

Emergence of Sustainable Development Law: A Legal Study

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MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled “**Emergence of Sustainable Development Law: A Legal study**” submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this university or any other university.

LEE, JI HOON

CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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Introduction

Sustainable development aims at the co-prosperity of all human beings. The emerging principle of sustainable development appears set to play an important role in the field of international environmental law. UN Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD) also refer to the principle of sustainable development in detail and, therefore, its impact is contribution to harmonization of the environment with development.

The Rio Declaration and Agenda 21 spell out how development can be driven. They also provide the guidelines to follow in protecting the natural environment as well as to promote development. There are, however, different views as regards how to integrate the environment with the process of economic development especially as cherished by most of the developing countries. In general, the necessity of integrating both has been agreed upon.

From the traditional view of international law, 'sustainable development' as an emerging international eco-standard does not enjoy the status of international customary law. The reason for this is that there is no general practice, only *opinio juris*. In addition, a state cannot be forced to assume responsibility on the basis of requirements for sustainable development. There is, however, room to develop international law through continuous practice. The more important element is how to ensure cooperation among international subjects such as states, international organizations and other non-state actors until the sustainable development is acceptable as one of the 'principles' of international law.

Sustainable development could be managed not only from the legal aspects, but also from the wider sense of its meaning. It is necessary to clarify the meaning of sustainable development and to realize the profundity of its meaning. This will help provide basis for states, international organization and international court to apply the essence of the principle of sustainable development.

The legal consideration of sustainable development calls first for the definition of sustainable development, and then its consideration as a paradigm of international public policy. It is essential to understand its legal basis and not just as a social programme or declaration. Second, sustainable development could be studied to see how it relates to the equality of human life. Based on the collected data, it is possible to forecast the effects of human activities on the environment. This could be reflected in common policy not just on an individual basis.

The concept of sustainable development is no longer just a concept, but it has gradually found its way in different international legal instruments. It seems set to play a significant role in the field of international law. However, the difficulty of managing sustainable development and the tendency to look down upon its impact prevents it from becoming an important tool that can be used to solve environmental problems. The most important strategy is to change the way people think about living in the environment. We cannot conserve the environment without changing our ideas of the environment. At the same time sustainable development could provide a basis for the sustainable conservation of the environment. Once environment is degraded we will not be able to recover it. Certainly, people do not hope for such a disastrous situation and will work to prevent any catastrophic situation.

According to the report of the environmental researchers, it is a miracle that earth's climate still has remained stable for so long times. They warn, however, of a crisis on the earth during the 21st century. It seems the environmental damage wreaked on the earth is resulting in a crisis of survival for all living human beings. Hence, the international community of the world must undertake a mission to get over the crisis. The reason to conserve the global environment is to ensure survival for all mankind, present and future. The mission has fallen to us, the current generation.

Thus, it seems, proper comprehension of the concept of 'sustainable development' could provide a strong basis for the sovereign states to pursue their developmental aspirations. It could provide broad contours of the concept as well as facilitate the process of institutionalized response to realize it.

**Chapter 1,
Concept of Sustainable Development**

Chapter 1,

Concept of Sustainable Development

I. Evolution of Sustainable Development Law

The Stockholm Conference (UNCHE)

The concept of sustainable development came from the transition of idea that natural resources were exploited in the process for economic purpose. There have been conflicts between developer who wanted to exploit the natural resources and conservationist who try to preserve and maintain the unsustainable natural resources. In the backdrop of these international environmental concerns, the Stockholm Conference (UNCHE) was convened in June 1972, pursuant to a UN General Assembly resolution¹. The UN conference on the Human Environment was represented an environmental attention on international level, which was convened to consider the need for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment². The most notable component of it was Principle 21 which sought to put forward a two-part statement that;

States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other state of areas beyond the limit of national jurisdiction.³

This principle was the recognition of the sovereign rights of states to exploit their own resources pursuant to their own environmental policies. In such exploitation however, they were required to guard against future exhaustion of non renewable resources and safeguard the natural resources of the earth, though careful planning and management,

¹ See the UN documents, *General Assembly resolution 2398(XXII)*, 3 December 1968 and See (UN:UN Year Book, 1986).

² *Declaration of the United Nations Conference on the Human Environment*, Report of the UN Conference on the Human Environment, UN Doc.A/CONF.48/14, pp.2-65 and Corr.1 (1972). Also see *International Legal Materials (ILM)*, vol.11, 1972, p.1416.

³ Principle 21 of Stockholm Declaration on the Human Environment adopted 16 June 1972, UN Doc. A/COF 48/141 *international Legal Material s(ILM)* VOL 11, 1972, pp. 14-16.

for benefit of present and future generation⁴. It was first time to limit the right of states to exploit their natural resources, especially those that are non-renewable in an unhindered manner.⁵

World Conservation Strategy

The Stockholm Declaration had indentified a common outlook and link between resources exploitation for development and environmental protection. The spirit of the Stockholm Declaration subsequently came to be adopted in the World Conservation Strategy. The Strategy gave a birth to phase ‘sustainable development and maintained that ‘for development to be sustainable, it must take account of social and ecological factors, as well as economic factors.’⁶ This was contextual background within which the Brundtland report was presented to the international community, popularizing the phrase ‘sustainable development’ and proposing both an official definition and suggested dimensions of the concept. It was later adopted the UNCED, by an overwhelming consensus of nations through the Rio Declaration and Agenda 21.

Earth Summit: Agenda 21 and the Rio Declaration (1992)

UNCED represented a concerted effort to synthesize and integrate environment and development. Agenda 21 is the comprehensive international “plan of action” or blueprint of sustainable development adopted at Rio. It is a broad and detailed commitment by nations around the world to take actions to further sustainable development. The Agenda 21 commitment is not binding in international law, but it does represent a political commitment.

The centrality of Agenda 21 to sustainable development is suggested by the sustainable development review and implementation process established at the Earth Summit. The Commission on Sustainable Development (CSD), which is a part of United Nations system, monitors and assesses overall implementation of Agenda 21.

⁴ Principle 2 and 5 of *Stockholm Declaration on the Human Environment* adopted 16 June 1972, UN Doc. A/COF 48/141 *international Legal Materials (ILM) Vol. 11*, 1972

⁵ Suedi. S. P, *Sustainable Development Perspectives in International Law*, *Perspective in International Economic law*, Asif H. Qureshi (ed.)(New York: Kluwer International Law, 2002) p265

⁶ IUCN, *World Conservation Strategy*(Gland: IUCN, 1980)

The only document that came out of the U.N. General Assembly' Rio +5 review in 1997 was a Programme for the further Implementation of Agenda 21. As a plan of action, Agenda 21 is divided four sections and has forty chapters. The first two sections cover social and economic issues and the conservation and management of natural resources and include subject related to poverty, consumption patterns, deforestation, oceans and toxic chemicals. The third section describes in detail the role which nine major groups should play in getting to sustainable development include women, business, industry and NGOs. Because implementation obviously matters in a plan of action, the fourth section include a detailed program for providing financial and technical resource to countries that need such resources, for capacity building, and for better information for decision-making. Each chapter describes that factual basis for recommended actions, the objective of those actions, the particular activities that governments and others should take, and the entities that need to support and fund activities.

Agenda 21 provides context-specific meaning for sustainable development and indentified what mean specific sector in context of sustainable development. It is perhaps best understand as providing a starting point toward sustainable development. It does not describe the final destination because the exact nature of a sustainable society is unknown and because sustainability will depend to a great extent on each country's culture, history, economy, and environment. Agenda 21 is based to a great extent on the 27 principle of Rio Declaration. Agenda 21 and Rio Declaration mutually and deeply related. To some degree, the Rio Declaration restates principles that are accepted as or are becoming as accepted as principles of international law

World Summit for Sustainable Development (2002)

The World Summit on Sustainable Development (WSSD) was, held in Johannesburg (South Africa) during 26 August to 4 September 2002, and brought together an estimated 45,000 participations in Johannesburg (South Africa). Over 100 heads of states and more than 22,000 government delegates, international experts and non-governmental organizations and media representatives from 193 countries, attended the Summit itself, and another 23,000 were represented at parallel events for business,

scientist, civil society, and other major groups.⁷

The United Nations objectives for the Summit were to review the 1992 UN Conference on Environment and Development (UNCED) and strengthen the global commitment to sustainable development. In December 2000, the UN General Assembly decided to convene a ten year review of progress since UNCED.⁸ Despite ongoing efforts since the Stockholm Conference in 1972, to protect the environmental and natural resources, the UNGA expressed concern about continuing deterioration. Therefore, the World Summit on Sustainable Development sought to focus on the status of implementation of Agenda 21 and the other Earth Summit outcomes. The WSSD's mandate was to identify further measures to implement the Rio agreement, accomplishments and the areas where more effort and action-oriented decisions were needed, as well as new challenges and opportunities. The WSSD's central thrust was to ensure balance among economic, social and environmental concerns and reinvigorate the global commitment to sustainable development.

The WSSD sought to address social, environmental and economic problems in an integrated way. It negotiated and adopted two main documents –The Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation (JPOI). The Johannesburg Declaration outlines the paths taken from UNCED to WSSD, highlights present challenges, expresses a commitment to sustainable development, underscores the importance of multilateralism and emphasizes the need for implementation.

The Johannesburg Plan of implementation is designed as a framework for action to implement the commitment agreed at UNCED as included eleven chapters. These chapters are introduction; poverty eradication; changing unsustainable patterns of consumption and production; protecting and managing the natural resources base of economic and social development; sustainable development in globalizing world; health and sustainable development; sustainable development of small island developing states; sustainable development in Africa; other regional initiatives; means

⁷ *Johannesburg Declaration on Sustainable Development* (Johannesburg, South Africa: Report of the World Summit on Sustainable Development, 2002), A/COF.199/20.

⁸ UNCED, UN General Assembly Decision, 20 December 2000, A/RES/55/199.

of implementation; and international framework for sustainable development.

The Johannesburg Declaration on Sustainable development⁹

“The Johannesburg Declaration on Sustainable Development” is a three -page, six-section document it reaffirms, “from this continent, the cradle of humanity” a commitment to sustainable development and building a humane, equitable and caring global society cognizant of the need for human dignity for all. It emphasized the three pillars of sustainable development at all level and a common resolve to eradicate poverty, change consumption and production patterns and protect and manage the natural resources base. After tracing the road from Stockholm to Rio to Johannesburg, it addresses present challenges, such as the depending fault line between rich and poor, biodiversity depletion, desertification, pollution, the benefits and costs of globalization and the loss of confidence in democratic systems.

The Declaration also stresses the importance of human solidarity and urges the promotion of dialogue and cooperation among the world’s civilizations. It welcomes decisions on targets, timetables and partnerships to improve access to clean water, sanitation, energy, health care, food and to protect biodiversity. It highlights the needs for access to financial resources, opening of markets and technology transfer. It reaffirms pledge to address threats posed by foreign occupation and armed conflict, corruption, terrorist and intolerance in all forms, and to combat communicable and chronic diseases such as HIV/AIDS, malaria and tuberculosis. The document stresses women’s empowerment and emancipation, and the vital role of indigenous peoples. It recommits support to achieving Millennium Development Goals, increase official development assistance (ODA), regional initiatives such as NEPAD, and the requirement of small islands development states (SIDS) and least developed countries (LDCs). It emphasizes the need for better employment opportunities, and for the private sector to enforce cooperate accountability. The Declaration reaffirm all countries’ commitment to the UN charter and international law, all for strengthen

⁹ United Nations, *The Johannesburg Declaration on Sustainable Development* in Political Declaration and Plan of Implementation (New York: United Nations department of Public Information, 2003), p 7.

multilateralism and pledge to an inclusive process involving all major groups.¹⁰

Johannesburg Plan of Implementation (JPOI)¹¹

The Johannesburg Plan reaffirmed that the Johannesburg Declaration is the outputs of UNCED and states that intent of the implementation plan is to build thereon. It acknowledges that implantation of plan should benefit all, and that good governance, peace, security and stability are essential to attain sustainable development.

Poverty eradication

Poverty eradication, second chapter states that poverty is the greatest global challenge and presents targets and timetables for poverty eradication at all levels. In relation to poverty eradication, the JPOI affirmed the Millennium Declaration commitments to halve by 2015 the proportion of the world' people living on less than US\$ 1 a day and who suffer from hunger and establish a world solidarity fund to eradicate poverty and to halve by 2015 the proportion of people unable to reach or afford safe drinking water. It adds the new target to halve by 2015 the proportion of people who do not have access to basic sanitation.

In relation to energy access, the JPOI contains the following key commitments: take joint effort to improve access to reliable and affordable energy service; promote sustainable use biomass and support a transition to cleaner use of fossil fuels.

In relation to industrial development, the JPOI contains the following key commitments to provide assistance to increase income generating employment opportunities, taking into account the International Labour Organization (ILO) Declaration in Fundamental Principle and Rights at Work to promote micro, small and medium-sized enterprises and to enable rural communities to benefit from small scale mining ventures.

¹⁰ Marie- Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law; Principles, Practices & Prospects* (New York: Oxford University Press, 2006) , p36-37.

¹¹ United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), see also World Summit on Sustainable Development, Johannesburg, South Africa, 4 Spet. 2002. UN Doc. A/COF:199/20,

In relation to slum dwellers, the JPOI contains the key commitments to improve access to land the property for the urban and rural poor to use low cost and sustainable materials and appropriate technologies to construct housing for the poor and to support local authorities in slum upgrading programme. As regards the child labour,, the JPOI contains the key commitment to take immediate measures to eliminate the worst forms of child labour and promote international cooperation to assist developing countries requesting help in addressing child labour and its root cause.¹²

Changing unsustainable patterns of consumption and production

In relation to sustainable consumption and production, the JPOI contains the commitments to increase eco-efficiency with financial support for capacity building, technology transfer and exchange of technology with developing countries and countries with economics in transition. It also called for an increase in investment in cleaner production and eco-efficiency in all countries through incentives, support schemes and policies directed at establishing appropriate regulatory, financial and legal frameworks; provide incentives for investment in cleaner production and eco-efficiency in all countries, such as state- financial loans, venture capital and technical assistance; integrate the issue of production and consumption patterns into sustainable development policies, programmes and strategies, including into poverty reduction strategies; enhance cooperate environmental and social responsibility and accountability; and encourage financial institutions to incorporate sustainable development considerations into their decision making processes.

In relation to energy for sustainable development, the JPOI contains the following key commitments; promote the internationalization of environmental costs and the use of economic instruments; establish domestic programme for energy efficiency; accelerate the and energy conservation technology; recommend that international financial institutions and other agencies' policies support efforts to improve the functioning , transparency and information about energy markets with respect t to both supply and demand; strengthen and facilitate, as appropriate, regional

¹² United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), p 13.

cooperation arrangement for promoting cross-border energy trade; implement transport strategies for sustainable development; and promote investment and partnerships for the development of sustainable, energy efficient multimodal transportation systems.

In relation to waste and chemical management, the JPOI contains the following key commitments: encourage countries to implement the new globally harmonized system for the classification and labeling of chemicals, with a view to having the system operational by 2008; prevent and minimize waste and maximize reuse, recycling and use of environmentally friendly alternative materials; develop waste management systems, with highest priorities placed on waste prevention and minimization, reuse and recycling, and environmentally sound disposal facilities promote the ratification and implementation of relevant international instruments on chemicals and hazardous waste; and promote efforts to prevent international illegal trafficking of hazardous chemicals and hazardous wastes and to prevent damage resulting from the trans-boundary movement and disposal of hazardous wastes.¹³

Protecting and managing the natural resource base of economic and social development

In relation to water resources, the JPOI contains the commitments: launch a programme of actions to achieve safe drinking water and sanitation goals; mobilize international and domestic financial resources, transfer technology, promote best practice and support capacity building; promote and provide new and additional financial resources and innovative technologies to implement Chapter 18 of Agenda 21; and develop integrated water resource management and water efficiency plans by 2015.

In relation to oceans, the JPOI contains the key commitments: where possible. Maintain or restore depleted fish stocks to maximum sustainable yield levels not later than 2015; eliminate subsidies contributing to illegal, unreported and unregulated

¹³ United Nations, *Plan of Implementation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), p 18.

fishing and to over-capacity; implement the Ramsar Convention; implement the Global programme of Action for the Protection of the Marine Environment from Land-based Activities; and establish a regular process under the UN for global reporting and assessment for the state of the marine environment by 2004. On air pollution, the JPOI agrees to improve access by developing countries to alternative to ozone-depleting substance by 2010. On desertification, the JOPI calls on the Global Environmental Fund (GEF) to designate land degradation as a focal area of GEF and to consider making GEF a financial mechanism for the convention to Combat Desertification. In relation to biodiversity, the JOPI try to achieve by 2010 a significant reduction in the current rate of biodiversity loss; and negotiate an international regime to promote and safeguard the fair and equitable sharing of benefits arising from the utilization of genetic resources. On forests, the JPOI commits to take immediate action on domestic forest law enforcement and illegal international trade in forest production.

Sustainable development in a global world

JPOI addresses globalization, acknowledging that serious challenges included financial crises, insecurity, poverty, exclusion and inequality, and calling for national and international level policies. The first paragraph also offers support for the successful completion of the work programme in the World Trade organization's Doha Ministerial Declaration, implementation of the 2002 Monterrey Consensus on financing for Development, encourages efforts to ensure that decision making is open and transparent, supports enhanced capacity for developing countries to benefit from liberalized trade opportunities, supports the ILO's ongoing work on the social dimension of globalization, and calls for enhanced delivery of trade related technical assistance and capacity to encourage public and private initiative that enhance the ease of access, accuracy, timeliness and coverage of information on countries and financial markets; strengthening regional trade and cooperation agreements; and assisting developing countries and economic in transition in narrowing the digital divide.¹⁴

¹⁴ United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003) p 40-46.

Health and sustainable development

JPOI commits to strengthen the capacity of health-care services provide to deliver basic health care service to all. Agreed commitments include actions at all level to provide technical and financial assistance to developing countries and countries with economic in transition to implement the Health for All Strategy.¹⁵

Sustainable development of Small Island developing states (SIDS)

JPIO recognized the special needs of SIDS and calls for actions in the following areas to strengthen national and regional implementation with adequate financial resources, including through GEF focal areas; to undertake technology transfer and assistance for capacity building; to enhance sustainable development sustainable fisheries management and strengthen regional fisheries management organization; to support development and implantation of, inter alia, work programmes on marine and coastal biological diversity; freshwater programmes; development of community based initiative on sustainable tourism by 2004.; comprehensive hazard and risk management, disaster prevention, mitigation and preparedness, and relief from the consequence of disasters, extreme weather events and other emergencies; operationalization of economic, social and environmental vulnerability indices and related indicators, mobilization of adequate resources and partnership to address adaption to the adverse effects of climate change, sea-level rise and climate variability; capacity building availability of adequate, affordable and environmentally sound energy service and new efforts on energy supply and service by 2004; to undertake a comprehensive review of the implementation of the Barbodos Programme of Action for the Sustainable Development of SIDS in 2004; and request the General Assembly to consider convening an international meeting for the sustainable development of SIDS.

Sustainable development in Africa

¹⁵ United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), p48.

JPIO affirmed the international community's commitment to support sustainable development in Africa, through concrete action to implement agenda 21 in Africa, within the framework of the New Partnership for Africa's Development (NEDAD). This chapter highlights the need to support programmes and partnerships to ensure universal energy access to at least 35 per cent of the African population within 20 years; mobilize resources to address Africa's adaption to the adverse impacts of climate change, including sea level rise, climate variability and the development of national climate change strategies, support the sustainable use, and fair and equitable sharing of benefits arising out of the use of Africa's genetic resources; promote technology development and diffusion; support land tenure reform; capacity to achieve internationally-agreed development goals related to education, hunger and food security; bridge the digital divide and create opportunities including access to infrastructure and technology transfer and application; support sustainable tourism; strengthen health care systems; mobilize financial support to make available necessary drugs and technology in a sustainable and affordable manner to control communicable disease such as HIV/AIDS, malaria, tuberculosis diseases caused by poverty.¹⁶

Other regional initiative

JPOI recognizes initiative at the regional, sub-regional and trans-regional level to promote sustainable development. There are several sections; sustainable development in Latin America and the Caribbean, sustainable development in Asia and the Pacific, sustainable development, sustainable development in the West Asia Region and sustainable development in the Economic Commission for Europe (ECE).¹⁷

Means of Implementation¹⁸

¹⁶United Nations, *Plan of Implementation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), p 54.

¹⁷ United Nations, *Chapter IX : Sustainable Development in Asia and the Pacific, Plan of Implementation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003) p 60-61.

¹⁸ United Nations, *Chapter X Means of Implementation, Plan of Implementation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), pp 62-77.

As regards implementation, JPOI contains sections on finance trade, technology transfer, capacity building and education. The section on finance state that internationally-agreed development goals, including those in the Millennium Declaration and Agenda 21, require significant increases in financial resources as elaborated in the Monterrey Consensus cites the common but differentiated responsibilities principle and calls for implementing the outcomes of major UN conferences. The section also describes financial mobilization as a first step to ensuring that the twenty-first century becomes the century of sustainable development for all; identifies the challenge of ensuring the internal conditions for saving and investment calls for the facilitation of greater flows of foreign directive investment to support developing countries; recognize that a substantial increase in official development assistance (ODA) and other resources is required and calls for the delivery of the relevant ICFD commitments; encourages more efficient and effective use of ODA; addresses to reform the international financial architecture to foster transparency and equity; welcome the third replenishment of the GEF; calls for the exploration of ways to generate new public and private sources of finance; and calls for a reduction of the unsustainable debt burden and for the speedy implementation of the enhanced highly Indebted Poor Countries (HIPC) initiative.

JPIO recognizes the major role that trade can play in achieving sustainable development and eradicating poverty, and encourages WTO members to pursue the work programme agreed at the Fourth WTO Ministerial Conference. They are also encouraged to facilitate the accession of all developing countries; implement substantial trade-related technical assistance and capacity-building measures and support the Doha Development Agenda Global Trust Fund; implement the New Strategy for WTO Technical Cooperation; and support the implementation of the Integrated Framework for Trade-Related Technical Assistance to last Developed Countries.¹⁹

It also calls for; a determination to address developing country issues regarding the

¹⁹ United Nations, *Para 90, Chapter X, Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), p 66.

implementation of some WTO agreements and decisions, fulfillment of WTO members' commitment; notably on market access, fulfillment of a commitment to comprehensive WTO negotiation initiated under the Agreement on Agriculture, aiming to phase out all forms of export subsidies; developed countries to work towards duty-free and quota-free access for all least developed country (LDC) exports; commitment to address trade-related issues and concerns affecting the integration of small, vulnerable economies; capacity building for commodity-dependent countries to help them diversify; and enhanced benefits for developing countries and countries with economic in transition from trade liberalization, including through public-private partnership.

The section also calls to enhance the mutual supportiveness of trade, environment and development, with a view to achieving sustainable development through actions at the WTO commitment on Trade and Environment and the WTO Commitment on Trade and Development, the completion of the Doha work programme, and technical assistance through cooperation between the Secretariats of the WTO and UN bodies. The trade section also encourage the use of environmental impact assessments and programmes mutual supportiveness between the multilateral trading system and environmental agreements, consistent with sustainable development goals, in support of the WTO work programme. The section also addresses the Doha Declaration on the TRIPS Agreement and Public Health; environmental measures as disguised restriction on trade, unilateral measures, self-determination of peoples and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States.²⁰

Institutional framework for sustainable development

It seems an effective institutional framework for sustainable development at all levels is based on the "full implementation" of Agenda 21, WSSD outcomes, and other internationally-agreed development goals. It outlines objectives, including to strengthen coherence, coordination and monitoring, and to increase effectiveness

²⁰ United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), pp 68-70

capacities, especially in developing countries. It has been proposed to integrate sustainable development goals in the policies, work programmes and operational guidelines of UN agencies and international trade and finance institutions; strengthen collaboration within the UN system; implement decisions on international environmental governance adopted by the UNEP Governing Council and invite the UN General Assembly to address the issue of universal membership of the Governing Council; promote good governance at the international level; commits to the ideals of the UN and to strengthen the UN and other multilateral institution.²¹

Apart from it, the UN General Assembly is called upon to adopt sustainable development as the key element of the overarching framework for UN activities. The JPOI reaffirms role of the United Nation Economic and Social Council (ECOSOC) in overseeing system-wide coordination and integration of the three pillars of sustainable development in the UN. Moreover, it seeks to ensure that there is a “close link” between its role in the follow up of the Summit and to the Monterrey consensus, “in a sustainable coordinated manner”.

It also agrees to enhance the role of the UN Commission on Sustainable Development (UNCSD), to review progress in the implementation of Agenda 21, address new challenge, and limit the number of themes addressed in each session, the UNCSD, it concluded, will serve as a focal point for discussion of partnerships, consider more effective use of national reports and regional experience, and exchange and promote best practice.

JPOI also underscores the need to strengthen international institutions as an evolutionary process. It stresses the need to enhance coordination among them in implementing Agenda 21, WSSD outcomes, the sustainable development aspects of the Millennium Declaration, the Monterrey Consensus on financing for Development and the WTO Doha Ministerial Declaration. It requests the UN Secretary-General to promote system wide coordination by utilizing the UN system Chief Executives Board. It also emphasizes strengthen cooperation among UNEP and other UN bodies,

²¹ United Nations, *Para. 139 A. objectives, Plan of Implantation of the World Summit on Sustainable Development, Political Declaration and Plan of Implementation* (New York: the United Nations Department of Public Information: 2003), p 78-79

the specialized agencies, Bretton Wood Institution and the WTO. It agrees to streamline the sustainable development meeting calendar, reduce the number of meeting in favor of implementation, and make greater use of information technologies. It has called for the regional commissions to enhance their capacity; it encourages multi-stakeholder participation, partnerships, and support for regional programmes. Apart from it, JPOI also dwells upon institutional frameworks at the national level so as to strengthen existing mechanism, formulate strategies for sustainable development immediately, promote the establishment of sustainable development councils, and enhance national institution arrangements for sustainable development and role and capacity of local authorities. JPOI has also recognized significance of enhance partnerships, including all major groups, and acknowledges the consideration being given to the possible relationship between environment and human rights, including the right to development.²²

II. International Law and Sustainable Development

What is international sustainable law?

The intention to need the stronger international law for sustainable development was presented in chapter 38 of agenda 21. Governments committed to the ‘further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns.’ ‘Governments also recognized the ‘ need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements of instruments, taking into account the special need s of the developing countries...’²³

Sustainable development law is the body of legal principle, treaties and legislation, and also legal instruments, which govern the area of intersection between social,

²² United Nations, *Plan of Implantation of the World Summit on Sustainable Development*, Political Declaration and Plan of Implementation (New York: the United Nations Department of Public Information: 2003), pp 81- 88.

²³ Chapter 38 of Agenda 21, 1992, Report of the United Nations Conference on Environment and Development, A/COF.151/ 29 Rev 1, 31, International Law Materials (ILM) 874,

economic and environmental law for sustainable development.²⁴ Though the role of international law in sustainable development is still in the process of definition, much process has been made in recent decades. A growing corpus of legal principles, treaties and instruments can now be identified which integrate international environmental social and economic law. And at minimum, coherence between these fields should be encouraged in the interest of future generation.

Sustainable development has been a vague concept in the field of international law. This was perhaps deliberate, in order to ensure that it could be relevant in different local and global contexts, from many cultures and region. But this vagueness has almost outlived its usefulness, particularly on the international level. Where consensus exists, defined by treaty, custom or other mean, international principles, treaties and organization have emerged to govern sustainable development cooperation between countries. Marie Claire propose if sustainable development is not actually a principle of international law, itself rather, it has been convincingly argued that sustainable development is and 'interstitial norm', articulated in order to point negotiations, implementation activities and especially, dispute resolution regimes, toward a coherent approach where decisions require a balance economic and social development, and environmental protection once they have been articulated, such international norms operate as modifying norms, bearing upon the customary norms that surround them. They also have a broader significance as reconciling concepts, exercising a very great influence on the system of international law and governance in this area. The rules and principles which are influenced in such a way by the international norms of sustainable development can, in effect, make up the body of what is now becoming known as 'sustainable development law'.²⁵

As such, at the area of intersection between social, economic and environmental law, a corpus of sustainable development now exists. International legal principles related to sustainable development have been defined, and myriad legal instrument have been developed to carry them forward

Legal status of Sustainable Development

²⁴ V. Lowe, the Politic of Law-making: Are the Method and Character of norm Creation Changing? In Byers, M., the Role of Law in International politic: Essays in international Relations and international law (US: Oxford University Press, 2001), p214

²⁵ Ibid, p216.

There seem to be growing recognition of international sustainable development law as the appropriate framework for environment and development decision-making. Though stimulated by popularity of the concept, international legal scholars continue to discuss its legal and normative status and other operation problems relating to sustainable development.²⁶ International legal scholars continue to debate its legal and normative status and other operational relating to sustainable development. Many scholars argue that sustainable development is too vague a concept and too ambiguous in meaning for it to have normative status. It is difficult to describe “sustainable development” as binging international legal principle in the traditional sense. As stated by Vaughan Lowe,” the argument that sustainable development is a norm of customary international law, binding on and directing the conduct of states, and which can be applied by tribunals, is not sustainable.” But neither is it accurate to describe sustainable development as simply vague international policy, void of normative value. As observed by the opinion in the International Court of Justice in the Gabcikovo-Naagymaros Case, there is wide and general acceptance by the global community of sustainable development. There is also emerging consensus on the need to strengthen international law on sustainable development and the need for further implementation of this law. In order to articulate the meaning of international sustainable development law, it is necessary to consider both its normative content and its alleged statue as a customary principle of international law.

In principle 27 of the Rio Declaration it was explicitly agreed to call for ‘the further development of international law in the field of sustainable development’. Sustainable development law is incorporated in a system of norms and rules that according to ruling doctrine cannot be considered to be true international law. A major part of sustainable development law has been by so called soft law. The tendency of using soft law instruments especially for decision-making procedure regarding MEA based institutional structure. As rapidly developing, the term ‘soft law’ faces the fact that it cannot be enforced through legal mechanisms. International sustainable development law has often been criticized as inspirational law or soft law because of lack of

²⁶ Vaughan Lowe, Sustainable Development and Unsustainable Argument, in Boyle & Freestone (eds): International Law and Sustainable Development: past achievement and future challenges (New York, Oxford University Press, 1999). pp 19-38.

effectiveness of enforcement. In practice, soft law refers to a great variety of instruments: declarations of principles, codes of practice, recommendations, guidelines, standards, charters, resolutions etc. Although all these kinds of documents are not legally bindings and consequently lack legal status, they hold a strong obligation for states and international organizations that their provisions will be respected and followed by the international community.

The relevance of soft law must not be underestimated, due to the fact that the evolution of customary international law can be accelerated by the inclusion of principles on soft law agreements and in non- governmental declarations and resolutions. Because of the growing number and influence of such documents, it is no inconceivable that such principles could become part of international law in the near future, even if they are not included in convention.

The reference to the concept of sustainable development in treaties as evidence of the concept's translation as a legal principle into the more binding status of customary law and stated as²⁷;

“There can be little doubt the concept of sustainable development has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner....By invoking the concept of sustainable development, the ICJ indicates that the term has legal function and both a procedural/temporal aspect (obligation the parties to ‘look afresh’ at the environmental consequences of the operation of the plant) and a substantive aspect (the obligation of result to ensure that a ‘satisfactory volume of water’ be released from the by- pass canal into the main river and its origin side arms). The ICJ does not provide further details to the practical consequence, although some assistance may be obtained from the Separate Opinion of Judge.

V. Lowe critic the progressive scholars like P. Sands who follow Judge Weeramantry's opinion and consider of sustainable development as having customary law status. He concluded that:

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“It is suggested that the reference of the concept of sustainable development in multilateral treaties and so on are evidence of concept's translation into customary international law. But what is the value of the evidence? One of the

²⁷ P. Sands, *International Law in Field of Sustainable Development: Emerging Legal Principle*, in W/ Lang (ed.) *Sustainable Development and International Law* (New York: Springer, 1995), p 56.

most noticeable characteristics of the example cited in Gabcikovo is that they do not include any instance of the actual application of the principle of sustainable development in order to reach a binding determination that states have acted unlawfully. There is no instance of reliance upon the concept itself as a rule of law binding upon states and constraining their conduct.”²⁸

He points out the concept of sustainable development lacks normative status, and it is not a binding norm of international law in the sense of the normative logic of the traditional law as reflected in Article 38(1) of the ICJ, but there is a sense in which the concept exemplifies another species of normativity, which is of great potential in the handing of the concept of international environmental law.²⁹ Lowe finds that sustainable development can properly claim a normative status as an element of the process of judicial reasoning. Thus, sustainable development is not simply a principle of international law itself. Rather, it has been argued convincingly that sustainable development is a normative concept operating in the interstices between primary norms when they overlap or conflict, such as the right to development or the duty to protect the environment. New development in law, for example, the principles of international environmental law such as that of sustainable development, do not articulate new general principles, but rather function as “interstitial norms”.³⁰ Once they have been articulated, such interstitial norms operate as modifying norms, bearing upon the primary norms that surround them. This means that where two primary norms come into conflict, such as the norm of economic development and the norm of environmental protection, the principle of sustainable development, as an interstitial norm, can serve to clarify how those two norms are to be balanced in a particular case.

The modifying norms can be considered legal concepts that do not depend upon state practice or opinion juris for their status, in a way primary legal norms do. Although in the context of judicial dispute settlement, a legal concept such as sustainable development can plainly affect the outcome of other cases. Especially the application

²⁸Vaughan Lowe, *Sustainable Development and Unsustainable Argument*, in Boyle & Freestone (eds): *International Law and Sustainable Development: past achievement and future challenges* (New York, Oxford University Press, 1999). pp 19-38.

²⁹ Vaughan Lowe, *Sustainable Development and Unsustainable Argument*, in Boyle & Freestone (eds): *International Law and Sustainable Development: past achievement and future challenges* (New York, Oxford University Press, 1999). p21.

³⁰ Vaughan Lowe, *Politics of Law-Making: Are the Method and Character of norm Creation Changing?* in Byers (ed.) *The Role of Law in International Politics : Essays in International Relation and International* (US: Oxford University Press, 2001) , pp213.

of the concept by the ICJ will inevitably influence the further development of the law, as these decisions under Article 38(1) (d) of the ICJ Statute are regarded as having persuasive authority as statement of the law.³¹

Sustainable development as a principle of customary international law?

While there is no supreme international legislative authority similar to domestic legislatures, article 38 of the Statute of International Court of Justice (ICJ)³² provided a list of the sources of international law.

Based on prior work by the United Nations Commission on Sustainable Development and other bodies, the International Law Association (ILA) Committee on the Legal Aspect of Sustainable Development has elaborated a set of principles of international law for sustainable development. Under this provision, the main sources of international law are treaties, custom and general principle of law and judicial decisions and the teachings are subsidiary sources. In the *Asylum case*, the ICJ laid down the requirement of custom as follows:

The party which relies on custom...must prove that this custom is established in such a manner that it has become binding on the other party....that the rule invoked...is in accordance with a constant and uniform usage, practiced by the States in question, and that this usage is the expression of a right appertaining to the state regarding asylum and a duty incumbent in the territorial state....³³

In the *North Sea Continental Shelf* cases, the ICJ commented again on the constitutive

³¹ Vaughan Lowe, *Sustainable Development and Unsustainable Argument* in Alan Boyle and David Freestone, *International Law and Sustainable Development; Past Achievement and Future Challenges* (New York: Oxford University Press, 1999). pp19-30.

³² Article 38 of Statute of International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

³³ *Asylum case* (Columbia v. Peru) I.C.J. Reports, pp. 266, 276-77

element of a rule of custom in international law. Byers argued that the two-pronged requirement which is called as 'bipartite conception' is necessary for the formation of customary international law. It requires that in order to qualify as a rule of customary law, state conduct must go alongside a psychological element that the conduct in question is in compliance with a rule of law, and is not merely one of morality, courtesy or ceremony.

In making the customary law argument in *Gabcikovo v. Nagymaros* case, Judge Weeramantry argued that sustainable development is not merely a concept as the majority decision concluded. He instead argued that sustainable development is a principle of law with normative force. Conducting his analysis within the framework of the sources of international law listed in Article 38 of the statute of the ICJ, Judge Weeramantry reasoned the case before the Court concerned the operation of two principles of international law.

He found support for the concept of sustainable development in the legal tradition and agricultural practice of a number of ancient civilizations. Judge Weeramantry argued that current international practice also supports the concept. He cited several multilateral treaties, declarations from international conferences, foundation documents of international organizations, regional declarations and planning documents, and argued that there is a wide and general acceptance of the concept by the global community. Alongside Judge Weeramantry, David Luff has also argued that developments in international law and policy since the Stockholm Conference led to the emergence of sustainable development as a legal institution with obligations for all countries. He argued that there now exists "an international custom compelling states to bolster development processes without depleting the environment and natural support for their activities."³⁴

However, the so-called quest for sustainable development as a principle of international law is questioned by other legal scholars. The general view seems to be that there is some state practice in support of the vague idea concerning sustainable

³⁴ David Luff, An overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development, 29 *Belg. Rev. of International Law*. 90, 94-97(1996)

development. This practice, however, can hardly be attributed to a belief that states are bound to act in the way they do. In other words, the states practice is not supported by *opinion juris*.³⁵ Indeed, Lowe argues that "... in the catalogue of treaty provisions, declarations, and so on that use the term 'sustainable development,' there is a lack of clear evidence that the authors regarded the concept as having the force of a rule or principle of customary international law"³⁶

In recent, the International Law Association shortly concluded that the concept of sustainable development had become a principle of international law and categorized it as "an established objective of the international community and a concept with some degree of normative status in international law." The committee did not specify the said normative status, but proceeded to discuss the legal status of individual principles of international law relating to sustainable development.³⁷ The only conclusion that can be drawn from the Committee's work is they could neither identify nor agree upon a definitive legal status for sustainable development.

With respect to the position taken by Weeramantry and Luff, I agree that despite the wide-scale endorsement of sustainable development and its vague idea of integrated decision-making, the realities of state conduct precludes a conclusion that it is a binding law. For example, despite broad consensus on the principle of common but differentiated responsibility as a means of implementing sustainable development commitments at the international level, many industrialized countries have failed to live up to the commitment reached at the Millennium Summit and at the Monterrey Conference on financing for development. The commitment requires them to contribute some of the GDP toward development assistance. While some elements of the exception may be normative, it is hard to say that there is now a binding legal principle of sustainable development.

While Judge Weeramantry gave a very insightful account of the evolution and

³⁵ S. Atapattu, *Sustainable Development, Myth or Reality? A survey of Sustainable Development under International Law and Sri-Lankan Law*, 4 Georgetown International Environmental Law Review Winter, 2001.

³⁶ *Environmental Protection and Sustainable Development: Legal Principle and Recommendations* (R.D. Munro & J.G. Lammers, Rapporteur, London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff (1987)

³⁷ Committee on Legal Aspect Of Sustainable Development, International Law Association, Searching for the Contours of International Law in the field of the Sustainable Development, Final Conference Report 7 (New Delhi: April 2002) at 5- 10, <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>

contemporary significance of sustainable development, one cannot help but notice that his analysis is influenced by traditional notions of legal pedigree at international law; notions that were themselves influenced by hierarchical thinking about the source of law. This is the hallmark of the positivist legal tradition. While no one can deny the continuing predominance of states in international lawmaking, current practice shows that a broad range of non-state actors are also involved in international legal process both formally as observers in international fora and informally as norm-entrepreneurs, in form of epistemic communities and government networks. Several non-state actors were involved in the emergence of sustainable development at the international level, including the Founnex and Brundtland Committees, as well as NGOs such as International Union for the Conservation of Nature (IUCN).

Sustainable development as interstitial norm

Vaughan Lowe has offered a more complete critique of Judge Weeramantry's argument. He proffers an alternative explanation of the normative status of sustainable development. While Lowe agrees to Judge Weeramantry that sustainable development could be normative in some sense, he maintains that it would be erroneous to suppose that the concept's normatively lies in the domain of constraining actor conduct.³⁸ Lowe departs from the premise that at least based on one reading of ICJ judgment in the North Sea Continental Self Cases, a putative rule of customary international law must possess a fundamentally norm creating character in addition to the traditional external tests of state practice and *opino juris*.³⁹ It would be recalled that one of the issues before the Court in those cases was whether the equidistance principle had evolved into a rule of customary law, despite its original formulation in treaty law. In considering that question, the ICJ reasoned that for a purely conventional rule to make the transition the customary obligation, "it would in the first place be necessary that the provision concerned should, at all events potentially be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of

³⁸ Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in Alan Boyle and David Freestone International Law and Sustainable Development : Past Achievement and Future Challenges(New York : Oxford University Press:1999) p 24, p 31.

³⁹ Vaughan Lowe, *the Politics of Law Making: Are the method and Characters of Norm Generation Changing?* In the Role of Law in International Politics: Essays in International Relations and Principle in International Law 40(US: Oxford University Press,2001).

law.”⁴⁰ Then the Court proceeded to discuss the elements of states practice and *opinio juris* and concluded that for a treaty rule to evolve into the customary obligation there must be extensive and virtually uniform practice on the part of states whose interests are specially affected by the rule, and that such practice must have been on the belief that it was required by law⁴¹

As based on the above reasoning by the ICJ, Lowe argued that sustainable development lacks a ‘fundamental norm-creating character,’ and as such, it cannot constrain action. Since it lacks this substance of normativity, it is impossible for the concept to evolve into a customary rule binding upon states and other action. His notion is that sustainable development could be normative in the sense of constraining actor, he suggest that the concept could be normative in the arena of dispute settlement. He says

“International lawyer excessively concerned with the aspect in the norm which demands that states and other legal persons bound by the norm conduct themselves in compliance with it. There are other aspects of normativity. Norms may function primarily as rules for direction, of concern to judicial tribunals, rather than as rules of conduct. Where disputes are submitted to such tribunals by agreement between the parties to the dispute, as is always the case in international law, the submission entails an authorization to reason juridical even where the reasoning implicates norms that may not have been established through process of international law formation... it is in the area of those norms that I believe the search for the normative force of the concept of sustainable development should be sought. Sustainable development can properly claim a normative status as an element of the process of judicial reasoning. It is a meta-principle, acting upon other legal rules and principle- a legal concept exercising a kind of international normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.”⁴²

The notion that the principles such as sustainable development perform mediating function in the context of judicial decision-making is subject to controversy. Some scholars have raised concern that by ascribing to interstitial norms the role of resolving conflicts between substantive rules of law, Lowe places too high an exception on these norms. Resolving conflicts and overlaps between rules, the

⁴⁰ *North Sea Continental Shelf Case* (Fed. Rep of Germany v. Denmark; Fed. Rep. of Germany v. Netherland), ICJ Reports (1969), Para 72.

⁴¹ *North Sea Continental Shelf Case* (Fed. Rep of Germany v. Denmark; Fed. Rep. of Germany v. Netherland), ICJ Reports (1969), Para 74.

⁴² *Vaughan Lowe, Sustainable Development and Unsustainable Arguments*, in Alan Boyle and David, Freestone *International Law and Sustainable Development: Past Achievement and Future Challenges*(New York : Oxford University Press:1999) pp 31-32.

argument goes, is a judicial function that must be excised by judges and supported by practical reasoning.⁴³

Sustainable development is neither a principle of customary international law nor should its interstitial normativity be confined to judicial context is debatable. As result of controversial process, sustainable development has become symbolize the expectation to integrate economic, environmental and social considerations in decision-making process in international society. In order word, sustainable development does as guidance norm as realizing the economic growth with equity, environmental preservation and social well-being.

Conclusion

As this first chapter, the evolutions of legal aspects of the concepts of sustainable development can be identified as considering the transition from the Stockholm declaration to Johannesburg Declaration. And the legal concept of sustainable development law can be analyzed as considering the opinions of some scholars as like Vaughan Lowe. The principles of international la relating to sustainable development will be discussed in next chapter. I will study the principles which proposed by International Law Committee on the Legal Aspect of Sustainable Development and then examine the emergence and application of general principles of sustainable development law.

⁴³ J Ellis, *Soft Law As Topos: The Role of Principles of Soft International Law in the Development of International Environmental Law* 5 (Montreal, McGill University, 2001), http://digitool.library.mcgill.ca/R/-?func=dbin-jump-full&object_id=37857¤t_base=GEN01.

Chapter 2
Content of Sustainable Development Law

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Content of Sustainable Development Law

I. Role of sustainable Development

In recent years, the discussion of the role of international law in sustainable development has expanded considerably. Increasing numbers of international treaties, particularly in fields of international economic and environmental law, have a set sustainable development as an objective or part of their purposes.

The question remains that the international principles related to sustainable development are sufficiently substantive at this point to be capable of establishing the basis of an international cause for action. Can such principles give rise to an International customary legal obligations, the violation of which would give rise to a legal remedy? To answer this question, it is important to identify substantive principles of international law related to sustainable development consider whether they have a “fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”, and to analyze the practice and opinion juris of the States. Not all principles of international law on sustainable development, or those reflected in recent treaties related to sustainable development have been recognized as international customary law.

The principles of sustainable development law have a normative character in international law; they generate obligations or rights for the states that are bound by them. They can play a role in interpretation or application of international law. The principles help to resolve disputes related to sustainable development, and to guide law and policy at the intersections of international environmental, social and economic norms towards development that can last.⁴⁴

After of the World Summit on Sustainable Development, there can be legitimate expectations that States and other actors will make good faith efforts to live up to their

⁴⁴ See P. Sands, *Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law* in A. Boyle & D. Freestone, *International Law and Sustainable Development; Past Achievement and Future Challenges* (New York: Oxford University Press 1999) p39.

global commitments to sustainable development. The changing structure of international law has allowed a multiplicity of actors, both States and non-States, to generate knowledge and participate in the development of sustainable development discourse through domestic and international legal system. Greater recognition of norms and principles holds potential to further strengthening of intentional sustainable development law.⁴⁵ Emerging from “soft-law instruments” such as declaration and international statements, such principles are starting to assert certain persuasive force.⁴⁶ But much more work is needed to properly analyze and understand the implications and level of acceptance of each, in international law, even as increasing use of and compliance with these norms contributes to the unfolding process of sustainable development.

The 2002 Principles of International Law Related to Sustainable Development, identified by the Commission on Legal Aspects of Sustainable Development of the International Law Association (ILA), provide a useful starting point. Over the course of a decade of legal scholarship and debate, efforts have been made by the International Law Association to identify general substantive and procedural principles of international law for sustainable development.⁴⁷ In the 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development, the ILA Committee on the Legal Aspects Related to Sustainable Development identified several principles.

1. New Delhi Declaration of Principles of International Law Relating to Sustainable Development

Since the Rio conference, many legal scholars have made attempts to identify legal principles of sustainable development. Phillippe Sands argued that as a principle of of

⁴⁵ M. Decleris, *the Law of Sustainable Development: General principles, a Report for the European Commission* (Brussels; European Commission, 2000) p 14.

⁴⁶ See A. Lowe, *Sustainable Development and Unsustainable Development* in A. Boyle & D. Freestone, *International Law and Sustainable Development; Past Achievement and Future Challenges* (New York: Oxford University Press 1999), p19.

⁴⁷ **Substantive Category**; The principle of Intergenerational Equity, The principle of Sustainable Use, The principle of Equity use, and The principle of Integration

Procedure Category; The principle of good neighborliness and international Cooperation, The principle of common but differentiated responsibility, The principle of preventive action, The precautionary principle, and The pollution-pays principle

international law, sustainable development requires recognition of inter and intra-generational equity, the sustainable use of natural resources, common but differentiated environmental responsibilities, and the integration of environmental and developmental decision making.⁴⁸ According to P. Sand, the sovereignty over natural resources and the responsibility to avoid environmental harm, the preventive as precautionary principle, environmental impact assessments, and the polluter-pay principle are presented as separate environmental principles parallel to the principle of sustainable development.

For Boyle, the elements of sustainable development are sustainable utilization, integration of environment and development, the right to development, and intra and intergenerational equity. He identifies environmental impact assessment and public participation in decision-making as the procedural aspects of implementing sustainable development at national level, and argued that these function to legitimize decisions.⁴⁹ According to Dernbach, sustainable development implies adherence to the principle of integrated environment and development decision-making, the polluter-pays principle, sustainable consumption and population levels, the precautionary principle, intergenerational equity, citizen participation and common but differentiated responsibilities for developed and developing countries.⁵⁰

The United Nations Commission on Sustainable Development (CSD) and other bodies, the International Law Association (ILA) Committee on the Legal Aspect of Sustainable Development has elaborated a set of principles of international law for sustainable development.

The international Law Association came up with two sets of principles presents as a framework of international law in the field of sustainable development.⁵¹ The first

⁴⁸ Phillipe Sands, *Environmental Protection in the Twenty-First Century: Sustainable and International Law* in R.L. Reverz, P. Sands & R.B. Stewart, *Environment Law, The Economy and Sustainable Development* (New York: Cambridge University Press, 2002)

⁴⁹ A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievement and Future Challenges* (New York: Oxford University Press, 1999) pp 8-16.

⁵⁰ J.C Dernbach, *Sustainable Development: Now More than Ever*, ELR news & Analysis, Environmental Law Institution. REP(Washington DC, 2002)

⁵¹ *Committee on Legal Aspect Of Sustainable Development*, International Law Association, Searching for the Contours of International Law in the field of the Sustainable Development, Final Conference Report 7 (New Delhi: April 2002) at 5- 10, <http://www.ila-hq.org/en/committees/index.cfm/cid/1017>

set includes four principles. The first of them is that the principle is the rule of law in international relations, including international economic relations. According to this report, this principle entails a duty incumbent on state to abstain from measures of economic policy that are incompatible with their international obligations and which are detrimental to the sustainable development opportunities of third countries and peoples. Treaties and binding decisions by international institutions have to be observed and fulfilled in good faith by all parties concerned. Second is the principle of the duty to co-operate towards global sustainable development and protection of the global environment. The duty to co-operate is well established in international law.⁵² It is embodied in Principle 27 of the Rio declaration where it provides as:

States and people shall cooperate in good faith and in spirit of partnership in the fulfillment of the partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

And principle 7 of Rio Declaration also states some word in related to the duty of co-operate:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the earth's ecosystem...

Third is the principle of the observance of human rights, both economic, social and cultural rights and civil and political rights. This principle is instrumental for integrating human right concerns and the discourses on sustainable development as well as emphasizing the preponderant role of public participation in promoting development, social progress and environmental conservation. The fourth and last is the principle of integration. This principle is likely to be the backbone of sustainable development. This can derived from various principles of Stockholm and Rio Declaration. The World Charter for Nature, the IUCN Covenant, the Earth Charter, as well as many multilateral treaties such as the UN Convention on the Law of the Sea, the EC Treaty, the Principle 3 and 4 of Rio Declaration and principle 13 of the Stockholm Declaration include the intention of it. The first of these four principles restates the general principle of good faith in international relations as regards the observance and implementation of international treaty obligations. As far as the treaty

⁵² For example, Chapter IX on International Economic and Social Co-operation of the UN Charter and Principle 4 of the 1970 Declaration on Friendly Relations.

law is concerned, the principle of good faith is widely accepted and uncontroversial. The duty to cooperate is also widely recognized in international law and has featured in many international instruments such as the United Nations Charters and the Stockholm and Rio Declarations.

The ILA also identified a second set of 'specific principles' of sustainable development. These are (1) Sovereignty over national resource and the duty to protect both the domestic and trans-boundary environment; (2) the sustainable use of natural resources; (3) intergenerational equity; (4) intra-generational equity; (5) Common but differentiated responsibility; (6) common heritage of human-kind; (7) the precautionary principle; (8) public participation and accesses to information; and (9) good governance and democratic accountability.

With respect to legal status, the ILA recalled that the principle of sovereignty over natural resource is well established in international law. They also noted that while intergenerational equity has been recognized in various international instruments including the Stockhloim and Rio Declarations, the United Nations Convention on the Law of the Sea (UNCLOS), and Biodiversity and Climate Change Convention, its legal status remains unclear outside these specific contexts. Intra-generational equity was classified as being at best an emerging principle of international law in the field of sustainable development. The principle of common but differentiated responsibilities was said to have firm status in various fields of international law, including human rights, international trade and international environmental law.

1) The principle of Sustainable Use

States have sovereign rights over their natural resources but must not cause undue damage to the global environment through their use of these resources. This principle, the ILA argues, has evolved into a positive obligation to ensure that natural resources are used in a sustainable manner in many areas. Such obligations are apparent, for example, in the 1968 African Convention on the Conservations of Nature and Natural Resources and its 2002 revisions, the 1992 Framework Convention on Climate Change and the 1992 Convention on Biological Diversity. This duty also recognizes the importance of common concerns for states, as respect for such concern is often the

legal basis of regulations that impose obligations on state, regional and local authorities.⁵³

2) The principle of Equity use

As part of sustainable development, states should promote a just distribution of resources among members of the present generation. This principle would suggest that such distribution should focus on meeting the basic needs of the poor, who have the greatest priority in sustainable development, and that present generations have an obligation to refrain from depriving future generations of the means to meet their own needs. Further, states which are in a position to do so have a further responsibility to assist other states. Commitments to equity are found in the 1992 Convention on Biological Diversity, the 1998 Kyoto Protocol to the 1992 Framework Convention on Climate Change, and many other sustainable development related treaties.⁵⁴

3) The principle of common but differentiated responsibility

The common responsibility of states for the protection of environment at the national and global levels is balanced by the need to take account of different circumstances, particularly in relation to each state's historical contribution to the creation of a particular problem, as well as its ability to prevent, reduce and control the treat. This principle would hold that developed countries bear a special burden of responsibility in reducing unsustainable patterns of consumption and providing assistance to developing countries to meet global sustainable development.⁵⁵ For example, the principle of common but differentiated responsibility guides many provisions of the 1987 Montreal Protocol on Substances that Deplete the Ozone layer to the 1985 Vienna Convention for the Protection of the Ozone Layer. A distinct but related concept of 'special and deferential treatment' for developing countries guides various provisions of the World Trade Organization (WTO).

⁵³ *Para. 1 of ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p 4.

⁵⁴ *Para. 2.1, 2.2, 2.3 of ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p 4.

⁵⁵ *Para. 3.1 of ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002)

4) The Precautionary Approach

Natural resources, ecosystems and human health are vulnerable priorities. By giving the benefit of the doubt to health and ecosystems when there is scientific uncertainty, the precautionary principle shifts the burden of proof to those proposing activities which might cause serious harm.⁵⁶ It favors prevention over remediation, focuses on the relevance and robustness of scientific data to development decision-making and carries an obligation to use precautionary measures in proportion to potential damage and the likelihood or degree of risk involved in each case. Precaution is implemented in the text of the 2001 Cartagena protocol in Bio safety to the 1992 Convention on Biological Diversity, and a narrow version of precaution might also be found in the provision of the 1994 Agreement on Sanitary and Phytosanitary measure of the World Trade Organization (WTO).

5) The Principle of Public Participation and Access to Information and Justice

This sustainable development law principle holds that people should be able to participate in decision-making processes which affect and impact their lives and well-being.⁵⁷ In order to participate fully, the public must have access to adequate information. And in different ways, citizens should have access to independent appeal if their concerns are not addressed. The 1998 Aarhus Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental Matters, which relates mainly to the environment, is one primary example of an international legal instrument based in this principle, and many international human-rights instruments also provided specially for public participation, access to information, and access to justice.

6) The Principle of Good Governance

⁵⁶ Para 4.1, 4.2 of *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p 5.

⁵⁷ Para 5.2 of *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p5.

This principle, argues the ILA, holds that good governance is based on the respect for the rule of law, democracy, political accountability, government flexibility and responsiveness for its citizens. Good governance means that institutions and process seek to serve a strategic vision and include significant stakeholders. Structures are oriented toward building consensus, ensuring efficiency, coherence and coordination among institution actors.⁵⁸ Good governance mediates differing interests to reach a board consensus on what is in the best interests of the community and, where characteristics are mutually reinforcing. Good governance is almost a pre-condition for effective law and regulation in any area, and is specifically prioritized in the Johannesburg Plan of implementation (JPOI) as well as other international legal instruments.

7) The principle of integration and interrelationship

States should strive to resolve apparent conflicts between competing economic and financial, social and environmental considerations.⁵⁹ The 1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa is an example of an international treaty which integrates environmental, social and economic concerns, as are the 2001 Cotonou Agreement for cooperation between the European Union and African, Pacific and Caribbean countries, and the 1989 Indigenous and Tribal Peoples Convention of the International Labour Organization.

These proposed principles, taken together, provide considerable guidance for jurists seeking ways to balance conflicting or overlapping social, environmental and economic obligations. They are generating increasing interest in academic, legal and policy debates. A recent survey by the Centre for International Sustainable Development Law of international treaty and customary sources of international law indicates that many are becoming more widely adopted after the 2002 Johannesburg Summit.

⁵⁸ Para 6.1 of *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p 6.

⁵⁹ Para 7.1 of *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, The Conference of the International Law Association (New Delhi: ILA, 2002), p 7.

II. The Principles of International Law on Sustainable Development

1. Emergence of principles

1) The principle of integration and interpretation ship in related to social, economic and environmental objective

The need for the integration of social and economic development and environmental policy permeates soft law, including the 1972 Stockholm Declaration, the 1992 Rio Declaration and Agenda 21, and, as mentioned above, the 2002 Johannesburg Declaration and palm of Implementation.

Principle of the 1992 Rio Declaration stated that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”⁶⁰ As a consensus statement negotiated and signed by over 160 countries, this indicates that States agree that social and economic development should integrate environmental protection. The principle 4 argument that environmental protection cannot be considered in isolation advocates integrated consideration of these fields at the international level, in policy and in law. This view is supported by the word of Chapter 39 of Agenda 21⁶¹, where states commit to focus on “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns”; and recognize an important “need to clarify and strengthen the relationship between existing international instrument or agreements in the field of environment and relevant social and economic agreement or instrument, taking into account the special needs of the developing countries”⁶²

After the Earth Summit, integration of laws and policies in these areas was directly addressed in many global treaties, using different textual formulations depending on the context and purpose of the instruments. It is a keystone provision in two of the 1992 Rio Conventions (the UN Framework Convention on Climate Change and the UN Commission on Biological Diversity). Most of the post-Rio environmental

⁶⁰ UNCED, 1992 *Rio Declaration*, Principle 4, *Rio Declaration on Environment and Development*, A/CONF.151/26, (Rio de Janeiro: United Nations Department of public information, 1997) “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation form it”

⁶¹ International Legal Instrument and Mechanism, Chapter 39 of Agenda21 p13

⁶² *Agenda 21: Programme of Action for Sustainable Development*, para 39.1, chapter 39 .1 objective (a) and (b), Report of the UNCED, (1992) UN Doc A/CONF 151/26 Rev 1 (1992) 31 International Law Materials 874 and see source: UNEP website, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52>.

conventions contain specific substantive provisions, which aim to address relevant social and economic considerations related to their purpose and object. Some even do it to the extent that they move away from simply being environmental conventions at all, and can be considered as sustainable development conventions instead, whose integrated social, economic and environmental purposes focuses on the development of a resource or address a development challenge, in a sustainable way. Example of such treaties might include the 1994 United Nations Convention to Combat Desertification in countries Experiencing Serious Drought and /or Desertification, particularly in Africa, and the 1997 United Nations Convention on the Non-Navigational Uses of International Watercourses.⁶³

International scholarship in various fields notes trend toward integration, at the international level. This refers to integration in the sense that economies and societies are becoming more integrated, on international level (also sometimes called the “globalization” phenomenon). For example, according to Alexandre Kiss:

“[e]vidence of global integration abounds: regional trading units; regional political and economic organizations...international regimes covering issues ranging from banking and trade to human right, environmental protection, and arms control; and the spread of financial markets. The information revolution, the rapid technological advances, global environmental problems, liberalized trade, and other economic and other interdependencies compel greater interdependency and greater integration.”

Such a trend is clearly emerging; however there is a second meaning to integration, one that seems closer to what is intended in the 1992 Rio Declaration, which looks to integration between economic and social law and policy, and environmental law and policy. This type of integration is no simply a trend or a “coming together”, on the international level, but rather, a need to undertake development in way that fully takes into account, and combines, its social, economic and environmental aspects. It is a challenging requirement for research, planning, law-making and judicial decision-making. Indeed, as noted by on commentator, “if there is no longer much doubt about whether integrative approaches to research are needed in support of a sustainability transition how to achieve such integration in rigorous and useful programs remains

⁶³ See the *Desertification Convention Art 4(2)*, 33 International Law Materials 1328 and *Watercourses Convention*, UN Doc. A/51/869 (1997)

problematic⁶⁴.

2) The duty of states to ensure sustainable use of natural resource

This principle emerged from environmental law, as in Principle 21 of the Stockholm Declaration, whereby:

States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereignty right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environmental of other States or of areas beyond the limits of national jurisdiction.

Subsequently, the 1992 Rio Declaration reaffirmed Principle 21 of the Stockhlo Declaration. While reaffirming the responsibility not to cause damage to the environment of other states or areas beyond the limits of national jurisdiction, Principle 2 of Rio Declaration declares that the states have “the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.” Principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration each comprise two fundamental elements. The first element reaffirms the sovereign right of states to exploit their own natural resources. The second element, however, limits the first, by introduction the responsibility, or obligation, not to cause damage to the environments of others states. Taken together, in the context of scientific advancements in many resources sciences, which indicate much greater degrees of connection between natural systems over distance, these can be interpreted to extend a basic obligation of sustainable use, so as not to damage the environment and natural resources of other states.⁶⁵

Within the limit established by international law, the principle of State sovereignty provides that states will act according to their own law about natural resources within their territory. The activities may have a negative effect on their own environment. Actually, this is rooted in the principle of permanent severity over natural resources as formulated in various resolution of UN General Assembly. In 1962, one of the

⁶⁴ W.C. Clark, *A Transition towards Sustainability* (2001Symposium: Environment 2000 - New Issues for a New Century, Sustainable Science for a Sustainable Environment, 2001) 2001, 27 Ecology L.Q 1021.

⁶⁵ Marie-Claire Cordonier Seggar & Asfaq Khalfan, *Sustainable development Law; Principle, practice & Prospects* (Oxford: Oxford University Press 2004) p111.

resolutions of the UN General Assembly includes “rights of peoples actions to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development of the well-being of the people of the states concerned.”⁶⁶ Sovereignty in this area has been accepted by the tribunals reflecting customary international law. In 1972, UNGA declared that “each country has the right to formulate, in accordance with its own national policies on the human environment,”⁶⁷ and the UN Resolution on Permanent Sovereignty over Natural Resources would “strongly reform ... the inalienable rights of states to permanent sovereignty over all their natural resources, on land within their international boundaries.”⁶⁸

The importance of permanent sovereignty over natural resources is reflected by some international agreement. For example, The 1971 Ramsar Convention, the 1983 International Tropical Agreement, 1992 Climate Change Convention and the 1992 Biodiversity Convention reaffirmed the importance of it. The Ramsar convention emphasized that the inclusion of national wetlands sites in its List of Wetland did “not prejudice the exclusive sovereign rights of ... the party in whose territory the wetland situated.”⁶⁹ International Tropical Timber Agreement recalled “the sovereign of producing members over their natural resources.” The preamble to the 1992 Climate Change Convention reaffirmed “the principle of sovereignty of states in international co-operation to address climate change.” And the 1992 Biodiversity Convention more specifically reaffirmed that “states have sovereign rights...over their natural resources” and that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”⁷⁰

Nevertheless, as early the 1970s, limit to the application of the principle of sovereignty over natural resources emerged as the international community recognized the need for co-operation for sustainable development. Both protection of the environment, and respect for universal human rights, emerged as limits to sovereignty. Consequently, the second element of the principle of permanent

⁶⁶ UNGA Res 1803, UN GAOR, 17a sess, supp. No 17

⁶⁷ UNGA Res. 2849, UN GAOR 26th Sess., UN Doc. A/RES/2849 (1972)

⁶⁸ UNGA Res. 3171, UN GAOR 28th Sess., Supp. No. 30, at 52, UN Doc. A/9400 (1973)

⁶⁹ Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, 2 Feb 1971, TIAS No 11, 084, 996 UNTS 245, Art 2(3) [hereinafter Ramsar Convention]

⁷⁰ Biodiversity Convention, Article 15. Access to Genetic Resources, Source: <http://www.cbd.int/convention/articles.shtml?a=cbd-15>

sovereignty over natural resources reflects the view that states are subject to social and environmental limits in the exercise of their rights. Beyond its specific relevance in sustainable development law, it has also been persuasively demonstrated that the responsibility not to cause damage to the environment of the other states or of areas beyond national jurisdiction has been accepted as an obligation by all states, a central tenet of international environmental law.⁷¹

Nicholas Schrijver commented that the rights of states in international law under the principle of permanent sovereignty over natural resources, bound as they are by the other conditions, imply the following duties:

- 1) To ensure that the people (including indigenous peoples and future generation), benefit from the exploitation of resources and the resulting national development
- 2) To have due care for the environment, which incorporate the customary obligation to prevent harm to areas beyond national jurisdiction, as well as the nascent responsibility to manage natural resources to ensure sustainable production and consumption.⁷²

The responsibility of states not to cause damage in areas outside their jurisdiction is related to the obligation of all states to protect within their territory the rights of other states, in particular to integrity and inviolability in peace and war. Most scholars have accepted this formulation as a rule of customary international law. Consistent State practice and *opinion juris* are difficult to discern. Legal analysis is confounded by the many different formulations and contexts in which the principle is used. While there are relatively few claims brought by states relying upon this principle, there are many treaties and “soft law” declarations which do reflect the rule in various formations, related to respect for the territory, heritage, environment and natural resources of other states. This principle may have originated as one of the principles of good neighborliness in international law.

The development of the second element of the principle, an obligation not to damage the territory or natural resources of other states can also be traced to several early

⁷¹ P. Sands, *Principle of International Environmental Law*, 2nd edition (New York: Cambridge University Press, 2003) see also Marie-Claire Cordonier Seggar and Ashfaq Khalfan, *Sustainable Development Law: Practice, Practice & Prospects* (New York: Oxford University Press, 2004) p 112.

⁷² N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (New York: Cambridge University Press 1997) pp 390-392.

treaties such as the 1951 international Plant Protection Convention, the 1963 Nuclear Test Ban Treaty and the 1968 African Conservation Convention.

The principle has been affirmed in many General Assembly resolutions and acts of other international organizations. The principle 21 of Stockholm Declaration is endorsed by the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe⁷³ Principle 3 of the 1978 UN Draft Principle, which requires states to ensure that” activities within their jurisdiction or control do not cause damage to the natural system located within their other states or in areas beyond the limits of national jurisdiction”,⁷⁴ and 1982 World Charter for Nature declares “the need to safeguard and conserve nature in areas beyond national jurisdiction.”

The second element of this principle appears in treaties such as the 1978 Amazonian Treaty, the 1981 Lima Convention and the 1982 UNCLOS. The 1978 Amazonian Treaty declared that exclusive use and utilization of natural resources within their respective territories is right inherent in the sovereignty of each state and that “the exercise of this right shall not be subject to any restrictions other than those arising from international law.” The Lima Convention requires activities to be conducted so that “they do not cause damage by pollution to others or to their environment and that pollution arising from incidents or activities under their jurisdiction or control does not, as far as possible, spread beyond the areas where they exercise sovereignty and jurisdiction.” the 1985 ASEAN Convention also recognizes the second element of the principle 21 as a “generally accepted principle of international law.”⁷⁵

N. Schrijver have observed that the support given to a principle on sustainable use of trans-boundary natural resources by states and other members of the international community over the past twenty years establishes a compelling basis for the view that it now reflects a general rule of customary international law.⁷⁶ As shown in chapter

⁷³ Helsinki Final Act, 14 Internal LM (1975), 1292; 1 Aug. 1975 and source: <http://www.hri.org/docs/Helsinki75.html>

⁷⁴ UNEF Draft Principle of Conduct in the field of the Environmental of Guidance of States in Conservation and Harmonious Utilization of Natural Resources shared by Two or More states, UN Doc. UNEP/1G12/12 (1978), 17 ILM 1097, 1099 (1978)

⁷⁵ Article 20 of the Association of South East Asian Nations (ASEAN) Agreement on the Convention of Nature and Natural Resources (1985), 12 Environmental Policy and Law p 64, 68

⁷⁶ N. Schrijver, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties* (New York: Cambridge University Press 1997)

IV in the 2002 World Summit on Sustainable Development Johannesburg Plan of Implementation, the protection and management of the natural resource base of economic and social development is priority as a focus of international sustainable development law. It in fact constitutes legal limits on the right of states in respect of activity under their jurisdiction.⁷⁷

3) The Principle of Equity and the Eradication of Poverty

The Chapter IX of the Charter of United Nations is the roots of the principle of equity and the eradication of poverty, where the UN has the role of promoting higher standards of living, full employment, conditions of economic and social progress and development, respects for human rights, among others.⁷⁸ Principle of 5 the Rio Declaration recognized the indispensable role of poverty alleviation in achieving sustainable development.⁷⁹ The imperative of the eradication of hunger and poverty was given key importance in Agenda 21.⁸⁰

One of key of component of the principle of equity of the concept of intergenerational equity, which is defined as “that principle of ordering of the community of mankind which will make it possible for every generation, by virtue of its own effort and responsibility to secure a proportionate share in the common good of the human species.”⁸¹ Such concern that has emerged in the context of future generations in particular, as noted in the Brundtland Report:

“Many present’s effort and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable - in both the rich and poor nations. They draw too heavily, too quickly, on already overdrawn environmental resources accounts to be affordable far into the future without bankrupting those accounts... We act as e do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions. But results of the present profligacy are rapidly

⁷⁷ L. B Sohn, the Stockholm Declaration on the Human *Environment*, 1973, Harvard International Law Journal 423, p 485.

⁷⁸ *Chapter IX of the Charter of United Nations*, (UN: United Nations Departments of Public information, 2006)

⁷⁹ Principle 5 of the Rio Declaration, Rio Declaration on Environment and Development, A/CONF.151/26, Rio de Janeiro (Rio de Janeiro,UNCED,1992).

⁸⁰ See Agenda 21, supra note 43, chapter 3 ((Rio de Janeiro,UNCED,1992).

⁸¹ E. Aguis, *Obligations of justice Towards Futures Generations: A Revolution on Social and Legal Thought* in E. Aguis, ed , *Future Generations and International Law*(London: Earthscan Publications 1998), p 10.

closing the options for future generations.⁸²

Furthermore, the Brundtland Report observed:

“future generation are disadvantage which respect to the present generation because they can inherit an impoverished quality of life ... Future generation are disadvantaged because they are mute, have no representatives among the present generation. Consequently, their interests are often neglected in present socio-economic and political planning. They cannot plead or bargain for reciprocal treatment since they have no voice and nothing they do will affect the current situation.”⁸³

The principle suggests that just as these resources have been handed over from past generations, the present generation has no obligation to transmit them in good and even enhanced conditions to prosperity.⁸⁴ Intergenerational equity, as employed in the current international instrument, called for States to “ensure a just allocation in utilization of resources between past, present and future generation.” It requires attaining a balance between meeting the consumptive demands of existing societies and ensuring resources are available to meet the needs of future generations.⁸⁵

Schachter has suggested that intra-generations equity had become a de facto legal norm for developing countries and generally for many industrialized countries:

What is striking is not so much its espousal by the large majority of poor and handicapped countries but that the governments on the other side, to whom the demands for resources are addressed, have also by and large agreed that the need is a legitimate and sufficient ground for preferential distribution... It is undeniable that the fulfillment of the needs of the poor and disadvantages countries has been recognized as a normative principle which is central to the idea of equity and distributive justice.⁸⁶

The WCED characterized sustainable development in inherently intergenerational terms that distinguished it from other previous types of development that focused

⁸² *Our Common Future*, United Nations Report, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Co-operation: Environment, 1987, source: <http://www.un-documents.net/wced-ocf.htm>.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See O. Schachter, *Sharing the World's Resources* (Bangalore: Allied 1977), pp 11-12, See also E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and International Enquiry* (New York: Transnational Publishers, 1989); and T.M Franck, *Fairness in International Law and Institution* (US: Oxford University Press, 1995).

⁸⁶ Ibid

merely on economic growth.⁸⁷ Edith Brown Weiss argues that, the “notion that future generation have rights to inherit a robust environmental provides a solid normative underpinning for environmentally sustainable development might depend entirely on a sense of nobles oblige of the present generation.”⁸⁸ It has realized that some kind of responsibility towards exists. The preamble of the UN Charter states that “to save succeeding generations from the scourge of war”. And 1946 International Convention for the Regulation of Whaling recognized the” interest if the nations of the world in safeguarding for future generation s the great natural resources represented by the whale stock”.⁸⁹ The 1992 Convention on the protection and Use of Tran-boundary Watercourses and International Lake also states “water resources shall be managed so that the needs of the present generations to meet their needs”.⁹⁰ The Treaty on Good Neighborly Relations and Friendly Cooperation between the Republic of Hungary and the Slovak Republic stated at Article 9 that:

the contracting parties motivated by their interest concerning care for the natural environmental and preservation of acceptable living conditions for future generations, shall cooperate in environmental and nature protection, aiming at preventing and reducing environmental pollution, especially as regards trans-frontier pollution.

The principle 3 of Rio Declaration provided that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”. The IUCN Draft International Covenant on Environment and Development provides that “inter-generational and intra-generational responsibility, as well as solidarity and cooperation among the peoples of the Earth are necessary to overcome the obstacles of sustainable development.” and that “freedom of action of each generation in regard to the environment is qualified by the needs of future generation.”⁹¹ We can find this principle in soft law declarations. Article 3 of the

⁸⁷ *Our Common Future*, United Nations Report, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Co-operation: Environment, 1987, p 8, 43, 47, and pp156-157, source: <http://www.un-documents.net/wced-ocf.htm>.

⁸⁸ E. Brown Weiss, *Environmentally Sustainable Competitiveness: A Comment* (1993) ,102 Yale Law of Journal 2123.

⁸⁹ *International Convention for the Regulation of Whaling*, Washington, 2 Dec, 1946, Source: <http://www.iwcoffice.org/commission/convention.htm#convention>

⁹⁰ *Convention on the protection and Use of Tranboundary Watercourses and International Lake*, 17 March 1992, 31 ILM1312 and see at <http://www.unece.org/env/water/pdf/watercon.pdf>

⁹¹ *IUCN Draft international Covenant on Environment and Development*, (Gland, Switzerland, International Union for Conservation of Nature and Natural Resources, 1995,2000, 2004 and see Environmental Policy and Law Paper No 31 Rev. 2, source: http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf

United Nations Framework Convention on Climate Change states that: “parties should protect the climate system for the benefit of present and future generations of humankind, on basis of equity and in accordance with their common but differentiated responsibility.”⁹² Principle 4 of the Draft Principles on Human Rights and the Environment recognized the right to an environment “adequate to meet equitably the need of present generation ... that does not impair the right of future generations to meet equitably their needs.”⁹³

In the Maritime Delimitation in Area between Greenland and Jan Mayen (Denmark v. Norway), Judge Weeramantry referred to intergenerational equity and specially to “the concept of wise stewardship of natural resources ... and their conservation for the benefit of future generations.” It is worthy that intergeneration as legal norm has been included in the case law of the international Court of Justice, albeit in separate and dissenting opinions, such as those provided by Judge Weeramantry in the case of Denmark v. Norway, are useful in offering alternative interpretations in the subject matter and contribute to what many regard as the ICJ’s role in developing and clarifying international law in controversial issues.⁹⁴

4) The Principle of Common but Differentiated Responsibility

The principle of common but differentiated responsibility evolved from the notion the ‘common heritage of mankind’ and is a manifestation of general principle of equity in international law.⁹⁵ This principle recognizes historical differences in the contributions of developed and developing States to global environmental problems, and addresses their respective economic and technical capacities to tackle these problems, despite their common responsibilities. Important differences exist between the stated responsibilities of developed and developing countries.⁹⁶

⁹² *United Nations Framework Convention on Climate Change*, 9 May 1992, Article 3(1) 31 International Law Materials 849

⁹³ UNCHR, *Principle 4 of the Draft Principles on Human Rights and the Environment* (included in the 1994 Special Rapporteur’s Report to the UNCHR)

⁹⁴ See H. Lauterpacht, *the Development of International law by the International Court* (London Stevens and Dons limited, 1958)

⁹⁵ P. Sands, *Principle of International Environmental Law: Frameworks, Standards and Implementation* 2nd edition (New York: Cambridge University press, 2003), p 217.

⁹⁶ J.C Dernbach, *Sustainable Development as a Framework for National Governance*, 49 Case W. Res, 1998.

The Rio Declaration provides:

In view of different contribution to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environmental and of the technologies and financial resources they command.⁹⁷

This principle appears in the Johannesburg Plan of Implementation and exists in Climate Change Convention, one of instance; Article 3(a) of this convention provides that “parties should protect the climate system on the basis of equality and in accordance with their common but differentiated responsibility and respective capability.”

The principle includes two fundamental concerns. First concern is the common responsibility of the states for the protection of the environment at the national, regional and global levels. The second concern is the need to take into account the different circumstances, particularly in relation to each state’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat.⁹⁸

5) Precaution Regarding Human Health, Natural Resources and Ecosystems

The concept is enshrined in Article 15 of the 1992 Rio Declaration on Environment and Development, where the most widely accepted elaboration of the concept of precaution is found. It states: “in order to protect the environment, the precautionary approach shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”⁹⁹

The precautionary was first explicitly introduced into international negotiation in the

⁹⁷ *Principle 7 of the Rio Declaration, Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Rio de Janeiro, June 1992.*

⁹⁸ Maire Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principle, Practice and Prospects* (New York: Oxford University Press, 2004), p 133.

⁹⁹ Article 15 of the 1992 Rio Declaration on Environment and Development, (Brazil, Rio de Janeiro : UNCED,1992)

North Sea in Ministerial Conference. As early as 1980, the German Council of Experts in Environmental Matters found that the principle was a “requirement for a successful environmental policy for the north Sea ecosystem.”¹⁰⁰ The principle was included in the Final Declaration of the Second International North Sea Conference in 1987, where it was noted that “Accepting that, in order to protect the North Sea from possible damaging in necessary which may require action to control inputs of such substances even before a causal link has been established by absolute clear scientific evidence.”¹⁰¹ In the third North Sea Conference, participants agreed to “continue to apply the Precautionary Principle which is to take action to avoid potentially damaging impacts of substances that are persistent, toxic, and liable to bio-accumulate even where there is no scientific evidences to prove a causal link between emissions and effects.”¹⁰²

At the Ninth Meeting of the Conference of the Parties to CITES (Convention on the International Trade in Endangered Species of Wild Flora and Fauna), states adopted a resolution to in-cooperate the precautionary principle in the procedure for listing species in need of protection. The resolution reads:

Recognizing that virtue of the precautionary principle, in case of uncertainty, the parties shall act in the best interest of the conservation of the species when considering proposals for amendment of Appendices I and II; ... resolve that when considering any proposal to amend Appendices I and II that Parties shall apply the precautionary principle so that scientific uncertainty should not be used as a reason for failing to act in the best interest of the conservation of the species.¹⁰³

The Vienna Convention and its Montreal Protocol also provide important examples of the precautionary principle and states “determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basic of developments in scientific knowledge, taking into account technical and economic

¹⁰⁰ D. Freestone and E. Hey, *The Precautionary Principle and International Law : the Challenge of Implementation* (The Hague: Kluwer Law International , 1996)

¹⁰¹ Second International Conference on the Protection of the North Sea: Ministerial Declaration Calling for Reduction of Pollution, 25 Nov. 1987, 27 ILM 835 (1988) Article VII.

¹⁰² *Declaration of the Third International Conference on Protection of the North Sea*, 1-8 Mar. 1990, Year book of International Environmental Law 658, pp 663-73.

¹⁰³ *Resolution of the Conference of the Parties, Criteria for Amendment of Appendices I and II*, Ninth Meeting of the Conference of the Parties, Fort Lauderdale (USA), 7-19 Nov. 1994

consideration.”¹⁰⁴

UNCED significantly furthered the consensus around the precautionary principle. The precautionary principle was adapted to the Principle 15 of the Rio Declaration and invoked in the Biodiversity Convention and the Climate Change Convention, as well as Agenda 21.

The precautionary approach has also appeared in regional declaration and treaties; 1990 Bergen Ministerial Declaration on Sustainable Development in the Economic Commission for European Regions stated that

“in order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measure must anticipate, prevent and attack the cause of environmental degradation where there are threats of serious of irreversible damage. Lack of full scientific certainty should not be used as a reason for postponing measure to prevent environmental degradation.”

1991 Ministerial Conference on the Environment of the United Nations Economics and Social Commission for Asia and the Pacific also invoked the principle: “in order to achieve sustainable development, policies must be based on the precautionary principle.”¹⁰⁵ Since the early 1990s many European Regional agreements have also included the precautionary principle, including the ECE Transboundary Watercourses Convention, the Baltic Sea Convention and North-East Atlantic Convention etc.

On the basis of the after-mentioned evidence, some claim that there is sufficient evidence of state practice to justify the conclusion that the principle, as elaborated in the Rio Declaration, the Climate Change Convention and the Biodiversity Convention, is receiving broad support to allow a good argument to be made that it reflects and emerging principle of customary international law.¹⁰⁶

6) The Principle of Public Participation and Access to information and justice

¹⁰⁴ *Montreal Protocol on Substances that Deplete the ozone layer*, 16 Sept. 1987, 26 ILM 154

¹⁰⁵ *Report of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) Ministerial Meeting in the Environment, Bangkok, Declaration on Environmentally sound and Sustainable Development in Asia and the Pacific (1990)*, para. 19.

¹⁰⁶ P. Sands, *Principle of International Environmental Law: Frameworks, Standards and Implementation* 2nd edition (New York: Cambridge University press, 2003), p 112.

The role of public participation as a necessary means for achieving sustainable development was clearly identified in the Brundtland Report, which found that:

in the specific context of the development and environment crisis [...], which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development require: [...] a political system these secure effective citizen participation in decision-making.

The Brundtland Commission emphasized that effective participation is necessary and referred to participation of specific groups of public, namely indigenous people and NGOs. The preamble of the Rio Declaration calls for the establishment of a new and equitable global partnership which will be realized through new levels of cooperation among states and non-states actors. Agenda 21 provide that “one of the fundamental prerequisites for the achievement of sustainable development is board participation in decision-making.” Agenda 21 recommend that governmental process “facilitate the involvement of concerned individual, groups and organization in decision-making at all levels.

The Johannesburg Summit strongly reconfirmed this principle at all levels. It reflects upon important aspect of environmental decision-making as well as provisions on the importance of public participation. Legal scholars have discussed participation by affected groups in areas of environment and development decision-making as a right.¹⁰⁷

The right to participation is treated as a means for facilitating the realizations of other human right in the 1994 Draft principles on Human Rights and the Environment. It maintains that:

“all persons have the right to active, free and meaningful participation in planning and decision-making and processes that may have an impact on the environment and development. This includes a right to a prior assessment of the environmental, developmental and human rights consequence of proposed actions.” The IUCN Draft Covenant on Environment and development also refers to the right to public participation as a facilitating right, stating the” all persons [...] have [...] the right to participate in relevant decision-making processes.”¹⁰⁸

¹⁰⁷ See Kiss and D. Shelton, *International Environmental Law*, 2nd ed. (New York:Transnational Publishers, 1994), p 67.

¹⁰⁸ Marie-Clarie Cordonier Seggar and Ashfaq, *Sustainable Development Law; Principles, Practice & Page 51 of 108*

7) The Principle of Good governance

The use of term “governance” is attributed to the World Bank. In 1989 World Development Report, the president of the bank stated that “private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance.”¹⁰⁹ In 1992, the World Bank published a report entitled Governance and Development, which in many respects represented the promulgation of good governance as a major variable in economic development. It discussed in more detail some of the signposts of “good governance” as perceived by the institution. These included public sector management, legal framework, accountability and transparency.

The World Bank described in 1994 some of its experiences with a team working in concrete situation. In that material, the World Bank indicated its sensitivity to the political dimensions of governance and its restraint in that regard. It did, however, confirm the consultative role it must play with governments and other funding agencies in “governance matters”. Finally, in an acknowledgement of the critical role the states plays in economic development, the World Bank in 1997 announced that an effective states apparatus, combined with “good governance” is a necessary condition for development.¹¹⁰

A number of other development-oriented institutions have paid attention to the issue of governance. For instance, in 1997, the International Monetary Fund (IMF) decided to incorporate governance as a criterion for assistance. However, given its preoccupation with macroeconomic management issues, the IMF has been less conspicuous in its interest in “good governance”. Nevertheless, it proposed to coordinate its concerns on governance with other bilateral and multilateral funding sources¹¹¹. Furthermore, the United Nations Development Program (UNDP) has started that “it is only with good governance that we can find solution to poverty,

Prospects, (New York: Oxford University Press, 2004), p158.

¹⁰⁹ G. Hyden and M. Bratton, *Governance and Politics in Africa* (Boulder: Lynne Rienner Publishers, 1993) p7.

¹¹⁰ See World Bank, *The State in a Changing World* (Washington: World Bank, 1997), source: http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/1997/06/01/000009265_3980217141148/Rendered/PDF/multi0page.pdf

¹¹¹ See *International Monetary Fund, Good Governance: the IMF's Role* (Washington: IMF, 1997)

inequity and in security”.¹¹² The Organization for Economic Co-operation and Development (OECD) also started its preparedness to rely on governance as a test for assistance to poor countries. The African Development Bank, the Asian Development Bank, bilateral development agencies such as British Overseas Development Agency, the Danish Development Agency, the United States Development Agency and others, have all, since the late 1980s, stressed the importance of governance as a critical factor in development.¹¹³

8) General Observations

The principle of international law related to sustainable development, as proposed by the International Law Association in the 2002 New Delhi Declaration provides basis for some of the decisions of courts and tribunals and the Johannesburg outcome itself. They represent a useful first step in analysis. However, in most cases, there are as yet emerging principles of international law. Further study, precise analysis of their normative (rule-setting) formulations and above all, evidence of acceptance as a binding custom by states, are still required to make a convincing case for their normative, binding character. Principles such as integration, precaution, equity and poverty, sustainable use of natural resources, common differentiated responsibility, public participation and good governance, along with others that may be proposed, appear with increasing frequency and operational relevance in many social, economic and environmental regimes. It will be important, over the next decades, to monitor their development, operationalization and recognition by states as sustainable development law become better defined and implemented.¹¹⁴

2. Application of the Principles

1) The Principle of Integration and Interrelationship

The integration and interrelationship principle obviously was a difficult conceptual aspect, and is only applied to extremely specific to the context and purpose of

¹¹² United Nations Development Program, Governance Policy Paper (New York: UNDP, 1997), p1.

¹¹³ See T.M Frank, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995).

¹¹⁴ United Nations Development Program, Governance Policy Paper (New York: UNDP, 1997) at 171

international instruments or commitments. So the degree to which international regimes integrate economic, social and environment have been slowed. Marie- Claire discussed that four degrees of integration can be identified, as following; separate sphere, parallel yet independent, partially integrated sphere and highly integrated new regime.¹¹⁵

According to her, at the first stage, the international economic, social and environmental regime is not held to have particular significance for the other sustainable development priorities and there is only a little pressure to integrate the three spheres of economic, social and environmental law. At second degree of integration, a core agreement in one field of law exists in parallel with additional, complementary accords in other areas of law. This parallel yet independent relationship exists in order to allow the whole package to proceed on a policy level, but inter-linkages between the elements can be weak or almost non-existent.¹¹⁶ And next degrees, the instruments emerging in field of law are slowly taken into account and integrated social, economic and environmental priorities as a result of changing the views of developing countries and developed countries. A relevant instance of this is the integration of environment and health issues into the trade law¹¹⁷. Finally, the integrated sustainable development law treaties and instruments are emerged, which included consideration of social, economic, and environmental aspects of problems, often in the negotiation process, the provisions of the final accord, and the decision of their dispute settlement.

The 1994 United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, which was an effort to slow down the advance of deserts resulting from environmental and economic pressures. The 1992 Convention on Biological Diversity contains provisions regulating trade in genetically modified products for social and environmental objectives. And the last example is the 2001 International Plant Genetic Resources Treaty, which ensure

¹¹⁵ Marie-Clair Conrondonier Seggar and Ashfaq Kalfan, *Sustainable Development Law* (2004) at p. 106

¹¹⁶ For example, environment and labour agreement can run parallel to trade liberalization agreements, as does the *North America Free Trade Agreement* (NAFTA) and its North American Commission for Environmental Cooperation and North American labour Cooperation Agreement as well as the Environmental Side Agreements to the Canada-Chile and Canada-Costa Rica Free Trade Accords.

¹¹⁷ See recent decisions of WTO Appellate Body as such Shrimp-Turtle and EC-Measures Concerning Meat and Meat Products cases

sustainable use of fishery stock and protection of marine environment.

2) The Principle of Sustainable Use of Natural Resources

In the tension of development and environmental protection, the term of sustainable use of natural resources extend the two distinct concepts represented by Principle 21 of Stockholm Declaration and Principle 2 of Rio Declaration. The concepts are “common heritage of mankind” and “Common interest of mankind”.

The concept of “Common heritage of mankind” has been applied in attempts to develop an international regulatory regime for resources in global commons. However, the term has not been accepted. As there is a growing consensus that various elements of the planet are ecologically interdependent, the compromise reached with respect to the Biodiversity Conservation and the Climate Change Convention is that these treaties address common “concern” of humankind.

The Biodiversity Convention explicitly proclaims the common concern of humanity for these resources by stating “the importance of biological diversity for evolution and for maintaining life sustainable system in the biosphere” and by “affirming that the conservation of biological diversity is a common concern of mankind”. The Biodiversity Convention’ preamble affirms that “the conservation of biological diversity is a common concern of humankind” and declares that the contracting parties are determined to conserve and sustainably use biodiversity for the benefit of present and future generations. Likewise, the Climate Change Convention’ preamble acknowledges that “change in the Earth’s climate and its adverse effects are a common concern of humankind”.

The term “common interest of mankind” has also have used. This term appeared in international treaties concerning the exploitation of natural resources. The Convention for Regulating of Whaling recognize in its preamble the “interest of the world in safeguarding for future generations the great natural resources represented by the whale stocks” and that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible.¹¹⁸

¹¹⁸ International Convention for the Regulation of whaling, 2 Dec. 1946, 62 Stat. 1716, 161 UNTS 72
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The 1952 Tokyo Convention for High Seas Fisheries of the North Pacific also expresses the conviction of the parties that it will best serve the common interest of mankind, as well as the interests of the contracting parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean.¹¹⁹ The 1959 Antarctic Treaty's preamble affirmed that "it is the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes". The most recent addition to the Antarctic Treaty achieved full recognition of common interest. Its preamble expresses the conviction that development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole and for this purpose it denominates Antarctica as a nature reserve, devoted to peace and science.¹²⁰

The principle of sustainable use of natural resources demonstrates an integrative potential—it weaves together economic, environmental and social concerns by considering between "concern" or "interest" for management of resources that extend beyond the territory of single states, based on the obligation not to damage their interests.¹²¹

3) The principle of equity and the eradication of poverty (inter-generational equity)

In the programme of Action of the World Summit for Social Development, states identified the needs relating to poverty eradication, and committed to a programme to resolve these needs. The Millennium Declaration commits to halve by 2015 the proportion of the world's people whose income is less than a dollar a day, who suffer hunger and do not have access to clean water. The Monterrey Consensus on Financing for Development sets out a number of objectives relating to poverty eradication, and indicates their importance in the areas of the mobilization of domestic financial resources, foreign investment, trade, international cooperation, external debt and the

¹¹⁹ Tokyo Convention for the High Seas Fisheries of the north Pacific Oceans, 9 May 1952, Emu. T 52:35

¹²⁰ UN General Assembly Resolution on the Question of Antarctica, UNGA Res. 46/41 UN GAOR, 46th Sess. No 49 UN Doc. A/46/49 (1992)

¹²¹ M. C Cordonier Segger and Ashf Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) , p.122.

overall monetary, financial and trading system.¹²² The principle is primarily related to poverty and intra-generational equity.

While an application of an intra-generational equity is problematic, it is not impossible. Regular references to the rights and interests of “present and future generations” in cotemporary international legal instruments dealing with sustainable development suggest that international community has come to recognize the use of natural resources in an inter-temporal context. The reference also indicated that generational equity has become integral to international law dealing to environmental protection, resources utilization and socio-economic development.¹²³ In the both “intra-”and “inter-” generation dimension, equity constitutes a bridge for recognized mutual interests between environment protection, socio-economic development and human right law. This evolving complementarity is a new phenomenon, as suggested by proponents of environmental justice in general and indigenous peoples’ rights in particular. While the concern with regard to interest of indigenous community emerges, the human right movement has been closer to environmental and development communities. The interdependent relationship between intergenerational equity and sustainable development of natural resources is highlighted in situation involving protection of ecosystems.¹²⁴In addition to the inter-states dimension, international equity encompasses what is referred to as “international justice” or “intra-generational equity”.

The principle of “inter- and intra-generational equity” is an useful tool for integrating human rights with economic and environmental priorities. As with the other principles of international law on sustainable development, recognition of a particular principle in treaty law and their regimes does not necessary mean that the principles has been recognized and it is formally binding in customary law. States are increasingly recognizing the importance of equitable and to eradicate poverty in international law on sustainable development, which found in many ratified international human right,

¹²² *Monetary Consensus on Financing for Development*, 22 March 2002, UN Doc, A/A 257/32 para1

¹²³ G.F Maggio, *Inter/intra-Generational equity; Current Applicants under International Law for Promoting the Sustainable Development of Natural Resources*, 1997, 4 Buffalo Environmental Law Journal, p 161.

¹²⁴ For example, Amazonian Communities in US federal courts; the case of the effects of pollution by domestic and multinational oil companies in indigenous tribal areas in Ecuador’s biologically rich Amazon region.

economic, environmental treaty as well as declaration as such the 1992 Rio Declaration. And the principle can be recognized as a principle that guides a significant number of international treaties related to sustainable development and a potential future customary law.

4) The principle of common but differentiated responsibility

According to Marie-Claire Cordonier Seggar, the application of this principle has at least two consequences. First, it entitles and may require all concerned states to participate in international response measures aimed at addressing environmental problems. Second, it leads to environmental standards that impose differing obligations on states.¹²⁵ Despite its recent emergence in the current formulation, the principle of common but differentiated responsibility find its roots prior to UNCED and is supported by state practice at the regional and global levels.

Common responsibility describes the shared responsibility of two or more states towards the protection of a particular environmental resource. Differentiated responsibility of the states for the protection of the environment is widely accepted in treaty and other states practices. It translates into differentiated environmental standards set on the basis of a range of factors, including special needs and circumstances, future economic development of countries, and historic contributions to the creation of an environmental problem.

The 1972 Stockholm Declaration and the 1974 Charter of Economic rights and Duties of States express the principle. In Rio Declaration, the international community agreed that “environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply”, that “the special situation of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority”, and that standards used by some countries “ may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”¹²⁶ This is reflected

¹²⁵ Marie-Claire Cordonier Seggar & Ashfaq Kalfan, *Sustainable Development Law; Principles, Practices & prospects* (New York: Oxford University Press 2004), p 133.

¹²⁶ See Rio Declaration, Principle 11 and 6, Rio Declaration on Environment and Development, Page 58 of 108

in many treaties, for example, the 1972 London Convention, Article 11(3) of the 1976 Barcelona Convention and the preamble of UNCLOS.

The principle of differentiated responsibility has also been applied to treaties and other legal instruments for developed countries; the 1988 EC Large Combustion Directive, the 1991 VOC Protocol, and Maastricht Treaty. Differential responsibility promotes substantive equality between developing countries and developed states within a regime. The aim is to ensure that developing countries can come into compliance with particular legal rules over time thereby strengthening the regime in the long term. Recognition of common but differentiated responsibilities strengthens the integrative potential of international law relating to sustainable development by addressing the balance between global environmental problems and economic development.¹²⁷ Therefore it is closely related to poverty eradication. Developed countries have a role and take the lead on environmental problems. In Agenda 21 also reaffirmed that developed countries contribute official development assistance such as transferring environmental technologies to developing countries.¹²⁸

The principle of common but differentiated responsibility is referenced six different times in the Johannesburg Plan of Implementation (JPOI), emphasizing its importance in the commitments of the states. It is raised specially in the introduction, where governments agree to “undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including the principle of common but differentiated responsibilities as set out in Principle 7 of the Rio Declaration on Environment and Development.”¹²⁹ The principle emerged strengthened, broadened and invigorated by the WSSD in several ways. In JPOI, most references to the Rio Principle singled out the principle of common but differentiated

A/CONF.151/26 (Vol. I), Rio de Janeiro: see also Climate Change Convention, preamble

¹²⁷ S. R. Chowhury. *Common but differentiated State Responsibility in International Environmental Law: From Stockholm to Rio* in K. Ginther et al., *Sustainable Development and Good Governance* (The Hague: Martinus Nijhoff, 1995), p. 332.

¹²⁸ *Agenda 21: Programme of Action for Sustainable Development*, para. 33.13.33. Report of the UNCED, (1992) UN Doc A/CONF.151/26 Rev.1 (1992) 31 *International Law Materials* 874 and see source: UNEP website, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52>.

¹²⁹ M.C. Cordonier Segger, A. Khalafan, M. Gehring & M. Toering, *Prospects for Principles of International Sustainable Development Law after Johannesburg: Common but Differentiated Responsibilities, Precaution and Participation* (2003) *Review of European Community and International Environmental Law* 12:1.

responsibilities and it was also specifically mentioned as a principle to guide efforts relating to the enhancement of international cooperation, trans-boundary air pollution, and energy and climate change.

Even if the Principle 7 begins by mentioning the need to protect Earth ecosystem as well as differential contributions to global environmental degradation, it indicates responsibilities for developed countries related to the international pursuit of sustainable development, which includes non-environmental goals such as equity, poverty eradication and development. M.C. Cordoiner Segger considered the interpretation of the principle as justified for two reasons. First, the UNCED recognized that the environment cannot be protected in isolation from its social and economic contexts. Second, although the principle is grounded on the greater contribution of developed countries to global environmental degradation, environmental degradation often has negative social and economic effects. And remedial measures also need to be taken in each of the three pillars of sustainable development.

After Johannesburg, the challenge is to ensure that the principle of common but differentiated responsibilities is applied in a concrete manner in sustainable development decision-making. One opportunity provided in a draft of the JPOI required the UNCSD to consider modalities to operationalize the principle so as to enhance the capabilities of developing countries to implement Agenda 21 and the outcome of the WSSD. However consensus was not found on this proposal and it was removed in the final days. The WSSD signaled the relevance of the principle in a wide range of sustainable development issues. It is likely that negotiators and civil society organization will take greater account of the principle in future negotiations and decision-making in specialized treaty bodies.

The WSSD's application of the principle of common but differentiated responsibility to the sustainable development decision-making in general will play a great part in fostering coherence in the manner in which developed and developing countries divide responsibilities in the environment, economic and social regimes. The principle of common but differentiated responsibilities is not identical to similar principles in human rights, labour and trade regime.

Many developing countries have claimed that developed countries have greater responsibilities, on the basis of unequal benefits from the world economy or as compensation for the effects of colonialism. And certain countries have viewed international assistance obligation in human rights treaties as fulfilling such obligations. But developed countries have so far been unwilling to join in any international consensus on such interpretation. Given the reality of inter-sectoral concerns, as recognized by the WSSD, the principle for common but differentiated responsibilities should be used to interpret, and strengthen other corresponding principles of sustainable development law in situations of overlap or conflict between social, economic and environmental regimes.

5) Precaution Regarding human Health, Natural Resourcing and Ecosystem

The value of precaution lies in the assumption that natural systems are vulnerable, as opposed to being resilient or invulnerable, thereby giving the benefit of the doubt to environmental protection when there is scientific uncertainty. In its application, then, precaution shifts the burden of proof from those supporting natural systems to those supporting development.¹³⁰ The principle is premised on the preference of preventing pollution to subsequent remediation, the relevance of scientific data to governmental decision-making and the obligation to take precautionary measures that are in proportion to the potential damage.

Precaution is especially important for sustainable development because the carrying capacity of the global environment as well as regional ecosystem is mostly unknown or at least uncertain. Although it is generally agreed that the environment can tolerate a particular human activity or set of activities unless scientific information demonstrates otherwise. Because the quality of human life ultimately depends on these natural resources, we must be careful in protecting them. As such, the precautionary principle provides a useful tool to ensure that development trends do not have a detrimental effect on the environment, particularly those caused by

¹³⁰ B. Weintraub, *Science, International Environmental Regulation, and the Precautionary Principle, Setting Standards and Defining Terms*, (1992) 1 New York University Environmental Law journal, p. 173 , p 178.

unknown risks.¹³¹

Precaution is raised in the Johannesburg Plan of implementation, in Chapter X on Means of Implementation, as part of a commitment to improve “policy and decision-making at all levels through, inter alia, improved collaboration between natural and social scientists, and between scientists and policy maker.¹³²” and precaution is also raised in Johannesburg Plan of implementation in regard to the Agenda 21 commitment to sound management of chemicals and hazardous wastes. This commitment aims to achieve “the use and production of chemicals in ways that lead to the minimization of significant adverse effects in human right and the environment.” WSSD advanced acceptance of the principle in following three ways. First, states raised questions on how the legal concept of precaution has evolved since the 1992 UNCED. Precaution has developed further in specialized treaty regimes and priority areas of international action for sustainable development. In some fields, such as straddling fish stocks, it has clear relevance and utility. It is also relevant to issues such as human health in the context of chemical and hazard wastes management. In such fields, formulations of the principle should take into account the progress on its modalities since 1992. Secondly, application of developing countries becomes an issue. In the Plan of Implantation, States commit to “support developing countries in strengthening their capacity for the second management of chemicals and hazardous wastes by providing technical and financial assistance.”¹³³

For developing countries, slow progress at the WSSD on this issue was not about precaution itself. Indeed, several leading developing countries have deliberately incorporated precaution into their domestic law, or even into their constitutions, as recognizing the principle as useful legal tool.¹³⁴ Thirdly, precaution is a principle at the intersection of three areas of law, environmental, social and trade law, within the boarder rubric of international law for sustainable development. This intersection

¹³¹ G. Maggio and OJ Lynch, Human rights, Environment, and Economic Development: Existing and Emerging Standards in International law and Global Society(World Resources institute,1996) at 75

¹³² *Chapter X of JPOI*, Means of Implementation, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002)

¹³³ *Para 23 of JPOI, Changing Unsustainable Patterns of Consumption and Production*, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002)

¹³⁴ M. C. Cordonier Seggar and M.W Gehring , *Precaution in International Sustainable Development Law*. Centre for International Sustainable Development Law (CISDL) Legal Brief ,Aug 2002, found online at http://www.cisdsl.org/pdf/brief_precaution.pdf

holds the potential to reconcile sometime clashing interests for constructive, long-term solutions to challenging policy dilemmas. Governments could have gone further than what was agreed in Johannesburg. Development since Rio could have been underlined, and more specific guidelines of the application of precaution could have been detailed.

The WSSD reaffirmed the importance of precaution, in its 1992 Rio Declaration formulation at Principle 15. In most areas, including where environmental law intersects with international economic or social development law, this concept appears to be *lex ferenda*, a principle in the process of becoming international customary law, with persistent objectors properly on record. The debates at the Johannesburg Summit on precaution, which question the legal validity of the precautionary principle per se, became less relevant internationally, and may well foster and enhance implementation, because instead of focusing on abstract legal concepts, debates now consider how the principle actually works and can be applied in a transparent and fair way. In the future, the manner of application and implementation will be crucial to both its acceptance and utilization.¹³⁵

6) The Principle of Public Participation and Access to information and Justice

Since the UNCED, there has been widespread agreement in international legal agreement dealing with the environment and socio-economic development that active “participation” by affected groups is not only desirable but necessary if sustainable development objectives are to be met. These instruments reflect the emergence of three dimensions to the concept of “public participation”.

First, people should be accorded the opportunity to participate in official socio-economic development decision-making process and activities that directly affect and impact their lives and well-being. Second, in order to participate fully, the public must be provided with, or at least have access to, adequate information concerning the decision and activities of government. Agenda 21 recommends that governments ensure non-state actors access to information as necessary for effective participation.

¹³⁵ Marie-Claire Cordonier Seggar & Ashfaq Kalfan, *Sustainable Development Law: Principles, Practices & Prospects* (New York: Oxford University Press 2004), p 155.

By including diverse groups as necessary participation for achieving sustainable development, Agenda 21 and the other UNCED materials challenged longstanding assumptions regarding the role of government as the only legitimate player in developing and implementing international standards and legal rights and obligations. Recognizing a place for non-state actors in the drafting and amending of international legal instruments for environmental protection and sustainable development is one of the major developments to come out of the UNCED. Third, those whose rights are affected by state-decisions should have the right of access to justice.¹³⁶

The Johannesburg Declaration states that “countries recognize that sustainable development requires a long term perspective and broad-based participation in policy formulation, decision –making and implementation at all levels.”¹³⁷ They commit to “continue to work stable partnership with all major groups, respecting the independent, important roles of each of them.” In the JPOI, governments agreed to “ensure access, at international level, to environmental information and judicial and administrative processing in environmental matters, as well as public participation in decision-making.”¹³⁸ The principle 5, 7 and 11 of the Johannesburg Declaration concerns principles regarding poverty eradication, common but differentiated responsibilities and the need for standards to reflect specific contexts, particularly for developing countries.

There are commitments to ensure access to information and justice for public participation by taking into account the specific needs of different regions. The JPOI refer the public participation in areas such as poverty eradication which focuses on the participation of traditionally marginalized groups such as women and indigenous people¹³⁹. And at Chapter XI of JPOI on the Institutional Framework for Sustainable Development, there are provisions for the need to ensure the participation of civil society, major group, the public at different levels of sustainable development

¹³⁶ Marie-Claire Cordonier Seggar & Ashfaq Kalfan, *Sustainable Development Law; Principles, Practices & prospects* (New York: Oxford University Press 2004), at 163

¹³⁷ Para. 26 of *Johannesburg Declaration*, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002), p27.

¹³⁸ *Para.128 of JPOI*, Means of Implementation, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002), p76.

¹³⁹ *Ibid* at para 7

governance¹⁴⁰.

WSSD seeks to further develop concrete national and regional strategies to ensure public participation, access to information and justice in economics in transition, developing countries, and other areas. For example, a coalition of institutions led by the Center for International Sustainable Development Law, the International Development Law Organization and the International Law Association (Committee on International Law for Sustainable Development) launched the “International Law for Sustainable Development” partnership at WSSD.¹⁴¹

7) The Principle of Good Governance

There appear to be two approaches to current discussion on governance. It focuses on the good governance at domestic and international level. The JPOI states that “good governance within each country and at 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.”¹⁴²

The Chapter XI of JPOI is recognized the importance of good international governance and offer specific guidance to countries on a national level. At paragraph 162 and 163, it states:

¹⁴⁰ Ibid at para. 164, It affirms that “all countries should also do promote public participation, including through measures that provide access to information regarding legislation, regulations activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and development policy formulation and decision-making.”

¹⁴¹ The International Law for Sustainable Development partnership’s objectives are threefold. First, the partner will carry out legal research a capacity building in international sustainable development law to assist developing country government, Inter-Government Organizations, judges, parliaments, local communities and the media to effectively address inter-linked environmental, economic and social challenges. Second, they seek to produce a series of policy and educational publication on international sustainable development law, particularly to be used in training seminars and workshops, which shall be made widely accessible to scholars, decision-makers and civil society, in particular those in developing countries. Third, they aim to develop a user-friendly web-based legal resources centre, engaging developed and developing country jurists, to access, promote and implement integration of international social, economic, and environmental law. A network of developed and developing country sustainable development law faculties will support this legal resource centre.

¹⁴² *Para. 4 of JPOI, Political Declaration and Plan of Implementation* (Johannesburg: UN, 2002), p13.

“[c]ountries must 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”. And “all countries should 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 institution, including by providing necessary infrastructure and by promoting transparency, accountability and fair administrative and judicial institutions.”¹⁴³

It is one critical task in sustainable development law to support domestic implementation of global sustainable development principles and agreements. Consequently, the ‘good governance’ is essential for the adoption and promulgation of the principles of international law relating to sustainable development. But it remains to be seen whether “good governance” can be developed into a customary legal principle.

Conclusion

The emergence and application of general principles which included the principle of integration and interrelationship, the principle of sustainable use of natural resources, the principles of equity, the principle of common but differentiated responsibility, precaution principle, the principle of public participation and principle of good governance can be examined. Such principles of international law relating to sustainable development have been recently reflected in many international treaty instruments in the sphere of social, economic and environmental law. However, international community is addressing the challenging of implementation of sustainable development law. Especially, the challenging after WSSD will examine and analyze.

¹⁴³ *Para. 162 and 163 of JPOI, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002), pp86-87.*

Chapter 3
Challenge to Implementation of Sustainable Development Law

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Challenge to Implementation of Sustainable Development Law

Not much international law in the field of sustainable development is yet adequately implemented. There is need to overcome existing challenges and strengthen implementation of sustainable development law. There are two particularly important implementation challenges.¹⁴⁴

First, as the International Law Commission has expressed, there are general concerns about the risk of fragmentation of international law. This broader trend appears quite evident in the area of sustainable development law. As was recognized when negotiations for the JPOI were launched, there is a significant need to clarify, strengthen and enhance the international institutional architecture of sustainable development. International laws and policies have been designed to implement policy objectives in the three separate sphere of sustainable development- the economic, environmental and social- with insufficient attention to coherence or even co-ordination between them. As international regimes become more complex, and new institutions are constituted to implement obligations, states may even find that they have overlapping or conflicting obligations. This situation is most challenging for developing countries. Valuable resources, political will and capacity are squandered in the attempts to harmonize policies that were never meant to conflict. The challenge is about governance.

Second, while many treaties have been negotiated and ratified, there is still far too little implementation, enforcement, monitoring and compliance. Due in part to a lack of understanding of their modalities, as well as lack of political will for their use, cooperative instruments can become inefficient, cumbersome, or slow to deliver on commitments. Their nascent compliance and enforcement mechanisms can be perceived as ineffective or weak. This can lead treaties and institutions charged with sustainable development mandates to suffer lack of respect and credibility in international circles.

¹⁴⁴ M.C Cordonier Segger, *Significant developments in Sustainable Development and Governance : A Proposal*, Volume 28, Issues 1, Natural Resources Forum 28 (2004), p62-65.

This chapter will focus and analysis how addresses these challenges to implement sustainable development in the 2002 WSSD negotiations

Result of the WSSD

The 2002 JPOI sets in place a broadened institutional architecture for sustainable development to further implement Agenda 21 and the WSSD outcomes and also identify and address emerging sustainable development challenges. Institutions relating to sustainable development also have a role in implementing other internationally agreed development goals, including the objectives, which contained in the 2002 United Nations Millennium Declaration, the 2002 Monterrey Consensus on financing for Development and the relevant outcomes of other major UN conferences and international agreements since 1992.

The post WSSD international architecture for sustainable development is complex and multi-tiered. The JPOI sets out a strengthened and linked system of international bodies and organizations dealing with sustainable development. The framework of this newly-recognized sustainable development regime is shaped on three principle levels. An international regime, including the United Nations General Assembly, the United Nations Economic and Social Council (ECOSOC), and the United Nations Commission for Sustainable Development (UNSCD), and other agencies and international organizations, a regional regimes, which include the UN Regional Commissions and the other regional and sub-regional bodies, including the regional development banks, and a National regime, which include sub-national bodies and local authorities.¹⁴⁵

The JPOI emphasized the need to strengthen and better integrate the social, economic and environmental dimensions of sustainable development. Sustainable development governance was clearly differentiated from international environmental governance, which is addressed elsewhere in the UN system. Rather, in the renewed sustainable

¹⁴⁵ M.C Cordonier Segger, *Significant developments in Sustainable Development and Governance : A Proposal*, Volume 28, Issues 1, Natural Resources Forum 28 (2004),p 61-74, further information UN CSD website (www.un.org/esa/sustdev/csd.htm)

development governance system, all three dimensions of sustainable development need to be strengthened and integrated. And where there is overlap or intersection between the fields, this interlinked, multi-tiered international, regional, national sustainable development governance system can serve to facilitate more coordinated and coherent implementation activities. This coherence is particularly important for developing countries, which newly designed national development strategies.

In order to integrate the three pillars of sustainable development, the JPOI identified a clear need for further collaboration between the WTO and The United Nations Conference on Trade and Development (UNCTAD), the International Labour Organization (ILO), the United Nations Development Programme (UNDP), the UNEP and other organizations and agencies. The JPOI calls for trade and financial agencies to enhance the integration of sustainable development goals into their activities and take full account of national programmes to achieve sustainable development. The JPOI also recognizes that the social dimension of sustainable development needs to be strengthened.

The JPOI encourage collaboration within and between the UN system, the International Financial Institutions, the Global Environment Facility and the World Trade Organization (WTO) and rather complex grouping institutions, including the United Nations Chief Executive Board (CEB), the UN Development Group and the Environment Management Group (EMG) and other inter-agency coordinating bodies. In particular, the Secretary General of the United Nations was asked to use the CED to further promote system-wide inter agency cooperation and coordination on sustainable development to take appropriate measures to facilitate exchange of actions being taken to implement Agenda 21. The UN general Assembly was asked to adopt sustainable development as a key element of the overarching framework of UN activities to address the fragmentation and segmentation of mandates. This sets a global mandate in place, so that all other UN agencies can direct their activities to support sustainable development objectives. The new framework stress the need for all international institutions to enhance within their mandates the cooperative efforts to promote effective and collective support to the implementation of agenda 21.

The JPOI refers directly to the contribution of different UN agencies to sustainable

development. It also refers to those outside the UN system, such as the Global Environment Facility (GEF), the International Financial Institutions (IFIs) and the World Trade organization (WTO). This is to be done through increased collaboration to achieve the goals of Agenda 21 and the outcomes WSSD. ¹⁴⁶

JPOI grants a stronger role to the UN ECOSOC¹⁴⁷, especially in matters of coordination. ECOSOC is mandated to increase its role in overseeing system-wide coordination, and the balanced integration of economic, social and environmental aspect of United Nations policies and programmes aimed at promoting sustainable development. It is to organize periodic consideration of sustainable development themes in regard to the implementation of Agenda 21, including the means of implementation. It is to make full use of its high-level, coordination, operational activities and its general meetings to take into account all relevant aspects of the work of the United Nations on sustainable development. It is also promotes greater coordination, complementary, effectiveness and efficiency of activities of it functional commissions such as the Commission on Sustainable Development, the Commission on Social Development, and other subsidiary bodies and ensure that there is a close link between the roles of the Council in the follow-up to the Summit and its role in the follow-up to the Monterrey Consensus¹⁴⁸.

JPOI also recognizes the UNCSD continues to be the high-level commission on sustainable development within UN system. It serves as a forum for consideration of issues related to integration of the three dimensions of sustainable development. The JPOI recognized that although the role, functions and mandate of the Commission set out in Agenda 21 and adopted in UN General Assembly Resolution 47/191 continue to be relevant, the UN CSD needs to be strengthened and other relevant institutions and organizations taken into account. The CSD is directed to place more emphasis on actions that enable implementation at all levels, including promoting and facilitating partnership involving Governments, international organizations and relevant stakeholders for the implementation of Agenda 21.

¹⁴⁶ JPOI, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002)

¹⁴⁷ Further information on ECOSOC website, www.un.org/en/ecosoc/about/

¹⁴⁸ Marie-Claire Cordonier Segger, *Governing and Reconciling Economic, Social and Environmental Regimes*, Chapter 34 of M.C. Cordonier Segger & C. G. Weeramantry, eds., *Sustainable Justice: Reconciling Economic, Social & Environmental Law* (Leiden: Martinus Nijhoff, 2004), p.158.

The role, functions and mandate of the UN CSD were set out in Agenda 21 and adopted in General Assembly Resolution 47/191. At chapter 38 on 'international institutional arrangement', Agenda 21, CSD was to be the only major institution in order to ensure:

[E]ffective follow-up of the Conference, as well as to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environmental and development issues and to examine the progress of the implementation of Agenda 21 at the national, regional and international levels, a high-level Commission on the Sustainable development should be established.¹⁴⁹

CSD comprises 53 members, elected by the ECOSOC for the period of three years. It also has a small Bureau consisting of a chairperson, three vice-chair persons and a rapporteur to be elected from each of the regional groups as well a high-level advisory Board of eminent persons having recognizes inform the field. Apart from the CSD member states, other member states of the UN and its specialized agencies as well as accredited entitles can participate in the work of the CSD as observers. It also provides for involvement of a host other intergovernmental organizations as well as international institutions to assist and advise the Commission in the performance of its function. CSD can provide for effective participation of non-governmental organizations and other major groups in the deliberation.¹⁵⁰

CSD's mandate was originally fairly broad. It was to monitor progress of the implementation of Agenda 21 and activities related to integration of environmental and developmental goals by government, NGOs, and the UN bodies. The CSD's mandate is:

To monitor progress in the implementation of Agenda 21 and activities related to the integration of environmental and developmental goals by governments, NGOs, and UN bodies

To monitor progress towards the target of 0.7% GNP from developed countries for Overseas Development Assistance

To review the adequacy of financing and the transfer of technologies as outlined in Agenda 21

¹⁴⁹ *Chapter 38 of Agenda 21*, Report of the UNCED, (1992) UN Doc A/CONF 151/26 Rev 1 (1992) 31 International Law Materials 874 and see source: UNEP website, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52>

¹⁵⁰ Bharat H. Desai, *Institutionalizing International Environmental Law* (New York: Transnational Publishers, 2004), p.189.

- To receive and analyze relevant information from competent NGOs in the context of Agenda 21 implementation
- To enhance dialogue with NGOs, the independent sector, and other entities outside the UN system, within the UN framework
- To provide recommendations to the General Assembly through the ECOSOC¹⁵¹

CSD did not negotiate treaties. If an issue required a stronger legal framework, initial discussions took place at CSD, but were then designated to an appropriate body for negotiating legally binding actions. The three years from 1992 to 2002, the many critics raised by developing countries. The developing countries expected UN CSD to provide an effective body to monitor progress toward the target of 0.7% GNP, ensuring adequate financing and the transfer of sustainable development related to technologies, but this was not perceived to have happened.

CSD looked at finance and technology themes in isolation from issues that might have enable an effective argument for new fund. In addition, while occasionally the ministers for development, transport, energy or agriculture would attend if their sector was being discussed, CSD was rarely attended by finance ministers to address additional financing for sustainable development. Other critics were also raised, including the CSD being described as a “talk shop” with too many environmental interests, not enough development Ministers, too many northern NGOs, and no machinery for implementation.¹⁵²

JPOI states that UN CSD can promote and facilitate partnership involving governments, international organizations and relevant stakeholders for the implementation of Agenda 21. The CSD will continue to review and evaluate progress and promote further the implementation of Agenda 21, but will look to cross-sectoral aspects of specific sectoral issues. It will ensure better integration of policies through the interaction of ministers dealing with sustainable development. It will address new challenge and opportunities related to the implementation of Agenda 21, including the identification of constraints and ways these can be overcome. It will review issues related to financial assistance and transfer of technology for sustainable development

¹⁵¹ UNGA Resolution 1993/207

¹⁵² Marie-Claire Cordonier Seggar & Ashfaq Kalfan, *Sustainable Development Law; Principles, Practices & prospects* (New York: Oxford University Press 2004), p 237.

as well as capacity building while making full use of existing information, such as national reports and regional experience. The CSD mandate focuses on reviewing and monitoring the progress in implementation of Agenda 21 and fostering coherence of implementation, initiative and partnerships.¹⁵³

CSD will take into account significant legal developments in the field of sustainable development, with due regard to role of relevant intergovernmental bodies in promoting the implementation of Agenda 21 relating to international legal instruments and mechanisms. The CSD further agreed that mean of implementation should be addressed in every relevant issues, which include poverty eradication, changing sustainable patterns of consumption and production, protecting and management the natural resources base of economic and social development, sustain development in globalizing world, health and sustainable development, sustainable development of SIDS, sustainable development for Africa, other regional initiatives, means of implementation, institutional framework for sustainable development , gender equality, and education. The CSD is mandated to share best practices and lessons learned in sustainable development, using contemporary method of data collection and dissemination.

New sustainable development governance framework stresses the need for international institutions both within and outside the UN system, including international financial institutions, the World Trade Organization and Global Environmental Facility, to enhance their contribution to sustainable development. The Secretary-General of the United Nations is encouraged to utilize the United Nations System's Chief Executives Board for Cooperation to further promote system-wide inter-agency cooperation and coordination on sustainable development, to take appropriate measures to facilitate exchange of information and to continue to keep the ECOSOC and the CSD informed of actions being taken to implement of Agenda21.¹⁵⁴ The JPOI agreed to strengthen support for the capacity-building programmes of the United Nations Development Programme (UNDP) for sustainable development. It committed to strengthen cooperation between the UNEP and other UN bodies and

¹⁵³ Marie-Claire Cordonier Seggar & Ashfaq Kalfan, *Sustainable Development Law; Principles, Practices & prospects* (New York: Oxford University Press 2004), p 238.

¹⁵⁴ Para. 151, 152 of JPOI , Political Declaration and Plan of Implementation (Johannesburg: UN, 2002) pp 84-85.

specialized agencies, the Bretton Woods Institutions and the WTO, within mandates. The UNEP, UN-Habitat, UNDP and the UNCTAD were also requested to strengthen their contribution to sustainable development programmes and the implementation of Agenda 21 at all levels, particularly in promoting capacity-building.

According to the JPOI, regional sustainable development governance must also be strengthened. Implementation of Agenda 21 and the outcomes of the World Summit should be effectively pursued at the regional and sub-regional level, through regional commissions and other regional and sub-regional institutions and bodies. The United Nations Regional Commissions, in particular, should promote the integration of the three dimensions of sustainable development into their work in a balanced way, including through implementation of agenda 21. To this end, the regional commissions should enhance their capacity through internal action and be provided with external support. Their role is to facilitate and promote a balanced integration of economic, social and environmental dimensions of sustainable development into the work of regional sub-regional and other bodies, for example by facilitating strengthening the exchange of experiences, including national experiences, best practices, case studies and partnership experience related to the implementation of Agenda 21.

It seems they will assist in the implementation of technical and financial assistance, and facilitate the provision of adequate financing for the implementation of regionally and sub-regionally agreed sustainable development programmes and projects, including addressing the objective of poverty eradication and will continue to promote multi-stakeholder participation and encourage partnership to support the implementation of Agenda 21 at regional and sub-regional levels.¹⁵⁵ The JPOI recognized the need to support the sustainable development programmes of certain groups such as New Partnership for Africa's Development (NEPAD) and interregional aspects of the globally agreed Programme of Action for the Sustainable Development of Small Island Developing States.

The JPOI states that countries should promote coherent and coordinated approaches

¹⁵⁵ *Para. 160 of JPOI, Political Declaration and Plan of Implementation (Johannesburg: UN, 2002), p 86.*

to institutional frame work for sustainable development at all national levels, including through, as appropriate, the establishment or strengthening of existing authorizes and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws. It also states that countries should take immediate steps to make progress in the formulation and elaboration of national strategies for sustainable development and begin their implementation by 2005. And the strategies should be supported through international cooperation, taking into account the special needs of developing countries, in particular those of the least developed countries. Such strategies could be formulated as poverty reduction strategies that integrate economic, social and environmental aspects of sustainable development and should be pursued in accordance with each country's national priorities.

JPOI provides that each country has the primary responsibility for its own sustainable development, and the role of national policies and development strategies cannot be overemphasized. All countries should promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development and strengthen governmental institutions, including by providing necessary infrastructure and by promoting transparency, accountability and fair administrative and judicial institution. And the JPOI recognized that all countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies, policies and programmes and should also foster full public participation in sustainable development policy formulation and implementation.

JPOI calls for support for developing country efforts to enhance national local institutional arrangements for sustainable development. That could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging, participatory approaches and enhancing policy analysis, management capacity and implementation capacity, including mainstreaming a gender perspective in all those activities.

JPOI recognized the need to enhance partnership between governmental and non-

governmental actors, including all major groups, as well as volunteer groups, on programmers and activities for the achievement of sustainable development at all levels. It acknowledged the consideration being given to the possible relationship between environment and human rights, including the right to development, with full and transparent participation of Member States of the UN and observer States. And it also promoted and supported youth participation in programmes and activities relating to sustainable development through, supporting local youth councils or their equivalent, and by encouraging their establishment where they do not exist.

Challenges to Development and Application

Many scholars argue that the challenges still remain to further the development and application of international law on sustainable development. Among many scholars, N. Schrijver argued that the new strong origination is necessary for integration of sustainable development.

Sustainable development is a concept with many facets and the delicate balance between development, environmental conservation and human rights must not be disturbed. But it is necessary to delineate the concept. The definition of the concept is already complex. Furthermore, translation of the principles and rules into concrete and practical tasks and obligations of legal subjects can be helpful in specifying and delineating the concept. This has already occurred for the ozone layer problem in the 1987 Montreal Protocol, for Climate Change in the 1997 Kyoto Protocol and the 2007 Bali Action plan, and for the conservation of biodiversity in the 2000 Cartagena Protocol. It would be desirable to formulate similar specific obligations on achieving the Millennium Development Goals such as access to fresh drinking water and primary education, combating HIV and granting access to affordable medicines in developing countries for widespread diseases, such as Aides/HIV, tuberculosis and malaria.

Many new treaties have been concluded and various important new legal principles have taken root in recent decades. However, the development of international law relating to sustainable development has been very fragmented. The challenge is how to create a coherent basis for international law of sustainable development which can

form a common foundation for new agreements.¹⁵⁶ It is clear that a general treaty on environment and development, as advocated by the Brundtland Commission and the IUCN will still be a bridge too far for a long time. In the meantime, documents such as the IUCN draft Covenant on Environment and Development and the ILA New Delhi Declaration as well as studies by UNEP and the CSD secretariat can be very helpful in exploring the integrated approach and including the direction in which international law on sustainable development should be developed. Stepping up cooperation between the various secretariats and the conferences of the parties to the different treaty organizations is also recommendable to promote the necessary coordination and cohesion.¹⁵⁷

The integration is the greatest challenge in the international law on sustainable development. It is a problem how the various lines of evolution in international law in the relevant areas such as development, social and environment be linked to each other, should adjust to each other and form a coherent whole in pursuit of sustainable development. N. Schrijver argued that “integration required that general norm of sustainability and the objective of sustainable development are basis for the form an integrated part of policy and activities in all relevant fields.”

In order to address the challenge, international cooperation between states and other relevant actors, as the private sector, scientific and non-governmental environmental and development organizations is necessary. Such cooperation has received only fragmented substance in various relevant funds such as the Global Environmental Facility and the Montreal Multilateral Fund and in the work of the World Bank (UNDP, UNEP and FAO) as well as Type II partnership agreements of Johannesburg etc. More financial resources and greater scope is clearly needed for the operational activities of international organizations and new multi-stakeholder partnerships.

Since Johannesburg, it can be observed how public-private sector agreements on cooperation for the implementation of concrete projects have been undertaken between various nations, multinational corporations, international organizations such

¹⁵⁶ For example those which drive form the global negotiation on the basis of the Doha Development Agenda of the WTO.

¹⁵⁷ N. Schrijver, *The Evolution of Sustainable Development in International Law: inception: Meaning and Status* (The Hague: Hague Academy of International Law, 2008), p.222.

as the World Bank, and NGOS such as the IUCN .

There has been considerable discussion on the advantage and disadvantage of setting up new organizations such as the World Environmental Organization or World Organization for Sustainable Development. There are already so many international organizations. The question is how can have sustainable development as an integral part of general financial, trade and development policies. N. Schrijver given the answer of the question. He argues “This requires a decisive political forum that can apply itself energetically to this task. It clears that ECOSOC, UNEP and UN CSD will never acquire the stature that this mission demands.

Taking everything into consideration and mindful of the continually weak international structure for sustainable development, the best course of action could be to establish a new world organization for sustainable development as advocated by the Brundtland Commission or a UN World Environment Organization as proposed by France, Sweden and other countries. This could place the question of sustainable development much more clearly on the international agenda and provide an efficient centre of coordination of international environmental and development policy and operational activities. UNCTAD, UNEP, UNECE could be integrated into such a new world organization.”¹⁵⁸

Conclusion

There is need to overcome existing challenges and strengthen implementation of sustainable development law. There are two particularly important implementation challenges. First, as the International Law Commission has expressed, there are general concerns about the risk of fragmentation of international law. Second, while many treaties have been negotiated and ratified, there is still far too little implementation, enforcement, monitoring and compliance. The integration is greatest s challenge in the sustainable development law. In order to address the challenge, international cooperation between states and other relevant actors, as the private sector, scientific and non-governmental environmental and development organizations is necessary. For this reason, the 2002 JPOI sets a broadened institutional architecture

¹⁵⁸ N. schrijver, Ibid, at 230

for sustainable development to further implementation of Agenda 21 and the WSSD outcomes and also identify and address emerging sustainable development challenges.

Chapter4
Sustainable Development Law in South Korea

Chapter4

Sustainable Development Law in South Korea

Introduction

The Republic of Korea has continued to implement national strategies for sustainable development since Agenda 21 was adopted at the 1992 UNCED as an action plan to achieve both developmental and environmental goals. The strategies include the institutional development, strengthening institutional capacities to improve coordination among agencies and enhancing the institution as whole in area such as comprehensive policy. The strategies for sustainable development in Republic of Korea focus on pursuit of a welfare society with a high quality of life. This is achieved by ensuring that all environmental costs are appropriately internalized in the socio-economic policies, and by using environmental factors as the standard in the decision-making processes of each field. Such is the process delineated in Agenda 21.

During the course of rapid economic development, the Korea experienced excessive utilization of natural resources and energy, accompanied the inevitable degradation of natural environment. In the 1980s, the country began taking aggressive steps to alleviate the environmental problems that had been neglected during the developmental period. Since then, Korea has established a comprehensive legal framework related to environmental conservation and sustainable development, and commenced a full scale implementation of environmental policies. Since the Rio Summit in 1992, Korea has strengthened national environmental countermeasure and has attempted to address to global environmental issues. With its entrance into the OECD in the 1996, an environmental system much like that of advanced countries was put into place in Korea.

The financial crisis in late 1997 and the subsequent structural adjustments brought sustainability issues to the forefront, especially in the social arena. In order to fully implement the measures outlined in Agenda 21 in 1992, it was necessary to compare

and analyze the contents of each chapter with existing strategies, and then concretize these objectives in the form of government policy. To facilitate this process, the National Action Plan for Agenda 21 was established in 1996. The 1996 National Action Plan for Agenda 21 is essentially a compilation of the entire set of implementation programs stated in each chapter of Agenda 21. The report presents an overall review and evaluation of the performance in implementing Agenda 21 since 1992. It examines the development of institutional infrastructures, integrated strategic plans, sector strategies and programs, policy measures to integrate environmental and economic considerations, and the role of major groups.¹⁵⁹

I. The implementation of Sustainable Development Law

1. Institutional Setting for sustainable development

The Ministry of Environment and related ministries are the primary government institutes for sustainable development. In realizing sustainable development, the most important institutional foundation is the implementation capacity of each ministry. The Ministry of Environment is not only responsible for the planning, development, and execution regulations and policies, but also for overseeing and coordination environmental affairs in other ministries and agencies. Nines agencies are implementing environment related policies or projects that are specific to their own sector. In the addition, the Ministry of Environment¹⁶⁰ (MoE) excises jurisdiction over provincial government in matters relating to the environment.

In 1994, during the major government restructuring, the ministry was elevated to the status of the present MoE. At this time, responsibility for water sewerage was transferred to the MoE from the Ministry of Construction and Transportation (MoCT), and drinking water, which fell under the jurisdiction of the Ministry of Health and Social Affairs, was also transferred to the MoE. The Environmental Conservation Act was reinforced and developed into six major laws: Basic Environmental Policy Act, Water Quality Preservation Act, Air Quality Preservation Act, Noise and Vibration Control Act, Hazardous Chemicals Control Act and Environmental Dispute and

¹⁵⁹ T. H Moon, *Sustainable Development in Korea: Key Issues and Government Reponses*, vol. 11, No.1, International Review of Public Administration 2006, p1-4.

¹⁶⁰ Further information, Ministry of Environment, Republic of Korea, Ministry of Environment <http://eng.me.go.kr/>

Settlement Act. In the 1990s, enforcement of Natural Environmental Preservation Act and the Environment Impact Assessment Act were legislated, and the National Park Act and the Law on the Protection of Birds, Beasts and Hunting were transferred to the MOE.

In 1985, under the 36th Basic Environmental Policy Act¹⁶¹, the Environmental Conservation Committee was established to coordinate and adopt mid- and long-term plans on environmental conservation and improvement. Headed by the Prime Minister, the committee comprised of 23 members, including 13 cabinet ministers. In addition to developing conservation and environmental improvement plans, the committee was responsible for identifying preservation and investment priorities, and serving as the final decision maker for matters pertaining to the environment.

The government's role in contributing to sustainable development is not limited to environmental policy formation and enforcement. Sustainable development is attained by integrating environmental factors into the socio-economic policies of all government bodies. In order to appropriately integrate environmental and social factors into the decision-making process of economy-related functions, it became clear that an established institutional mechanism to facilitate inter-ministerial coordination would be needed. Hence, the Presidential Commission on Sustainable Development (PCSD¹⁶²) was established in September 2000.

¹⁶¹ Any statutes, common law, treaties, conventions, regulations and policies related to the natural environment and living environment, which are defined by the Article 3 (1) of the Basic Environmental Policy Act.

¹⁶² Presidential Commission on Sustainable Development (PCSD) (2002), *Korea's Efforts Towards Sustainable Development in the 21st Century*, available at: <http://www.pcsd.go.kr/eng/index/html>; The 1st Presidential Commission on Sustainable Development was established in September 2000. Originally, the PCSD consisted of 35 members that are appointed for two years: 13 of them are exofficio members, i.e. 12 cabinet ministers and a coordinator (senior secretary for welfare and labour to the President). The remaining seats are assigned to representatives from NGOs and enterprises, academics, lawyers and media, etc. The PCSD operates several sub-committees. Under the current government's campaign, "Participatory Government", 77 members were appointed for the 3rd PCSD, out of which 48 appointed on the nominations by 16 local governments (3 for one local government, consisting of nominations from mayor/governor, local parliament and local NGOs), and 29 others from NGOs, academia, industries, labour, legal profession, mass media, arts and culture, agricultural and fisheries sector, religious and female bodies. Under the Commission, there is an operating committee, consisted of no more than 20 members, which is responsible for prior examination and coordination of issues for the Commission, and expert committees which set policy courses and implementation plans for five fields including dispute management policy, water, territory and nature, energy and industry, society, health and the environment, and international cooperation and education. The 3rd PCSD aims at four broad goals: 1) Quality living in active economy, 2) Prosperous living in civil harmonization, 3) co-existence of human and nature in clean environment and 4) civil integration through dispute

The PCSD is responsible for preserving the environment and minimizing the conflicts that could arise during the course of implementation of major environment policy measures by reviewing them at the planning stages. This commission is expected to understand the international status of environmental preservation and consider possible domestic applications or countermeasures. It consists of 33 people in total: 13 ministers and 20 members from civil society, academia and the business sector. The commission includes six sectoral sub-committees: land conservation, water resources, ecosystem and public health, energy policy, industry and environment, and international/regional cooperation. Mid- to long-term plans for environmental conservation, important global environmental issues, and other matters are expected to be addressed by this commission, which will also serve a mediating function in resolving conflicting interests among government ministries and agencies, and between the government, NGOs and the industrial sector. As such, the PCSD played an important role in evaluating the sustainability of the controversial Saemangeum Reclamation Project, which had ignited a series of intensive debates throughout the nation for its potentially adverse impact on the environment.

As the main agency for national land use management, the MoCT is in charge of enhancing sustainability in land use planning, urban planning, housing development, and balanced regional development planning systems. It is also responsible administering land development regulations relating to roads, ports, dams, and airports. During the 1999 government restructuring, the Construction Environment Division was instituted in the MOCT to enhance the sustainability of construction projects.

The founding of the Ministry of Maritime Affairs and Fisheries (MoMAF) in 1996 brought together an integrated marine management by combining marine-related

management. The PCSD organizes reporting to the President on a regular basis, deliberates major policies aimed at Sustainable Development and shall serve as a policy development centred commission. In this context it has the task to prioritise governmental tasks in the areas of water, energy or social affairs. Finally, it is also co-responsible for structuring the dispute management system, and shall undertake research to cope with social disputes. Since 2000, the PCSD has issued several policy counsels and has drafted guidelines for the sectoral implementation of SD for 11 areas of action, including land-use, transportation, water, fisheries, energy use and education. The PCSD also acted as a national preparatory committee for the WSSD between March 2001 and August 2002. Additionally, the PCSD prepared nation-wide implementation plans and strategies for major international agreements such as the UN Framework Convention on Climate Change (1992)

functions, previously distributed among other ministries. By entrusting seemingly conflicting functions, such as the development of marine resources and conservation of the marine environment, to the same ministry, a balanced and integrated approach was possible, providing the foundation for marine sustainable development.

The Ministry of Health and Welfare (MoHW), whose responsibilities include managing the social aspects of sustainable development, pursues strategies to combat poverty and disease by overseeing social safety nets and public health infrastructure. With the financial crisis, the importance of a social safety net was highlighted. Unemployment and poverty increased with the subsequent recession and corporate restructuring, while a more flexible labor market was formed in the domestic economy.

2. General strategic plan for sustainable development

National Action Plan for Agenda 21¹⁶³

Agenda 21 was established action plan for the agreement reached at the 1992 Rio Environmental Development Conference on sustainable development. Each country has established comprehensive national actions to bring Agenda 21. The Korea decided to establish its national action plan at the 1993 ministerial meeting on Global Environmental Issues, with the Ministry of Environment bearing the full responsibility for its implementation. With participation from each related ministry, the national action plan of Agenda 21 was formulated and initiated in 1996.

Furthermore, in accordance with the post-Agenda 21 plans adopted at the 1997 Rio +5 Conference, various stakeholders for the CSD are expected to meet to deliberate and establish national objectives and policy direction for sustainable development in the economic, social, and environmental fields. The national sustainable development strategies in land and 11 other policy¹⁶⁴ areas scheduled to develop by end of 2002.

¹⁶³ The Ministry of Environment, Republic of Korea, *National Assessment Report on the Implementation of Sustainable Development*, May 2002, p 9. source on : http://library.me.go.kr/DLiWeb25/comp/search/Detail.aspx?srv=4&m_var=64&cid=78223.

¹⁶⁴ It included the use management and human settlements, social welfare, industrial sectors,

Strategies and vision for sustainable development in the environmental sector

The basic Environmental Policy Act stipulates that the MoE shall be responsible for the establishment of the integrated long-term policy. The Green Vision 21 was established with forward –looking environmental policy and action plans the next decade. The government has established mid-term action plans in order to achieve these long term-objectives.¹⁶⁵ In 1998, a National Environmental Vision for the New Millennium was promulgated, which envisioned the creation of an environmentally friendly welfare society “where humans and nature co-exist and thrive.” The plan is grounded in a number of innovative principles, including a shift in policy emphasis from pollution control to pollution prevention, environmental governance based on market economics and democracy, the integration of environmental and economic policies, and active participation by all stakeholders to preserve the global environment.

South Korea promoted the plan by introducing 22 major programs and 80 individual projects in seven areas: 1) environmental ethics and education; 2) sustainable production and consumption patterns; 3) sustainable land-use; 4) improving basic living conditions; 5) developing environmentally friendly technology; 6) global environmental health; and 7) the greening of the government.¹⁶⁶

Socio-economic Development and Strategy for Sustainable Development

In line with the evolving international trends, Korea incorporated environmental considerations in the five year Scio-economic Plan (1993-1997). The government initiated a variety of programs to make concrete environmental conservation and

development of environmental science and technology, agriculture rural development, forests, nature conservation and biodiversity, marine sector, water quality management, and air pollution control and transportation.

¹⁶⁵ The main objective of Green Vision 21 is to improve the quality of life by maintaining the balance between development and conservation, without compromising the well being of future generations. It also deals with the concerns of ministries other than the Ministry of Environment, in the areas of natural environment conservation, air quality management, water quality management, marine environment preservation, drinking water supply management, waste management, and environmental technology development.

¹⁶⁶ The Ministry of Environment ,Republic of Korea, *National Assessment Report on the Implementation of Sustainable Development*, may 2002, p 12.

improvements in the quality of life, such as the development of an energy conservation/efficiency policy and a long-term plan for clean energy supply.

Following the rapid changes spurred by globalization, most notably the integration of the global economy, internationalization of the financial sector, and expansion of the information society, the Korea established an “open world, abundant society” project known as Vision 2011 to provide a direction for Korea’s future socio-economic development. This project supports 16 items in 3 areas: building efficient market systems, rising into a knowledge and information power in Northeast Asia, and guaranteeing a dynamic and affluent life for the people.

Mid- and Short-term Strategic Plans

Based on the long-term integrated strategic plan, the government has been promoting the Five-year Mid-term Comprehensive Plan for Environmental Improvement. The current mid-term plan is a government-wide, integrated plan for overall environmental conservation over a five-year period (1998-2002). The scope of the plan is divided into two main categories: environmental policy programs and environmental investment projects. Specifically, the plan initiates such activities as the reinforcement of the environmental management infrastructure, preservation of the natural environment, soil erosion prevention, air quality, water quality and drinking water supply management, hazardous chemical and waste control, marine environment preservation, global environmental preservation, and the strengthening of international cooperation.

In 2001, the government sought to harmonize environmental and economic goals by pursuing the ECO-2 Project. This project is a mix of strategies, policies, and activities that together aim for win-win solutions based on the integration of environmental and economic considerations. Among others, the ECO-2 promotes environmental industry, resource conservation, and waste recycling. It also advances the creation of technologies and markets for water conservation through demand management, the enhancement of the environmental knowledge and information infrastructure, and the development of reliable environment-economy indicators.

Development Indicators of the Nation's Sustainable Development

The integrated strategic plans are designed to materialize the spirit of sustainable development as outlined in Agenda 21, but a system is not in place to explore and evaluate whether they complement each chapter of Agenda 21. Also, although the National Action Plan for Agenda 21 is an integrated strategic plan to realize the targets set forth in each chapter of Agenda 21, it lacks practicality and enforceability. Recently, the PCSD has considered writing an updated national action plan for Agenda 21 that will address these shortcomings.

Fifty-three sustainable development indicators were developed in the areas of economy, society, environment, and policy as an objective measurement tool that will establish, enact, and confirm the results of developmental policies such as the National Action Plan. There are plans to further develop so that comparisons can be made with other countries through indexing.

3. Challenges of Implementation of Sustainable Development¹⁶⁷

1) Internalization of Environmental Costs

Korea's achievement in sustainable development is not as satisfactory as desired. This lack of progress is basically due to the fact that economic development has proceeded by means of the excessive exploitation of natural resources in a small and densely populated area.

To assess the situation correctly and to help devise the proper policy mix, the government intends to determine environmental standards or investment levels based on statistics by pollution per area, instead of pollution per capita income. By doing this, implementation of sustainable development strategies should be at the top of the nation's strategic priorities. At the policy level, the level of environmental expenses accrued in economic activities regarding environmental pollution should be

¹⁶⁷ The Ministry of Environment, Republic of Korea, *National Assessment Report on the Implementation of Sustainable Development*, May 2002, p44 -45.

strengthened and reflected accordingly. In other words, the Korea's various environmental regulations and economic instruments need to be adjusted to a level that can internalize environmental costs.

Of course, policy measures are needed to create a situation in which compliance of environmental regulations and environmental investments enhances business competitiveness. Environmental targets should be strengthened while boosting industry efficiency through voluntary participation in environmental conservation programs. When direct regulations or economic instruments are used, it is desirable for the government to draw up specific, precise details such as methods and extent of regulations and time frames. They must also implement the measures accompanied by the programs for developing technology to minimize pollution and enhancing economic efficiency.

At the national strategic decision making process level, it is important to integrate environmental and socio-economic elements in an efficient and participatory way. It is necessary to improve the participation of environmental institutions in the decision-making processes of economic institutions to increase efficiency. The roles of the PCSD are very important in this respect.

2) Enhancing Environmental Technology Development Policy

In establishing an environmental industry and technology development strategy, technology, environmental regulation, and environmental industry development policies should be linked to one another and implemented simultaneously. A coherent sustainable development path requires developing environmentally sound technologies. Emphasis should be placed on the demand side and the diffusion effect during the course of technology development rather than on the technology development target itself.

3) Financial Resources and Demand Management

Many measures must be sought to ensure that issues of securing financial resources do not become an obstacle to implementing sustainable development. The problem of

the funding shortage stems from a strategy that neglects the demand factors as is, and tries to solve with investments on the supply side. In this respect, the recent shift in emphasis of water policy from the quality and resource supply of water to demand management is on the right track.

4) Enhancing Partnerships

Although both national awareness of the environment and environmental investment growth have been elevated, as indicated earlier, the establishment of partnerships among various sectors of society is still very weak. Enhancements of such a partnership will serve as a major driving force for sustainable development.

II. National Sustainable Development strategy

As mentioned above, the Republic of Korea has continually implemented strategies for Sustainable Development since the Rio-Summit in 1992. Since March 2004, a set of comprehensive national strategies for sustainable development is in preparation by the PCSD, taking into account the outcomes of the WSSD, and is to be established by 2006. There is a well-established framework for long-term planning, both cross-sectoral and sectoral, and with a high degree of spatial diversification (planning at national, regional and local level). Long-term planning occurs for the economy as well as for the environment, but the environmental planning is most important for the issue of sustainability. Whereas the long-term plans provide a holistic environmental framework for action, the government adopts regular strategic plans in major sectors that aim at concretizing these holistic long-term plans.

Regarding the issue of Sustainable Development, two kinds of plans can be distinguished: 1) Plans that are drafted on the basis of the Basic Environmental Policy Act (1990) that obliges the government to pursue long-term planning and 2) plans that have been drafted for international conferences or as an expression of the political will of the government¹⁶⁸. Korea can be thus characterized as a country that has a

¹⁶⁸ *Republic of Korea Case Study*, Analysis of National Strategies for Sustainable Development (Berlin: Environmental Policy Research Centre, 2004), pp 4-8. Source: www.iisd.org/measure/capacity/sdsips.asp.

strong orientation towards strategic planning in all the important sectors of policy. Due to the dualism of the planning approach, this study does not focus on a single strategy or plan, but pays equal attention to the long-term environmental planning and the complementary voluntary planning regarding the implementation of Agenda 21. Leaving out a dimension would sketch a one-sided picture of the many set-screws of Sustainability Policy.

The most important strategic plans in the first category are: a) The ten-year plan Green Vision 21 (1996-2005), where currently work is being undertaken to formulate the second long term plan, b) the Mid-Term Plans for putting the long-term planning into practice, where currently the third Mid-Term Plan is in action (2003-2007) and c) several strategic plans in different sectors, that are developed by the responsible ministries. These incorporate the principles of Sustainability as they try to incorporate environmental needs into sectoral policy-making or foster the promotion of eco-friendly technologies.

Regarding the second category, a National Action Plan for the Implementation of Agenda 21 was adopted in 1996 as a compilation of the entire set of implementation programs started in each chapter of Agenda 21. In 2001, the follow-up plan “State Environmental Mission for a New Millenium” was adopted. The plans do not rival, but complement each other.

1) Planning for Sustainability – strategies content

Environmental planning follows the guiding vision of building a “Life-respecting, Sustainable Green Nation”. It lays down guidelines for all sectors to harmonize efforts for environmental improvement and sustainable development. An important feature of environmental planning is the promotion of environmental industries. The government has committed itself to the objective of becoming a key environmental industry country by the year 2007. Another area of focus has been the integration of environmental and trade issues.¹⁶⁹

¹⁶⁹ The Report of Ministry of the Environment, Republic of Korea, *Green Korea 2003. Towards the harmonization of humans and nature*, , (Seoul: Ministry of the Environment ,2003) source on <http://eng.me.go.kr/main.do?method=searchResult&searchType=all&oldKeyword=Basic+Environmental+Policy+Act.&query=Basic+Environmental+Policy+Act++1985&startDay=&endDay=&x=0&y=0>

Regarding the National Action Plan for the Implementation of Agenda 21, it was drafted as a detailed action plan or a “mirror plan” for the Agenda 21. It presents an evaluation of the performance in implementing Agenda 21. It therefore addresses issues such as the promotion of cleaner technologies, of waste reduction and recycling and of environmentally friendly production and consumption patterns. The plan also mentions the issue of poverty eradication and promotes the implementation of local agenda 21. The National Environmental Vision for the New Millennium updates these voluntary efforts for integrated policy-making for Sustainable Development. It specially aims at introducing market-based instruments, enhancing preventive approaches of environmental protection and making the country a leader in global environmental policy making.¹⁷⁰

2) Coordination and Linkages with Other Strategies or Planning Processes

The Green Vision 21 obliged ministries to adopt sectoral environmental plans. For example, the Ministry of Commerce, Industry and Energy (MOCIE) has developed the 10-year National Plan for Energy Technology Development and the two 5-Year National plans for Energy Conservation. The Ministry of Construction and Transportation (MOCT) adopted the “plan first, develop later” concept of development for the whole country, including urban and agricultural areas. In order to promote sustainable development of the national territory, MoCT also enacted the Act on Planning and Use of National Territory effective as of January 1, 2003, combining the Urban Planning Act and the National Territory Use Act. Under the Fourth Comprehensive National Territorial Plan (2000-2020), which is the highest-ranking national plan on territorial development and which was formerly called the Comprehensive National Development Plan, MoCT paid greater attention to Green Vision 21, making integration of development and environment one of the 3 keynotes of the plan. The Ministry of Agriculture and Forestry has also set up a plan Environmental Policy in Agriculture, Forestry and Fisheries for the 21st Century that aims at policy integration and contains specific targets for the development of technologies for reducing the use of chemical fertilizers and synthetic pesticides by 30%

¹⁷⁰ Ibid

until 2004, and by 40% and 50% respectively until 2010 (basis year 1993) (UN 2002). Environmental considerations were also incorporated into the 7th Five-Year Socio-Economic Plan (1993-1997) through the development of measures such as energy conservation and efficiency.¹⁷¹

Economic and social planning follows inter alia the goal of eliminating absolute poverty in the short run and alleviating relative poverty in the long run. Also, emphasis is put to the fact that a viable health and medical care system is necessary. For this purpose, the National Basic Living Security Act was amended in order to guarantee basic standards of living for people in extreme poverty. Also the Act to Promote Shifting to an Environmentally Friendly Industrial Structure was enacted in 1995 (and revised in 1997 and 1999). It actively promotes energy conservation and resource-saving industrial activities¹⁷²

3) Integration of Sustainable Development Principles

Through the adoption of long-term plans, both obligatory and voluntary, the government formally obliges itself to a perspective of policy-making beyond the scope of single legislative periods. Regarding the content, planning for SD in the Korea was for a long time understood as planning for environmental protection, regarding both the long-term environmental planning on the basis of the law and the planning for the implementation of Agenda 21, although the latter also pays attention to the goals of poverty eradication and other socio-economic issues. The financial crisis in 1997 and the subsequent structural reforms brought the issue of sustainability to the political forefront. Nevertheless, this meant in particular, that economic issues were given priority over environmental issues due to the need of revitalizing the economy, instead of seeking for ways to equally consider economic, environmental and social needs. In recent years, the government has paid special attention to the introduction of market based measures as a means of internalizing environmental costs and encouraging sectors to operate in an environmentally friendly manner,

¹⁷¹ *Green Korea 2003. Towards the harmonization of humans and nature*, Ministry of the Environment, (Seoul: Ministry of the Environment, Government of South Korea ,2003) source on <http://eng.me.go.kr/main.do?method=searchResult&searchType=all&oldKeyword=Basic+Environmental+Policy+Act.&query=Basic+Environmental+Policy+Act++1985&startDay=&endDay=&x=0&y=0>

¹⁷² Ibid

without increase the overall administrative burden for enterprises¹⁷³.

III. Further Development for Implementation

1. Basic Law for Sustainable Development¹⁷⁴

On Jun. 5, 2007, in order to prepare a systematic foundation for sustainable development, the government presented “the Proposed Basic Act on Sustainable Development” to the National Assembly after it is considered by the Cabinet meeting. “The Proposed Basic Act on Sustainable Development” would be introduced to a special session of the National Assembly held in June after it went through the conference of related government departments (Mar. 28 - Apr. 26, 2007), advance announcement of the legislation of it (Apr. 13 - May. 3, 2007), a public hearing (May. 10, 2007), examination by the Government Legislations Agency (May. 4 - 29, 2007), and the approval of the Cabinet meeting (Jun. 5, 2007)

Civic groups continuously request the establishment of the law in order to prepare strategies for central government-level sustainable development, the settlement of implementation plans, and local government-level support systems for sustainable development. It is expected that Korea will lead in sustainable development when the economy, society, and environment have been substantially incorporated and when systems have been prepared to promote central government-level and local government-level sustainable development.

Contents¹⁷⁵

The Basic Law for Sustainable development” includes the Defining sustainable development and setting basic principles. In provision 2 of it, it defined that “ Sustainable development implies balanced development based on sustainability by means of the growth of economy, the stability and unification of the society, and

¹⁷³ *Green Korea 2003. Towards the harmonization of humans and nature*, Ministry of the Environment, (Seoul: Ministry of the Environment ,2003)

¹⁷⁴ The basic law for sustainable development(Korea: National Assembly of Republic of Korea, 2010) available at <http://likms.assembly.go.kr/law/>

¹⁷⁵ The Report of The Ministry of Environment, Republic of Korea, *Establishment of basic law for Sustainable Development*, Environmental Protection Programs, Virtual Center for Korea Environmental Technology Exchange (APEC-VC Korea), source on <http://www.apec-vc.or.kr/>

the preservation of the environment.”¹⁷⁶ the Basic principles of sustainable development included:

- (i) The central government and local governments shall make efforts to promote the people's participation, the growth of economy, the unification of the society, the preservation of the environment, and the practice of fair trade
- (ii) Enterprises shall improve their technological innovation abilities and facilitate technological development.
- (iii) The people shall actively participate in making decisions on sustainability policies, collaborate with the government, and share the responsibility for the results of the decision-making.

It also affirmed establishing basic strategies and implementation plans for sustainable development. The government shall establish basic national sustainable development strategies, which comprise of the vision and goals for sustainable development and relevant stratagems and principles, every 20 years.¹⁷⁷ Local governments shall establish their own development basic strategies, which agree to national basic strategies, every 20 years. The central government and local governments shall establish implementation plans every five years to execute basic strategies and the national committee and local committees examine the conditions of the promotion of the implementation plans every two years.

It has on role of reviewing the sustainability of relevant laws and mid- and long-term plans. It is mandated that the national sustainable development committee shall review the establishment, revision, amendment, or changes of sustainable development-related laws and major administrative plans. Local governments shall also subject the establishment or changes of sustainable development-related laws and major administrative plans to the appropriate national sustainable development committee. Currently, according to the stipulations of Presidential Decree number 19563, the national sustainable development committee review 43 administrative plans including Water Vision 2020¹⁷⁸ and present its opinions. It is expected that enhancing the sustainability of government policies will contribute to the prevention

¹⁷⁶ Provision 2, The basic law for sustainable development(Korea: National Assembly of Republic of Korea, 2010)

¹⁷⁷ Provision 7, The basic law for sustainable development(Korea: National Assembly of Republic of Korea, 2010)

¹⁷⁸ Comprehensive Water Resources Plan: Water Vision 2020 , the Report of Korea Water Resource Cooperation (Korea: Korea Water Resource Cooperation,2000) found online : <http://www.codil.or.kr:8080/web/common/fileView.jsp>

of social conflicts and economic damages. It will establish the national and local sustainable development committees.

The foundation of those committees has been laid for the establishment of the national sustainable development committee. The heads of local sustainable development committees must participate in the implementation of major administrative plans, which will help organic cooperation relations to be formed between the central and local governments. Sixteen large local sustainable development committees are mandated to be formed, while 230 small local sustainable development committees optionally formed; the name and organization of the committees shall be decided by government ordinances. Currently, four large local governments (Gyeonggi, Chungbuk, Daejeon, and Seoul) and one small local government (Damyang) have sustainable development committees established and operated. Most of the other local governments have organizations to promote Local Agenda 21. To execute sustainable development training, the central government shall construct and operate a sustainable development information network, in order to diffuse and spread the information on sustainable development. The central government and local governments shall conduct investigations, researches, and training programs development, etc. to realize sustainable development.

Conclusion

The case of South Korea is a good example showing how the challenges address at national level. Every county is addressing same challenges. In order to address the challenges, South Korea has developed a national strategy for sustainable development in short term and long term. Internalization of implantation of sustainable development, enhancing environmental costs, enhancing environmental technology development policy, financial resources and demand management and enhancing partnership has considered overcoming challenges of sustainable development in national level. And South Korea has encouraged the need of laws, institutional and social reform. Recently, South Korea established 2007 Korean basic law for sustainable development. The basic law for sustainable development will achieve further development of Korean sustainable development law.

Chapter 5

Conclusions

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Conclusions

As stated in first part of the research, the evolution and legal aspects of the concepts of sustainable development can be identified, as considering “international law on sustainable development”. Sustainable development law is emerging at the area of intersection. Sustainable development law is an emerging body of legal principles and instruments, as well as an “interstitial norm”, a concept that serves to reconcile conflicting environmental, social and economic development norm in international law, in interest of present and future generation. As was seen in the second chapter, certain principles of international law related to sustainable development, proposed by the International Law Association Committee on the Legal Aspects of Sustainable Development, are useful to jurists and judges working in this area. Such principles have been recently reflected in many international treaty instruments in the spheres of social, economic, and environmental law. In addition, the manner in which the international community is addressing the practical challenges of implementations sustainable development law is of high importance. The new institutional architecture of sustainable development governance was described and analyzed.

As mentioned, in 1992, in Agenda 21, governments called for the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns and identified a need to clarify and strengthen the relationship between existing international instruments and agreements in field of environment and relevant social and economic agreements or instruments, taking account the special needs of developing countries. Ten years later, the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation, made a collective commitment to advance and strengthen the interdependent and naturally reinforcing pillars of sustainable development, economic development, social development and environmental protection, at the local, national, and international level. These commitments have become central tenets of the emerging international sustainable development agenda. Moving forward from the 2002 World Summit of Sustainable Development, it is

necessary to develop the legal principles and technique to coordinate and integrate social, economic and environmental regimes-including design, strengthening and implementation of laws, instruments, and policies to address current sustainable development challenges at the global, regional, national and local level. It is an exciting area, one that promises to grow exponentially in coming years in the international legal community, through the International Commission and other bodies, seeking to address perceptions of fragmentation in its system.

International law is needed to govern the intersections between conflicting global priorities and norms to ensure a balanced outcome. This paper has identified analysis of the emergence of principles of international law on sustainable development or sustainable development law as means to address this challenge.

There are number of critical challenges for the further elaboration of sustainable development law. Among them, the significant challenge is the need for coordination and integration between economic, social and environmental law in the field of sustainable development, and how to create a coherent basis for international law of sustainable development.

The case of Korea is a good example showing how these challenges address at a national level. Korean sustainable development law is still evolving towards recognizing the principles of sustainable development articulated in the international arena. The principle of sustainable development is yet to be recognized as the overarching guide of Korean sustainable development. Even if a viable discourse has become increasingly common in Korea, it was still limited to the definition.

The concept of sustainable development in Korea context as implicitly expressed in law and policies means the following: sustained economic development to ensure healthy and pleasant lives of both present and future generations of humanity while recognizing the importance of maintaining harmony and paying consideration to the environment and the economy. Korea has also encouraged the need of laws, institutional and social reform, and Korea have successful transition from growth oriented economy to an ecologically sound. The result of the transition is the 2010 basic law for sustainable development. It is expected that Korea will lead in sustainable development when the economy, society, and environment have been

substantially incorporated and when systems have been prepared to promote central and local government-level sustainable development.

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