly come to be seen as disenfranchised from the people that it claimed to be governing, thus precipitating a legitimisation crisis.<sup>44</sup>

The *White Paper* identifies and explores the following five principles that underpin good governance:

- *Openness*: strengthening and liberali[s]ing communication policies to facilitate accessibility of the general public to the decisions of the Commission;
- *Participation*: wide participation in developing and implementing EU policies to generally increase its effectiveness and acceptability;
- *Accountability*: legislative and administrative roles should be clarified in terms of identifying entities responsible within a particular area of decision-making;
- *Effectiveness*: policies must be implemented within a set timeframe and within a framework of clear objectives, which should incorporate sustainability impact assessments, and if available, lessons learnt; and
- *Coherence*: policies must be formulated in a user-friendly manner. This is especially paramount in the context of the ever-evolving application of EU policies and the growing complexity of the application of the decision-making framework [*emphasis mine*].<sup>45</sup>

The *White Paper* fundamentally underscores the concomitant presence of each of the above-noted principles in terms of their effective and successful implementation, and ultimately the achievement of good governance.

Within the context of sustainable development, the concept of good governance was initially formulated through the *Johannesburg Plan of Implementation*,<sup>46</sup> which states that:

[g]ood governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.<sup>47</sup>

In Chapter XI, *Institutional Framework for Sustainable Development*, the value of good international governance, particularly with respect to global economic governance and a rules-based multilateral trading system, is acknowledged. In addition, Chapter XI lays down a framework for countries to adapt to good governance at the national level. Paragraph 162, for instance, notes that nation States must:

[c]ontinue to promote coherent and coordinated approaches to institutional frameworks for sustainable development at all national levels, including through, as appropriate, the establishment or strengthening of existing authorities and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws.<sup>48</sup>

Finally, paragraph 163 states that all nation States should:

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<sup>44</sup> *Ibid.* at 7.

<sup>45</sup> *Ibid.* at 10, 32.

<sup>46</sup> See *Johannesburg Plan of Implementation*, Report of the *World Summit on Sustainable Development*, Johannesburg, South Africa, 4 September 2002, UN Doc. A/CONF.199/20, online: UN <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)> [JPOI].

<sup>47</sup> *Ibid.* at para. 4.

<sup>48</sup> *Ibid.*, c. XI at para. 162.

promote sustainable development at the national level by, *inter alia*, enacting and enforcing clear and effective laws that support sustainable development. All countries should strengthen governmental institutions, including [the provision of] a necessary infrastructure and [the promotion of] transparency, accountability and fair administrative and judicial institutions.<sup>49</sup>

The application of good governance in the field of sustainable development clearly overlaps at the national and international levels of policy-making. Hence, a higher degree of guidance is requisite once the concept of good governance is applied on the domestic front.

#### *The legal meaning of the principle of good governance*

The concept of good governance as developed by the World Bank is essentially a touchstone upon which the prevailing administrative structure of a given country can be measured. Consequently, it provides ample evidence of the robustness of the structural suitability of donors as efficient vehicles of multilateral aid investment to developing countries. Good governance is therefore chiefly envisaged as a set of procedural tools to guarantee the efficacious improvement of the donor identified subject. Politically, however, the principle of good governance has not been very well received. For instance, governments may be reluctant to be held accountable to donor agencies, and they may sometimes display widespread hostility against such agencies (or other bodies) that are construed to be interfering in their (sovereign) domestic affairs.<sup>50</sup> The real or imagined fears have stemmed mainly from the fact that the term “good governance” has largely been identified with “liberalism” and “*laissez-faire*” policies common in most developed countries. Further, the usage of the term “good” derives primarily from subjective interpretations especially in the context of large multicultural and diverse economies that characterise the developing world.

While the above-noted factors have unequivocally compounded the confusion, the initial skepticism to date has not been justifiable. The concept of good governance, as invented and applied by the World Bank, is a convenient term that refers to the entire gamut of political and economic frameworks. The term has been largely validated within political science and theories of economic prudence, albeit under a different rubric. Thus the rule of law, transparency and accountability represent indisputable principles of sound governance whose origin is steeped in the tradition of liberal political theory. Perhaps the rapid, widespread popularity and acceptance of the concept --- at least among donor agencies --- can be attributed to its historical roots. Notwithstanding the contemporary global and dynamic nature of the donor community, it is not surprising that the concept of good governance has largely been internalised as the principle criteria for extending international loans and aid investment.

The origin of good governance, particularly with respect to its construction and application, has resulted in various legal repercussions. Good governance has primarily been constructed as an aid criterion, and has consequently been procedural in nature. For instance, ‘good governance’ focuses on the ‘presence’ of governmental institutions rather than on their ‘performance’. An hypothetical example might include the presence of a centralised body for checking against corruption. The Central Vigilance Commission in India *per se* is a good example of checking against corruption. It follows that the Commission’s mandate would be to ensure that the mechanisms and systems of

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<sup>49</sup> *Ibid.* at para. 163.

<sup>50</sup> Furthermore, nation States may deliberately decide to violate the sovereignty of other countries.

delivery are in place in order to facilitate the efficient disbursement of development assistance. In this instance, since good governance has generally been equated with aid criterion, nation States have been unduly burdened with loans in order to ensure that the delivery mechanisms are established prior to the release of the loan amount. This scenario illustrates how good governance that is primarily driven by donor interests will not be as deep-rooted as those circumstances involving domestic political imperatives *per se*. The example further highlights how linking the concept of good governance to mechanisms or systems exclusively can serve to undermine its substantive content and result in its diminished meaning.

The development and application of the concept of good governance in the field of human rights has occurred in response to the absence of any substantive content, and thus represents the drive to engage further in the concept. Hence, the application of good governance in the international human rights field represents an important milestone in the creation of the concept. For the first time, international human rights law requires states to internalise the principle of good governance, while ensuring an enabling environment exists for the fulfillment of internationally recognised norms of human rights law.

The concept of good governance refers to a framework that permits the fulfillment of a right to development. In a similar fashion, the *Millennium Development Goals (MDGs)* have also extensively supported the implementation of the concept of good governance at the level of individual nation States.<sup>51</sup> The governance framework is synonymous with the application of intrinsic values like transparency, accountability and access to information. In the long run, these values will assist in the fulfillment of the MDGs in all nation States.<sup>52</sup> One could therefore conclude that regardless of the distinctive attributes of countries, for instance, politically, economically and culturally, *all countries should nevertheless achieve common goals*. The MDGs complement and validate this contention since they are widely accepted political processes that enable the achievement of such goals. In addition, the resolution calling for the implementation of the MDGs strongly encourages the application of a good governance framework of administration, which in turn provides the requisite infrastructure to realise such goals.

The resolution, however, also provides for a semantic linkage between democracy and good governance. It aims to establish a linkage between democratic political governance and good governance. On the surface, it implies that both elements are *sine qua non*, i.e. one cannot exist without the other. This is also a key structural linkage since it validates the contention that democratic nation States inevitably adapt to the principle of good governance. Further, the values inherent within the concept of good governance have also been widely accepted and tied to the successful operation of a political democracy. Indubitably, this linkage generates strategic value since it increases the likelihood of buy-in to the concept of good governance.

In this instance, it would be prudent to study the conceptual dimensions of good governance as elucidated in the above-noted UNDP report. The report argues that the following principles form

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<sup>51</sup> *UN Millennium Development Goals*, available online: UN <<http://www.un.org/millenniumgoals/>>.

<sup>52</sup> S. Fukuda-Parr, "Millennium Development Goals: Why They Matter" (2004) 10 *Global Governance* 395. *Contra* H. White & R. Black, eds., *Targeting Development: Critical Perspectives on Millennium Development Goals and International Development Targets* (London: Routledge, 2002); J. Foster, *The Millennium Declaration: Engaging Civil Society Organizations* (New York: World Federation of United Nations Associations, 2002), available online: WFUNAt <[www.wfuna.org](http://www.wfuna.org)>; R. Bissio, *Civil Society and the MDGs* (Montevideo: Instituto del Tercer Mundo, 2003).

part of good governance: participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability and strategic vision. These principles also reflect the values that need to be implemented in order to justify the governance framework. Hence, good governance is neither a homogenous nor a one-dimensional concept. Instead, it is a concept that acts like a receptacle in maintaining a growing number of mutually supportive goals and processes. It is not a tightly wrought receptacle, but rather, one which is still getting filled and then emptied in turns. Its malleability also means that it is employed in varying contexts, with differing degrees of precision.

Whereas the aforementioned resolution calling for the implementation of the MDGs seeks to highlight the democratic aspect of good governance, the UNDP report and the EU paper on governance seek to underscore other facets of accountability, openness, participation, coherence, etc. As noted above, good governance is neither a single nor a uniform concept with unchanging dimensions, but rather, a largely lucid and adaptive concept that lends itself to shifting scenarios to which it is applied. What does the term good governance therefore mean? According to a recent UN General Assembly resolution, nation States are urged to reform their administrative structures in order to provide for good governance, which in turn facilitate the achievement of various political principles and goals. Such goals could range from the eradication of corruption to the recognition of fundamental human rights or even the circumvention a legitimation crisis. It therefore casts a positive obligation<sup>53</sup> on the State to promote and implement the principle of good governance. As well, this obligation forms part of the jurisdiction of international law and the international community, with the exception being the EU, where support for the concept has generally emerged in the context of a growing political alienation of the citizen from the Union. In this case, good governance generally reflects a positive obligation of the EU towards its citizens. The concept of good governance bears legal implications. Accordingly, States and international financial institutions (IFIs) *per se*, equate good governance chiefly with contractual requirements for the acquisition and continuation of development assistance. Thus the non-performance of good governance represents a legal ground for the withdrawal of legal aid. As a caveat, however, the majority of international declarations are morally binding in character.

### III International Treaties

To date, no implicit reference has been made to the principle of good governance in any international legal treaty. However, in delineating the concept of good governance to specific criterion, it could be argued that, as suggested earlier, the receptacle of good governance contains various public values such as transparency, anti-corruption, responsiveness, equity, etc. It could therefore be argued that international legal treaties that refer to, or support such values through preambular and substantive provisions, essentially contribute to the fulfillment of the objectives inherent in the functioning of the principle of good governance. It would thus be instructive to study the transparency requirements (among other values) within the World Trade Organisation (WTO) and other international trade agreements, including some multilateral environmental accords (MEAs).

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<sup>53</sup> The question on precisely how binding remains debatable.

*Transparency requirements in the World Trade Organisation (WTO)*<sup>54</sup>

Essentially, two transparency requirements exist within the WTO. One refers to the external transparency aspects, i.e. the manner in which the WTO relates to other international actors, organisations and civil society. The other requirement examines the transparency stipulations that are mandated for Member States in the context of commitments undertaken under the respective agreements of the WTO. In terms of external transparency, however, the WTO has often been criticised as being a ‘closed’ organisation. Not surprisingly, environmental advocacy groups have advanced demands for greater transparency.<sup>55</sup> Such advances have increasingly gained ground to the extent that the dispute settlement body rulings may impose restrictions on the flexibility of a Member State’s national policy on a wide range of issues and sectors.<sup>56</sup> Accordingly, environmental advocacy groups have insisted that the procedures for the i) filing of complaints; ii) hearings between the Appellate Body, Panels and Parties; and iii) consideration of evidence be made available for public scrutiny. The WTO has responded to some of these demands for greater transparency. For instance, in the ongoing Biotech case,<sup>57</sup> the Panel has admitted *amicus curiae* submissions that have been filed by a coalition of NGOs.<sup>58</sup> In 1996, the General Council adopted guidelines<sup>59</sup> to improve transparency and enhance communication with NGOs. In 2002, the Council decided to ameliorate this process by unrestricting documentation. This transition has greatly improved the accessibility of information almost in unison with that of its distribution to Member States.

Still, the WTO is one of the few international organisations whose mandate is to ensure that transparency is embodied within trade agreements. Article V:2 of the *WTO Agreement* explicitly authorises the General Council to “make appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO.”<sup>60</sup> In more recent times, the Consultative Board has reported, “the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution.”<sup>61</sup> The Consultative Board has recommended that the first level panel hearings and Appellate Body hearings should be generally open to the public. As a caveat to this recommendation, however, it has added that “this new practice would be open to a motion by a Panel (or Appellate division) or by a disputing party, arguing there is a “good and sufficient cause” to exclude the public from all or part of a hearing.”<sup>62</sup>

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<sup>54</sup> *Marrakesh Agreement Establishing the World Trade Organisation*, 15 April 1994, 1867 U.N.T.S. 154 (entered into force 1 January 1994) in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999) [*The Legal Texts*]. The WTO texts and dispute settlement reports are available online at <<http://www.wto.org>>.

<sup>55</sup> *Trade Wars: A Bulletin from Seattle*, December 1999.

<sup>56</sup> These groups have made demands most prominently in the environmental sector.

<sup>57</sup> WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products: Request for Consultations by the United States*, WTO Docs. WT/DS291/2/3.

<sup>58</sup> The Center for International Environmental Law, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products: Amicus Curiae Brief*, 1<sup>st</sup> June 2004 (WT/DS/291, 292, and 293), online CIEL <[http://www.ciel.org/Publications/ECBiotech\\_AmicusBrief\\_2June04.pdf](http://www.ciel.org/Publications/ECBiotech_AmicusBrief_2June04.pdf)> (date accessed: 2 March 2005). See also *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998), reprinted in 38 I.L.M. 118 (1999) [U.S.--Shrimp/Turtle I].

<sup>59</sup> WTO, *General Council Guidelines for Arrangements on Relations with Non-Governmental Organizations* (see art. V:2 of the WTO Agreement contained in Doc. WT/L/162 (1996).

<sup>60</sup> *WTO Agreement*, *supra* note 54, art. V:5.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

In the context of transparency in government procurement, paragraph 26 of the WTO 2001 *Doha Development Agenda* notes that: “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations [i.e. how the negotiations are to be conducted].”<sup>63</sup>

Paragraph 26 also stipulates that the: “[n]egotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers [it is separate from the multilateral Government Procurement Agreement].”<sup>64</sup>

The *Declaration* also highlights the commitment to development-related issues, such as technical assistance and capacity building.<sup>65</sup>

The detailed notification requirements that Member States are obliged to perform *vis-à-vis* standards and technical barriers to trade is also a reflection of the value of transparency that the agreement seeks to engender. Some examples include the notification requirements within the WTO<sup>66</sup> and the North American Free Trade Agreement (NAFTA).<sup>67</sup> Of note, the United States has been pushing consistently for the adoption of transparency requirements and anti-corruption standards in all free trade agreements to which it is a Party.<sup>68</sup>

#### *Transparency requirements in the Multilateral Environmental Accords (MEAs)*

The compliance procedures and mechanisms within the multilateral environmental accords (MEAs) represent crucial mechanisms for which transparency is ensured in fulfillment of the obligations of Member States. To date, only four MEAs have concretely laid down detailed requirements in this regard: the 1973 *Convention on International Trade in Endangered Species of Flora and Fauna* (CITES),<sup>69</sup> the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,<sup>70</sup> the 1979 ECE *Convention on Long Range*

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<sup>63</sup> WTO, *DOHA WTO Ministerial 2001: Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 (held on 20 November 2001, adopted on 14 November 2001, online: WTO <[http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)> at para. 26.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> See arts. 2(9), 2(10), 5(6), 5(7), 10(3) of the *WTO Agreement*, *supra* note 54.

<sup>67</sup> See arts. 909(1)-909(10) in NAFTA, *North American Free Trade Agreement*, available online: NAFTA <[http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=134#A909](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=134#A909)>.

<sup>68</sup> E.g., the *Central American Free Trade Agreement (CAFTA)* and the *Free Trade Area of the Americas (FTAA)*. See e.g. A. Wayne, *NAFTA: Ten Years After Testimony before the Subcommittee on International Economic Policy, Export, and Trade Promotion* (Senate Committee of Foreign Relations, 20 April 2004).

<sup>69</sup> *Convention on International Trade in Endangered Species of Flora and Fauna (CITES)*, online: <<http://www.cites.org/eng/disc/text.shtml>>. See e.g., S. Lyster, *International Wildlife Law: An Analysis of International Treaties concerned with the Conservation of Wildlife* (Cambridge: Cambridge University Press, 1985).

<sup>70</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, 17 September 1987, 26 I.L.M. 154 (entered into force 1 Jan. 1989), as amended by the *London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 29 June 1990, UNEP/OZ.L.Pro.2.3, Annex II [*Montreal Protocol*]. For additional information about the Montreal Protocol, please visit Multilateral Fund for the Implementation of the Montreal Protocol <[www.multilateralfund.org/](http://www.multilateralfund.org/)>. For an overview of the Multilateral Fund Secretariat’s mandate, see *Creating a Real Change for the Environment* (Montreal: The Secretariat of the Multilateral Fund for the Implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer, September 2005), online: Multilateral Fund for the Implementation of the Montreal Protocol <<http://www.multilateralfund.org/files/MLFbrochure.pdf>> (data accessed: 1 October 2005).

*Transboundary Air Pollution (LRTAP)*<sup>71</sup> and the 1997 *Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC)*.<sup>72</sup>

The *CITES* compliance mechanism has been developed incrementally over the years.<sup>73</sup> It is largely based on articles VIII, XII and XIII, which concern reporting requirements and international measures, in addition to the various resolutions of the Conferences of the Parties (COP) that support and clarify these requirements.<sup>74</sup> Article VIII of the *Convention* requires States Parties to submit to the Secretariat periodic reports regarding national implementation of the *Convention*.<sup>75</sup> Such reports pertain to information on legislative, regulatory and administrative measures taken to enforce the provisions of the *Convention*. Article XIII provides for procedures for addressing non-compliance issues.<sup>76</sup>

The *Montreal Protocol*<sup>77</sup> represents one of the earliest multilateral environmental accords (MEAs), which seeks to address compliance provisions (and thus transparency concerns) in a comprehensive manner. Article 8 of the *Montreal Protocol* requires that States Parties “consider and approve procedures and institutional mechanisms for determining non-compliance with its provisions and for treatment of [States] [P]arties found to be in non-compliance.”<sup>78</sup> In 1990, in an effort to monitor and enforce the *Montreal Protocol*, the States Parties approved an interim non-compliance procedure,<sup>79</sup> which was subsequently reviewed and established on a permanent basis in 1992.<sup>80</sup>

The *LRTAP* was adopted in 1979, and came into force in 1983.<sup>81</sup> At the time of its inception, the *LRTAP* did not provide for a non-compliance procedure. However, article 10 of the *LRTAP* provides for a review of the implementation by the Executive Body, composed of representatives of contracting Parties.<sup>82</sup> In 1997, the Executive Body adopted, through decision 1997/2,<sup>83</sup> a non-compliance procedure applicable to all protocols under the convention. Decision 1997/2 establishes an Implementation Committee *inter alia* to periodically review compliance by States

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<sup>71</sup> *Convention on Long Range Transboundary Air Pollution*, 13 November, 1979, 1302 U.N.T.S. 217 (entered into force 16 March 1983) [*LRTAP*]. See *Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes*, 31 October 1988, UN Doc. C.N.252.1985. Treaties.1 of December 1988 (entered into force 14 February 1991), available online: United Nations Economic Commission for Europe <<http://www.unecce.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf>>.

<sup>72</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 3d Sess., Dec. 11, 1997, 37 I.L.M. 32 (1998) (not yet in force until ratified by States Parties whose emissions aggregate 55% of the global total), online: UNFCCC <<http://unfccc.int/resource/docs/convkp/kpeng.html>> [*Kyoto Protocol*]. See e.g., P.D. Cameron & D. Zillman, *Kyoto: From Principles to Practice* (The Hague: Kluwer Law International, 2001).

<sup>73</sup> *Supra* note 69. The *CITES* compliance mechanism was adopted in Washington, D.C., in 1973, and came into force in 1975.

<sup>74</sup> *Ibid.*, Resolution Conf. 7(5), 9(1).

<sup>75</sup> Art. VIII – *Measures to be Taken by the Parties*, online: *CITES* <<http://www.cites.org/eng/disc/text.shtml#VIII>>.

<sup>76</sup> Art. XIII – *International Measures*, online: *CITES* <<http://www.cites.org/eng/disc/text.shtml#XIII>>.

<sup>77</sup> *Montreal Protocol*, *supra* note 70.

<sup>78</sup> *Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Terms of Reference for a Multilateral Fund*, Annex IV (Non-compliance Procedure), UN Doc. UNEP/OzL.Pro.4/15, (25 November, 1992) Y.B. Int'l Env. L. 824 [*Multilateral Fund Terms of Reference*] at 44-46, available online: UNEP <[http://www.unep.ch/ozone/Meeting\\_Documents/mop/04mop/4mop-15.e.pdf#search='UNEP%2FOzL.Pro.4%2F15'](http://www.unep.ch/ozone/Meeting_Documents/mop/04mop/4mop-15.e.pdf#search='UNEP%2FOzL.Pro.4%2F15')>.

<sup>79</sup> See *Adjustments and Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer*, 29 June, 1990, 30 I.L.M. 537, 541 (1991) [*Amendments to Montreal Protocol*].

<sup>80</sup> See *Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, *supra* note 78.

<sup>81</sup> *Convention on Long Range Transboundary Air Pollution*, *supra* note 71.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

Parties with the reporting requirement of the protocols, and to consider any submissions or referrals made to it concerning a Party's non-compliance with treaty obligations.<sup>84</sup>

Articles 5, 7 and 8 of the 1997 *Kyoto Protocol*<sup>85</sup> establish a mechanism for Annex 1 Parties to demonstrate, and share information on, progress made in implementing their respective greenhouse gas emissions' reduction and limitation targets.<sup>86</sup> The *Kyoto Protocol* articles facilitate national systems by i) estimating greenhouse gas emissions and removals;<sup>87</sup> ii) applying adjustments to greenhouse gas inventories;<sup>88</sup> iii) reporting data on implementation of the Protocol;<sup>89</sup> and (iv) reviewing information submitted under article 7.<sup>90</sup>

Despite the omission of any explicit mention of the principle of good governance in the previously noted international treaties, the constitutive elements of the principle of good governance, such as supportive public values (transparency, anti-corruption, etc.), have already been incorporated in the international legal discipline through several accords. The principle has appeared not only in the realm of trade, but also across the global spectrum of environmental covenants. Henceforth, the essential ingredients of the principle of good governance actually form part of the substantive obligations that are mandated under international law.

#### IV International Case Law and Acts of Inter-Governmental Organisations

To date, the principle of good governance has neither been referred to nor explained in the context of international jurisprudence. Instead, the concept has emerged chiefly within the ambit of international policymaking. In addition, the malleability of the concept of good governance has resulted in its wide application in the media, including diverse subject areas. Under international law, the paradigm of rights, obligations and duties *per se* center mainly on the nation State. In terms of international human rights law, however, non-State actors, for instance, civil society, can acquire legal standing and become litigants.<sup>91</sup> Good governance has thus mostly been applied within the international legal framework as subject specific action-guiding statements. Since the nation State has been the driving force behind this call for positive action, it must therefore undertake the responsibility to implement practices of good governance through a range of policy applications, including the adoption of specific administrative mechanisms to fulfill internationally mandated goals.

The impact of the principle of good governance can also be attributed to its historical development.<sup>92</sup> Insofar as formally approving the semantic linkage between democratic governance

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Kyoto Protocol*, *supra* note 72.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, art. 5(1).

<sup>88</sup> *Ibid.*, art. 5(2).

<sup>89</sup> *Ibid.*, art. 7.

<sup>90</sup> *Ibid.*, art. 8.

<sup>91</sup> This scenario would necessarily differ under other international legal regimes such as nuclear law, hazardous waste, climate change, etc.

<sup>92</sup> Historically, the concept of good governance has been restricted to the legitimacy of nation States *vis-à-vis* citizens, donors and the international community at large. Non-State actors, too, such as international institutions, that publicly purport to be champions of good governance, have also been denounced for their guarded decision-making processes and lack of transparency and accountability. See *e.g.* E. Stein, "International Institutions and Democracy: No Love at

and good governance, it follows that the increasing legitimacy of the international right to democratic governance<sup>93</sup> leads to the positive reception of the principle of good governance. In light of this hypothesis, what differences exist between “good governance” and “democracy”? The underlying rationale behind this query is that singularly democratic processes, for instance, electoral voting systems, serve to legitimise national governments and therefore lends weight to the premise of State sovereignty and supranational governance mechanisms.<sup>94</sup>

The concept of democracy is synonymous with the political doctrine of government functioning, which also constitutes a form (or norm) of political governance. Good governance, however, remains a highly subjective concept, which consists of a number of public values like accountability, access to information and non-corruption *per se*, that characterise a democracy, though not necessarily so. Democracy is associated with electoral democracy and hence public participation. In this light, the principle of good governance serves to intensify the concept of democracy. Good governance has vitally contributed to the emergence of a substantive and democratic concept that is widely being recognised as a standard of international law. As a result thereof, the points of convergence between ‘good governance’ and ‘good administration’ need to be ascertained. For instance, are the two concepts identical to one another? While good governance has been debated primarily within the paradigm of development literature, good administration, on the other hand, has been employed mainly in the field of administrative law.<sup>95</sup>

In order to substantiate the concept of good governance, it is crucial to observe its structural linkage to human rights. From its early origin as an aid provision, to its normalisation as a concept of international development literature, good governance has gained immensely from its structural linkage to human rights.<sup>96</sup> Still, some members of academia have argued that, at the international level, the structural linkage has led to a two-pronged approach. For instance, human rights have initially been applied as a good governance yardstick, albeit its substantive contents have also been extrapolated from international human rights law.

The *Millennium Declaration* also emphasises the importance of good governance --- not only in the context of individual nations --- but also in terms of “multilateral trading and financial systems”. The *Johannesburg Plan of Implementation* declares that good governance at the international level requires a “dynamic and enabling international economic environment supportive of international cooperation, particularly in the area of finance, transfer of technology, debt and trade and full and effective participation of developing countries in global decision making.”<sup>97</sup> The UNDP also supports transparency and democratic processes in the WTO. The Office of the High Commission

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First Sight” 95 A.J.I.L. (2001) 489; K.O. Robert, “Power and Governance in a Partially Globalised World” (London: Routledge, 2002).

<sup>93</sup> P. Uvin & I. Biagiotti, “Global Governance and the ‘New’ Political Conditionality” (1996) 2 *Global Governance* 377.

<sup>94</sup> See S. Seppänen, “Good Governance in International Law” 13 (Helsinki: The Eric Castrén Institute Research Reports, 2003); F.M. Thomas, “Legitimacy and the Democratic Entitlement” in G.H. Fox and B.R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

<sup>95</sup> Administrative law has also championed national boundaries. In this respect, some scholars maintain the need to develop the role of global administrative law.

<sup>96</sup> This is due primarily to the fact that human rights are perceived as a universal concept.

<sup>97</sup> See *Johannesburg Plan of Implementation*, Report of the *World Summit on Sustainable Development*, Johannesburg, South Africa, 4 Sept. 2002, UN Doc. A/CONF.199/20, online: <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)> [JPOI].

for Human Rights (OHCHR) recognises that international institutions share duties and responsibilities under international human rights law.

Despite the preceding well-intentioned proclamations, the concept of good governance has neither been implemented in internal procedures nor in principles of governance. Therefore, the concept of good governance remains legally unenforceable in the context of the private sector and international institutions.<sup>98</sup> Instead, it suggests a split-level trajectory, i.e. one at the nation-state level and the other at the international level. The expansion of a two-tiered concept has not occurred in isolation of the other. This dialectic suggests linkages with respect to the formation of international constitutional law and the international community at large.

Remarkably, the principle of good governance has found resonance as an organisational discipline within the private sector, including intergovernmental organisations. Moreover, there is a growing realisation among international stakeholders that resource usage and other internal policies of the private sector have wide implications. As a result thereof, such entities should be made accountable not only to their shareholders, but also to civil society in general. Various policy initiatives have taken place globally in an effort to link the theme of good governance to the wider agenda of corporate social responsibility. Some examples include the UNDP High Level Commission on Private Sector and Development,<sup>99</sup> The *OECD Guidelines for Multinational Enterprises*<sup>100</sup> and other initiatives like the *UN Global Compact*<sup>101</sup> and the *Global Sullivan Principles of Social Responsibility*.<sup>102</sup> In effect, however, the majority of such initiatives are guidelines that are voluntary in nature and thus non-binding.

In recent times, the Standing Committee on Foreign Affairs and International Trade tabled a report<sup>103</sup> to the Canadian Parliament seeking an investigation into the impact of TVI Pacific Inc.'s Canatuan mining project in Mindanao. The Subcommittee on Human Rights and International Development<sup>104</sup> is also concerned about “the broader issue of corporate social responsibility with respect to the activities of Canadian mining companies in developing countries.”<sup>105</sup> Consequently, the Subcommittee has recommended that the Government of Canada:

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<sup>98</sup> J. Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002).

<sup>99</sup> Launched in 2003, the High Level Commission aims to engage the private sector in efforts to achieve the *Millennium Development Goals* (MDGs).

<sup>100</sup> *The OECD Guidelines for Multinational Enterprises* (Paris: OECD Publications, 2000), online: OECD <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> (date accessed: 5 March 2005).

<sup>101</sup> United Nations, *UN Global Compact*, online: <[http://www.unglobalcompact.org/content/cops/guidance\\_pack/doa\\_bp.pdf#search='UN%20Global%20Compact%2C%20Global%20Reporting%20Initiatives'](http://www.unglobalcompact.org/content/cops/guidance_pack/doa_bp.pdf#search='UN%20Global%20Compact%2C%20Global%20Reporting%20Initiatives')> (date accessed: 8 July 2005). See generally United Nations, *Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles*, online: UN Global Compact <<http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc-html-content/Public-Documents/gcguide.pdf>>.

<sup>102</sup> *Global Sullivan Principles of Social Responsibility*, online: The Leo H. Sullivan Foundation <<http://www.global.sullivanprinciples.org/principles.htm>> (date accessed: 8 July 2005).

<sup>103</sup> Canada, Standing Committee on Foreign Affairs and International Trade, *14<sup>th</sup> Report*, 38<sup>th</sup> Parliament, 1<sup>st</sup> Sess. (House of Commons), online: House of Commons <[http://www.parl.gc.ca/committee/Committee\\_Publication.aspx?SourceId=122765](http://www.parl.gc.ca/committee/Committee_Publication.aspx?SourceId=122765)> (date accessed: 8 July 2005).

<sup>104</sup> In accordance with the Standing Committee on Foreign Affairs and International Trade's mandate under Standing Order 108(1).

<sup>105</sup> Canada, *supra* note 103. Notwithstanding the adverse impact on the socio-economic wellbeing of employees and local residents (including the environment), the Subcommittee endeavours “to address problems related to corporate activities in developing countries [where] a number of organi[s]ations have developed and implemented voluntary norms

[c]onduct an investigation of any impact of TVI Pacific's Canatuan mining project in Mindanao on the indigenous rights and the human rights of people in the area and on the environment, and table a report on th[e] investigation [and] ensure that it does not promote TVI Pacific Inc. pending the outcome of th[e] investigation.<sup>106</sup>

It is anticipated that similar investigations will lend credence to the contention that governments need to play an increasingly proactive, regulatory role in terms of mandating guidelines for the smooth functioning of private sector companies that will support and integrate the principle of good governance.

## V Soft Law

Overall, the construction of the principle of good governance has largely been relegated to the confines of non-binding international imperatives, rather than tangible legal rights. As noted earlier, the term 'good governance' is ambiguous at best. Nevertheless, vague references to 'good governance' have emerged in various international documents and declarations, including texts of the Economic and Social Council (ECOSOC), the *Johannesburg Plan of Implementation (JPOI)*, the Commission on Narcotics Drugs (CND), the Organisation for Security and Cooperation in Europe (OSCE), the *Bucharest Declaration* and the *Millennium Declaration*. The aforementioned references to global governance serve to reaffirm the adoption of procedural mechanisms at the national level. Yet the nature and scope of the obligation and its application that is required under the principle of good governance remains unclear among nation States. Such a *mentalité* infuses skepticism, thereby impeding the process of international efforts to reach a consensus on a prescribed definition of the concept of good governance and its subsequent adoption.

## VI Status of the Norm

In conclusion, is good governance in fact a principle of international law? Despite the existence of a substantial number of international instruments and national legal documents, clarification is still required in terms of the substance and contents of the concept of good governance. Moreover, the *entente* of the concept itself is dependent on the context and the moral and political underpinnings of its architects. Accordingly, while the World Bank has relegated the term to neo-liberal economic policies – with the role of the State limited to that of a physical guarantor of economic assets --- the UNDP has largely sought to push its agenda for good governance *vis-à-vis* the inclusion of local government officials and members of civil society. Both platforms highlight the tensions inherent in the application of the concept of good governance.

Thus, does there exist a right to good governance? This point has been refuted and likened to an adventurous legal construction.<sup>107</sup> However, the right to good governance exists in legal literature.<sup>108</sup>

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for corporate social responsibility, including the [UN] Global Compact and the [OECD] Guidelines for Multinational Enterprises both of which are supported by the Government of Canada.”

<sup>106</sup> *Ibid.* at paras. 9-10.

<sup>107</sup> *JPOI*, in the *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, 26 August – 4 September 2002, UN Doc. A/CONF.199/20 (New York: United Nations, 2002).

<sup>108</sup> R. Falk, *On Humane Governance: Toward a New Global Politics* (Cambridge: Polity Press, 1995); G. Alfredsson, “The Usefulness of Human Rights for Democracy and Good Governance” in H.O. Sano, G. Alfredsson & R. Clapp, eds., *Human Rights and Good Governance: Building Bridges* (The Hague: Martinus Nijhoff Publishers, 2002). According to Alfredsson, good governance is analogous to an interpretative function in legal opinions.

To date, the right to good governance has not been constructed in legal terms primarily due to confusion over the concept itself. It therefore follows that legally enforceable rights would provide for a system of obligations and duties, including the identification of respective actors. Thus good governance is largely perceived either as a policy or an action-guiding tool that is applied generally at the nation State level. Given the inconsistency of State practice, and the lack of uniformity in the application of the principle of good governance, it follows that there can be no *opinio juris*.<sup>109</sup> In spite of numerous international treaties and declarations that endorse democratic human rights, concepts of good governance, such as transparency and responsiveness, are still viewed with reservation. On the other hand, some scholars maintain that the concept is commonly used in a number of legal arguments, for instance, human rights.<sup>110</sup>

The concept of good governance has been applied in several contexts, and as a result thereof, its substantive meaning has undergone considerable change. Accordingly, the concept has been propagated in conjunction with the right to development, human rights and the rule of law. Each of these platforms has contributed uniquely to the evolution of the concept of good governance. Yet the connotation of “good” in “good governance” remains highly subjective and has resulted in a great number of nation States exercising prudence in undertaking legally binding international commitments. The blurred nuance of good governance represents an inherent impediment to its evolution as a principle of international law. Within the sphere of sustainable development law, the concept of good governance has been applied amply. This is due in large part to the concept’s underlying principles of transparency, accountability and responsiveness. Indeed, the concept of good governance underlies the somewhat disparate frameworks of political decision-making *vis-à-vis* resource allocation. Its applicability, however, is not persuasive enough to lay claim to being a principle of sustainable development law. Its applicability would certainly be viable if there existed a sustained and irrevocable acceptance of the concept of good governance within the decision-making framework of resource allocation (which is crucial for the achievement of sustainable development). While good governance has been advocated across various domains, it continues to lack the continuity and sustained application to be lauded as a principle of sustainable development law. The question remains whether or not the subjectivity of the term “good” in “good governance” might pose an impediment to its broader application. This is due in part to the notion that resource allocation is closely linked with the guarded terrain of national decision-making. Hence some nation States may choose to avoid the ‘constraints’ of globally pre-determined rules of good governance.

In theorising about the development of an international legal principle of good governance, it should be noted that the term “sustainable development” is devoid of any international legal meaning with respect to substantive obligations arising from individual nation States. In fact, one of the most hotly contested issues hard won by developing countries relates to the right to define sustainable development objectives *nationally* in the context of the *Kyoto Protocol* negotiations. Accordingly, it is likely that the concept of good governance as a principle of international sustainable development law will continue to undergo resistance if it is negotiated through the international stage.<sup>111</sup> In proposing for a wider appreciation and recognition of the principle of good governance, nation

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<sup>109</sup> For a fruitful discussion regarding *opinio juris*, see J. Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems” (2004) 15 E.J.I.L. at 532-36. But see A.E. Roberts, “Traditional and Modern Approaches to Customary International Law” (2001) 95 A.J.I.L. at 757.

<sup>110</sup> See e.g. G. Alfredsson, “The Usefulness of Human Rights for Democracy and Good Governance” in *Human Rights and Good Governance: Building Bridges* (The Hague: Martinus Nijhoff Publishers, 2002).

<sup>111</sup> Still, the willingness of developing countries to take part in such negotiations should be questioned.

States must necessarily be allocated sufficient scope for independent policy-making. Fundamentally, countries should be permitted the flexibility to interpret their obligations and duties under the rubric of good governance in conjunction with their respective domestic priorities. This rationale, however, does not preclude the importance of achieving a consensus with respect to a minimum core set of guidelines as set out in the principle of good governance.

In an effort to reach an agreement on the concept of good governance, some queries merit attention here. For instance, which key ingredients or values might be integrated into the concept of good governance? Or more generally, does the legal meaning of good governance as a principle of sustainable development law warrant inclusion? Or procedurally, can the concept of good governance be adopted in the same way as the human rights regime? The democratic values of transparency, responsiveness, openness, accountability, and participation are all crucial in ensuring that the objectives of sustainable development (however defined) can be fulfilled. A *consensus ad idem* among sovereign nation States can be viably achieved through the identification of objectives and criterion of the principle of good governance, and the subsequent adoption and incorporation of procedures therein. In order to guarantee the objectives of equitable access and distribution of resources *per se*, the principle of good governance must be adopted concurrently with the application of national frameworks of governance and administrative processes.<sup>112</sup>

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<sup>112</sup> In advocating for an international legal principle of good governance, reference should be made to a *procedural* set of values and systems of administrative operations.