

## GLOBALISATION, SUSTAINABLE DEVELOPMENT AND THE COMMON CONCERN OF HUMANKIND

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### I INTRODUCTION

Challenges faced by states in the era of globalisation continue to erode the traditional international law concept of 'state sovereignty'. During the last two decades, there has been a growing economic interdependence amongst states, accompanied by changes to technology and financial markets and an associated growth in numbers of transnational corporations (TNCs). A large number of TNCs have head offices of the parent companies in developed countries and subsidiaries located in developing countries. Often these TNCs may have an income which is larger than the gross national product of many developing countries. Responsibility has tended to move from states to non-state actors, leading to an increasing influence on the part of transnational institutions (including corporations) which operate globally. This enables some TNCs to exert pressure when national and international policies are decided.<sup>1</sup> The dominance of information and communications technology and the changes to transboundary networks of production, finance and trade are also undermining the sovereignty of states.

Therefore, laws and compliance mechanisms should be developed that take into account the interests of all major stakeholders including states, companies, environmental groups and communities.<sup>2</sup> The creation of international norms will become essential in order to resolve global problems.<sup>3</sup> The advantage of the common concern of humankind (CCH) concept is that it is a global ethical concept which can focus on areas of concern for all humankind, and arguably, could

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<sup>1</sup> Dinah Shelton, 'The Impact of Economic Globalization on Compliance' in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 35, 36. P Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7 *International Law FORUM du Droit International* 281.

<sup>2</sup> Shelton, above n 1, 39.

<sup>3</sup> Ibid 40.

develop into an international norm which would prioritise 'environmental protection as a fundamental value of international society.'<sup>4</sup>

The international community recognises the continuing damage that is occurring to the Earth's environment. Representatives from government, United Nations agencies and non-governmental organisations (NGOs) met in Johannesburg for the World Summit on Sustainable Development (WSSD) on 2-4 September 2002 to consider whether there had been progress in achieving sustainable development over the previous decade. They pointed out that the global environment continues to deteriorate, for there is a depletion of biodiversity, an increase in desertification and growing evidence of the adverse effects of climate change.<sup>5</sup> In spite of efforts to achieve sustainable development during the previous decade, there had been little progress to date.<sup>6</sup>

There has been a growing international awareness and concern about the increasing scarcity of natural resources and the gradual deterioration of the environment.<sup>7</sup> As a consequence, 'the entire biosphere has been recognized as a fundamental value of all humankind, the protection and preservation of which constitute a common concern.'<sup>8</sup>

Globalisation occurs with transboundary developments in economic, social, political and cultural exchange. This phenomenon can be given many meanings. In the context of this article a broad concept of globalisation is adopted – it 'involves a deepening and broadening of rapid transboundary exchanges due to developments in technology, communications and media. Such exchanges and interactions occur at all levels of governance and among non-state actors, creating a more interdependent world.'<sup>9</sup> New key concepts are developing in international law as a result of these changes and arguably the common concern of humankind (CCH) is one of these.

If, on the other hand, a restrictive definition of globalisation is adopted, it could lead to a narrow focus and a failure to accommodate environmental, cultural and social issues. In such a case, the meaning of globalisation could be that of 'unregulated free trade across the world'.<sup>10</sup> This definition would be opposed to the common

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<sup>4</sup> Ibid 41. This is the gender neutral version of the 'common concern of mankind'. Another version of this concept is referred to as the 'common concern of humanity'.

<sup>5</sup> United Nations, *Report of the World Summit on Sustainable Development* [hereinafter *WSSD Report*], Resolution 1, annex, 'Johannesburg Declaration on Sustainable Development', 1, para 13, UN Doc A/CONF.199/20 (2002)  
<[http://www.johannesburgsummit.org/html/documents/summit\\_docs/131302\\_wssd\\_report\\_reissued.pdf](http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf)> at 10 February 2006.

<sup>6</sup> Ibid.

<sup>7</sup> Alexandre Kiss, 'Economic Globalization and the Common Concern of Humanity' in Alexandre Kiss, Dinah Shelton, and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 3, 4.

<sup>8</sup> Ibid.

<sup>9</sup> Shelton, above n 1, 36.

<sup>10</sup> Kiss, above n 7, 4-5.

concern of humanity because it would fail to take into account issues of common concern such as environmental protection.

In the first part of this article, the CCH concept is explained and the links between the CCH and sustainable development are revealed in three dimensions: social, spatial and temporal. Secondly, the concept of sustainable development is defined and the ethical view of these international environmental concepts is discussed. It is argued that the proper approach to sustainable development requires a change in the ethical basis of international legal principles which will more strongly recognise that humankind is part of the environment. Thirdly, the impact of the CCH on sustainable development in the globalisation era is considered. The final section predicts future trends for the further development of the CCH, leading to the conclusion that one of the advantages of the CCH is that it guides the operation of other environmental concepts. The CCH promotes sustainability and enables environmental protection to be given priority over other areas of international law.

## II THE COMMON CONCERN OF HUMANKIND CONCEPT

The CCH began its life as an international environmental legal concept in times of changing international relations between states. There is a movement in international environmental law away from the traditional emphasis on the concept of 'sovereignty' and increasingly the emphasis is on the community of interests of states and the need for states to act in a unified way to deal with issues of common concern.<sup>11</sup>

'Sovereignty' enabled a state to have independence over the affairs, persons and property within its boundaries to the exclusion of other states.<sup>12</sup> In the past, sovereignty had limited the ability of states to intervene where environmental damage had occurred in a neighbouring state. The damaging state was able to rely upon the principle of sovereignty to justify its freedom of action over its internal affairs at the expense of environmental concerns.

This emphasis upon the sovereignty of states restricted the application of international law to the environment that extends beyond state boundaries. These restrictions were inadequate to provide protection for the environment because the ecosystems of the Earth are interlinked, so that what occurs in the environment of one state often has an effect upon other states and upon areas which are not governed by any single state. Today sovereignty has been confined by state obligations at international law.<sup>13</sup>

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<sup>11</sup> Kiss, above n 7, 9.

<sup>12</sup> Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 289.

<sup>13</sup> Ivan Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994) 91; G Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' (1973) 55 *Annuaire de l'Institut de Droit International* 197, 249: 'A legal definition of sovereignty in international law, as it is now, might be that it consists of all those powers which the State has not parted with voluntarily by treaty or other form of international agreement or engagement, or the extent or *modus operandi* of which is not governed by any

‘Sovereignty’ is being reconsidered in the light of international obligations to the environment. The CCH limits sovereignty so that the interdependence of states in the global environment is taken into account.<sup>14</sup> In fact the application of the CCH has been stated to achieve ‘the balance between sovereignty and environmental protection.’<sup>15</sup> Principle 21 of the *Declaration of the United Nations on the Human Environment (Stockholm Declaration)*<sup>16</sup> can also achieve this balance.

Activities within state jurisdiction could affect not only the state’s own environment but also that of neighbouring states and the global environment.<sup>17</sup> Matters falling under state control such as transport, energy-efficient technologies and the management of forests may now be influenced by measures taken by states to reduce greenhouse gas emissions.<sup>18</sup> This movement to impose international regulation on states can be clearly viewed in the *Vienna Convention for the Protection of the Ozone Layer*<sup>19</sup> and the *Montreal Protocol on Substances that Deplete the Ozone Layer*<sup>20</sup> which regulate the production of ozone depleting substances. Similarly, biodiversity is no longer considered as solely within state control, due to international agreement leading to the incorporation of the CCH in the *United Nations Convention on Biological Diversity*.<sup>21</sup> The CCH operates as an

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rule of customary law. Thus, as it has been well put, State sovereignty consists of ‘a residuum of discretionary authority circumscribed by law.’

<sup>14</sup> E Adami, ‘Opening Address’ in D Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (1990) 7, 11.

<sup>15</sup> J Barbosa, ‘Conclusions of the Meeting’ in D Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (1990) 27, 31.

<sup>16</sup> *Report of the United Nations Conference on the Human Environment*, UN Doc E/73/II.A/14 (1972), 11 ILM 1416, 1419 (1972).

<sup>17</sup> Adami, above n 14, 11 ‘the concept of the ‘common concern of mankind’ lays the basis for the innovative right of mankind to concern itself with activities that bring about climate change, even where they occur within a State’s boundaries.’

<sup>18</sup> See Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report: Summary for Policymakers* (2001) <<http://www.ipcc.ch/pub/un/syrenng/spm.pdf>> at 15 February 2006.

<sup>19</sup> *Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 323, 26 ILM 1529 (1987) (entered into force 22 September 1985).

<sup>20</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1988, 1522 UNTS 3, 26 ILM 1550 (1987) (entered into force 1 January 1989).

<sup>21</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79, 31 ILM 818 (1992) (entered into force 29 December 1993). David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy* (1998) 344. These authors state: ‘The principle of common concern can thus be seen as causing creative tension with the principle of State sovereignty. Prior to the negotiations of the Biodiversity Convention, for example, States were assumed to have complete control and discretion with respect to conservation of biodiversity found within their boundaries. Growing international concern in the widespread loss of biodiversity, however led to pressure on all countries to agree jointly to its conservation and to find ways through international cooperation to facilitate such conservation. In this way, the conservation of biodiversity is no longer viewed as the province solely of individual States. The same can be said of the emission of fossil fuels that threatens the earth’s climate system.’ See also J Brunnée, ‘Environmental Security in the Twenty-first Century: New Momentum for the Development of International Environmental Law?’ (1995) 18 *Fordham International Law Journal* 1742, 1745.

overarching concept to achieve a balance between considerations of sovereignty and environmental protection so that states can cooperate for the benefit of the international community.<sup>22</sup>

The CCH can be viewed in a wider dimension and is not limited to the concerns of ozone depletion, biological diversity and climate change.<sup>23</sup> This concept could be extended to a wide range of environmental threats.<sup>24</sup>

Although the principle of the common concern was first used in the environmental context in the 1992 Biodiversity and Climate Change Conventions, all international environmental treaties and instruments arguably reflect a growing acceptance that protecting the environment and achieving sustainable development are ‘common concerns of humanity.’<sup>25</sup>

Thus, the CCH could apply to the prevention of marine pollution, the protection of forests, the protection of the Antarctic environment, the prevention of desertification, the control of the effects of genetically modified organisms on the environment and the prevention of space pollution. This concept also could be implied into the operation of many environmental protection instruments<sup>26</sup>, as well as in the operation of sustainable development agreements such as *Agenda 21*<sup>27</sup> and the Principles of the *Rio Declaration on Environment and Development (Rio Declaration)*.<sup>28</sup> It is possible to extend the CCH concept to other areas of international law such as health, international criminal law, and action against terrorism and drug traffickers.<sup>29</sup>

The key conclusions about the operation of the CCH<sup>30</sup>, discussed at the Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues, are summarised as follows:

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<sup>22</sup> See Kiss above n 7, 8.

<sup>23</sup> Ibid 7.

<sup>24</sup> International Union for the Conservation of Nature and Natural Resources, *Draft International Covenant on Environment and Development* [hereinafter *Draft Covenant*] (3<sup>rd</sup> ed, 2004). Article 3 states that ‘the global environment is a common concern of humanity.’ Note that this draft (which is aimed at providing a global legal framework) is only a guide. See also AS Timoshenko, ‘International Legal and Institutional Framework for Global Climate Change’ in T Iwama (ed), *Policies and Laws on Global Warming: International and Comparative Analysis* (1991) 39. Timoshenko considers that the CCH represents a holistic paradigm. ‘The paradigm obtains a potential of expanded application to all major environmental challenges.’

<sup>25</sup> Hunter, Salzman and Zaelke, above n 21, 343.

<sup>26</sup> See *Draft Covenant*, above n 24, 37. The commentary states: ‘The concept can be found in many multilateral environmental treaties...’

<sup>27</sup> *Report of the United Nations Conference on Environment and Development* (UNCED) [hereinafter *Agenda 21*], UN Doc A/CONF.151/26 (1992).

<sup>28</sup> *Report of the United Nations Conference on Environment and Development* (UNCED), vol I, ch 1, annex I, ‘Rio Declaration on Environment and Development’ [hereinafter *Rio Declaration*], UN Doc A/CONF.151/26 (1992), 31 ILM 874 (1992).

<sup>29</sup> Kiss, above n 7, 7.

<sup>30</sup> For further details about these conclusions on the common concern of humankind, see Laura Horn, ‘The Implications of the Concept of Common Concern of Humankind on a Human

1. The CCH may develop into a principle of international customary law.
2. The word 'humankind' implies intergenerational rights.
3. The CCH can apply generally to environmental problems
4. The CCH could apply to other areas of international law.
5. The proprietary connotations in 'common heritage' did not apply to the CCH because they are different concepts covering different fields.
6. The CCH is distinguishable from the 'common interest' concept. The CCH indicates the need to take action or serious consequences may result.
7. Equitable sharing forms part of the CCH concept. In the context of climate change, there is a burden upon developed countries proportional to their responsibility for the deterioration of the atmosphere.
8. The CCH indicates a balance between state sovereignty and environmental protection.
9. The CCH forms a link between human rights and environmental protection and encourages the development of a human right to a healthy environment.<sup>31</sup>

The characteristics of the common concern concept are not limited to states but can be extended to all members of the international community through the requirement of cooperation in the CCH. In fact the *Rio Declaration* requires states to carry out activities within their jurisdiction, such as the enacting of effective environmental legislation.<sup>32</sup> Birnie and Boyle point out that as far as sustainable development is considered to be a legal principle (which is uncertain) 'it might be said that this aspect of domestic environmental protection may by implication also be a matter of common concern.'<sup>33</sup>

In order to achieve sustainable development, there must be cooperation between states at an international level which should flow through regional and national levels so that individuals at the local level receive support in their communities to carry out action to achieve environmental protection. The CCH can thus be seen to operate as an overarching concept that can directly influence the operation of related concepts of international law. However its influence is limited by the fact that it is founded upon soft law and has not yet developed as a legal obligation based upon hard law.

In the following section the links between the global concept of CCH and the environmental protection concept of sustainable development are explored in their social, spatial and temporal dimensions.

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Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative Environmental Law* 233.

<sup>31</sup> Barbosa, above n 15, 27-32.

<sup>32</sup> *Rio Declaration*, above n 28, Principle 11.

<sup>33</sup> Patricia Birnie and Alan Boyle, *International Law and the Environment* (2<sup>nd</sup> ed, 2002) 98.

### III THE DIMENSIONS OF THE COMMON CONCERN OF HUMANKIND CONCEPT

The international community has begun to recognise that dangers posed to the environment are the common concern of all and now generally acknowledges that effective measures need to be taken to protect the environment.<sup>34</sup> There are some significant ways in which the CCH interrelates with the concept of sustainable development to achieve this objective.

Firstly the CCH concept has a social dimension<sup>35</sup> which involves all members of society in the conservation of the environment, including not only individuals but also the judiciary, the legislature, the executive government and government departments. 'Sustainable development' has emerged as the guiding concept to enable humanity to attain the goal of life in balance with nature.<sup>36</sup> The social dimension is also apparent in the operation of sustainable development where *Agenda 21* relies upon the support of all members of the community to carry out this program and there is support in the *Rio Declaration* for this view.<sup>37</sup> The WSSD parties confirmed their commitment to the *Rio Declaration* and to the full implementation of *Agenda 21* and the *Programme for the Further Implementation of Agenda 21*.<sup>38</sup> These commitments are extended in the Plan of Implementation<sup>39</sup> set out in the World Summit Report. The Plan of Implementation identified areas of commitment and measures to be taken at international, national and local levels. These areas included poverty eradication, water and sanitation, changing unsustainable consumption and production patterns, energy, the management of natural resources, sustainable agriculture, climate change and regional initiatives.<sup>40</sup> The wide range of measures indicates the links between sustainable development and other areas of international common concern which require action to be taken by states as well as action within the jurisdiction of states in order to achieve sustainable development.

Sustainable development is closely linked to the CCH concept because public participation is essential for the realisation of this aim. Public involvement means that not only should groups, organisations and individuals receive information about

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<sup>34</sup> Kiss, above n 7, 4.

<sup>35</sup> 'Note from the UNEP Secretariat to the Meeting' in D Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (1990) 36, 37.

<sup>36</sup> International Union for the Conservation of Nature and Natural Resources (IUCN), World Wildlife Fund (WWF), and United Nations Environment Programme (UNEP), *Caring for the Earth: A Strategy for Sustainable Living*, (1991) 10; World Commission on Environment and Development (WCED), *Our Common Future* (1990); *Agenda 21* above n 27.

<sup>37</sup> *Rio Declaration* above n 28, Principle 27: 'States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.' Note also that the *Rio Declaration* and *Agenda 21* are soft law instruments.

<sup>38</sup> *WSSD Report*, above n 5, Plan of Implementation, 8, para 1.

<sup>39</sup> *Ibid*, see the 'Plan of Implementation' 6ff.

<sup>40</sup> *Ibid*. See also K Gray, 'Accomplishments and New Directions?' (2003) 52 *International and Comparative Law Quarterly* 256, 257-65.

the environment and development but also that people can take part in decision-making especially in relation to the local environment where they live.<sup>41</sup> This participation also encourages commitment and responsibilities on the part of the individuals and groups concerned.<sup>42</sup> According to Skolimowski, responsibility is essential to ecological ethics:

Responsibility is an ethical principle in the sense that, if you understand the unity of life, and the fact that you are part of it, and one with it, then you must take responsibility for life, for all life ...<sup>43</sup>

Laws alone will not be adequate to ensure that the common concern is protected. There will also need to be public community support for the protection of the environment.<sup>44</sup> A second aspect of the CCH that links to the sustainable development concept is the spatial dimension where the cooperation not only of all states<sup>45</sup> but that of all humanity is called for,<sup>46</sup> and in this regard the action taken must be in accordance with the concept of sustainable development. The need for the cooperation of the international community to achieve sustainable development is a recurring theme throughout *Agenda 21*.<sup>47</sup> This is also reflected in the *Rio Declaration*<sup>48</sup> and is illustrated by Article 3 of the *Draft International Covenant on Environment and Development (Draft Covenant)*:<sup>49</sup>

The global environment is a common concern of humanity. Accordingly, all its elements and processes are governed by the principles of international law, the dictates of public conscience and the fundamental values of humanity.

This article refers not only to the need for the international community to take action to ensure that the environment is protected, but also to 'all actors' which include individuals, NGOs and companies.<sup>50</sup> Similarly, all social groups should

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<sup>41</sup> *Agenda 21*, above n 27, vol 2, para 23.2; *Rio Declaration*, above n 28, Principle 10.

<sup>42</sup> *Agenda 21*, above n 27, vol 2, para 23.2; Ben Boer, 'Institutionalising Ecologically Sustainable Development: The Role of National, State and Local Governments in Translating Grand Strategy into Action' (1995) 31 *Willamette Law Review* 307, 332.

<sup>43</sup> H Skolimowski, 'Reverence for Life' in JR Engel and JG Engel (eds) *Ethics of Environment and Development* (1990) 100.

<sup>44</sup> WCED, above n 36, 63.

<sup>45</sup> 'Note from the UNEP Secretariat to the Meeting', above n 35, 37.

<sup>46</sup> See, eg, the explanation of the CCH in L Glowka, F Burhenne-Guilmin, H Synge, J McNeely, and L Gündling, *A Guide to the Convention on Biological Diversity* (1994) 10.

<sup>47</sup> See, eg, *Agenda 21*, above n 27, paras 9.8(d), 9.12(a), 11.5, 12.10, 13.8, 14.39, 15.7, 16.7, 17.58, 19.7, 20.15 and 21.12.

<sup>48</sup> *Rio Declaration*, above n 28, Principle 7: 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem...' See also Principles 5, 9, 12, 14, and 27.

<sup>49</sup> *Draft Covenant*, above n 24, 36. See also preamble, para 11: 'Affirming the duty of all to respect and care for the environment and promote sustainable development.'

<sup>50</sup> See Shelton, above n 1, 42: 'regulation of non-state actors is based upon recognition that an international minimum standard is necessary for all those whose activities impact fundamental values. In particular, it sees environmental protection as a necessity, not an optimal corporate policy, because it is a common concern of humanity.'



have the opportunity to participate in action concerning sustainable development.<sup>51</sup> The responsibility of individuals and groups is included in the *Draft Covenant* which is aimed as a co-ordinated and global approach to sustainable development in international environmental law.<sup>52</sup> According to Article 12(2) of this document:

The Parties shall ensure all natural and juridical persons have a duty to protect and preserve the environment.

Finally, the CCH and sustainable development both contain a temporal dimension which refers to the rights and obligations of both present and future generations.<sup>53</sup> The interests of future generations are not often referred to in *Agenda 21*. Rather, the focus is on indicating current action on environmental problems that can be taken to achieve sustainable development which is carried out for the benefit of future generations.<sup>54</sup> However, *Agenda 21* is to be carried out 'in full respect of all of the principles contained in the *Rio Declaration*'<sup>55</sup> and the need to take into account the interests of future generations is referred to in the *Rio Declaration*.<sup>56</sup> The issue here is to what extent the CCH creates legal rights, particularly as far as future generations are concerned. There is arguably support for the implication that the CCH may create rights for individuals and future generations based upon Principle 1 of the *Stockholm Declaration*.<sup>57</sup> The institutions and procedures for enforcing these rights need to be established.<sup>58</sup>

There are problems of interpretation and application of the concept of sustainable development. In the *Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo Case)* the court referred to sustainable development as a 'concept'.<sup>59</sup> It

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<sup>51</sup> *Agenda 21*, above n 27, para 23(1): 'Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and involvement of all social groups.'

<sup>52</sup> *Draft Covenant*, above n 24, art 1: 'The objective of this Covenant is to achieve environmental conservation as an indispensable component of sustainable development, through establishing integrated rights and obligations.' W Burhenne and R Tarasofsky, 'Codification and Progressive Development of International Law – An Example from the Field of the Environment' (1998) 28 *Environmental Policy and Law* 77.

<sup>53</sup> 'Note from the UNEP Secretariat to the Meeting', above n 35, 37.

<sup>54</sup> See E Brown Weiss, 'Environmental Equity and International Law' in S Lin and L Kurukulasuriya (eds) *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1995) 7, 16-17.

<sup>55</sup> *Agenda 21*, above n 27, para 1.6.

<sup>56</sup> *Rio Declaration*, above n 28, Principle 3 states: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'

<sup>57</sup> *Stockholm Declaration*, above n 16. Alan Boyle, 'International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles' in R Churchill and D Freestone, (eds) *International Law and Global Climate Change* (1991) 12.

<sup>58</sup> See Boyle, above n 57, 13.

<sup>59</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [hereinafter the *Gabčíkovo Case*], 37 ILM 162, 201 (1988).

remains uncertain as to what extent this concept has developed into a principle of international environmental law.<sup>60</sup>

Sands argues that the principle has emerged where states should make sure that they develop their natural resources in a sustainable manner.<sup>61</sup> He also points out that principles can have different practical legal consequences which are:

First, legal and other implications may be drawn from them by courts and tribunals... Second, principles provide a basis for the negotiation and elaboration of future international legal obligations within the context of existing or new instruments. Third, principles can play a role in the application of procedural rules concerning verification and compliance by affecting the meaning and effect to be given to particular obligations.<sup>62</sup>

Even though there is no agreed specific definition of sustainable development,<sup>63</sup> it continues to play a significant role at international, regional, and national levels in the protection of the environment. The problems with the lack of definition are explored in the following section.

#### IV PROBLEMS WITH THE DEFINITION OF SUSTAINABLE DEVELOPMENT

The origins of sustainable development in international environmental law emerged after the *Stockholm Declaration*.<sup>64</sup> An important early attempt to define this concept can be found in the Brundtland Report, as follows:

Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future. Far from requiring the cessation of economic growth, it recognizes that the problems of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits.<sup>65</sup>

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<sup>60</sup> A A-Khavari and DR Rothwell, 'The ICJ and the *Danube Dam Case*: A Missed Opportunity for International Environmental Law?' (1998) 22 *Melbourne University Law Review* 507, 522-3.

<sup>61</sup> Philippe Sands, *Principles of International Environmental Law*, vol I (2<sup>nd</sup> ed, 2003) 252. See D McGoldrick, 'Sustainable Development and Human Rights: An Integrated Conception' (1996) 45 *International and Comparative Law Quarterly* 796, 802. McGoldrick states: 'Sustainable development has made some normative progress, most probably to that of a legal principle.'

<sup>62</sup> Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in W Lang (ed) *Sustainable Development and International Law* (1995) 53, 56-58.

<sup>63</sup> Birnie and Boyle, above n 33, 85. J Dernbach, 'Sustainable Development as a Framework for National Governance' (1990) 49 *Case Western Reserve Law Review* 1, 6; R Hoelting, 'After Rio: The Sustainable Development Concept Following The United Nations Conference on Environment and Development' (1994) 24 *Georgia Journal of International and Comparative Law* 117, 133.

<sup>64</sup> *Stockholm Declaration*, above n 16. P Malanczuk, 'Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference' in K Ginther, E Denters, and P de Waart (eds) *Sustainable Development and Good Governance* (1995) 23, 23-24.

<sup>65</sup> WCED, above n 36, 84.

It (sustainable development) contains within it two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organisation on the environment’s ability to meet present and future needs.<sup>66</sup>

The Brundtland report also points out that economic, social and cultural development are linked to sustainable development and that it is important to link economics and ecology in environmental decision making. Further, sustainable development is a concept requiring justice both between generations as well as within the present one, so sustainability demonstrates a concern for social equity. The comments of the court in the *Gabčíkovo Case*<sup>67</sup> support the abovementioned definition in regard to the need to balance environmental concerns with development.<sup>68</sup>

*Caring For The Earth* stated that this broad definition of sustainable development caused problems because it created ambiguity and misunderstanding.<sup>69</sup> A more restrictive interpretation of sustainable development was advocated. This report refers to:

improving the quality of human life while living within the carrying capacity of supporting ecosystems.<sup>70</sup>

This latter definition has been criticised as human-centred and utilitarian because it implies the environment is a resource for human use and that economic growth is important in order to satisfy human needs.<sup>71</sup> It could lead to a more restrictive interpretation of the CCH and a departure from an emphasis on ecological environmental protection which is based upon a respect for all life. A more balanced definition of sustainable development appears in the *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* Article 3(1)(a):

For the purpose of this Convention:

(a) ‘Sustainable Development’ means the process of progressive change in the quality of life of human beings, which places it as the centre and primordial subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full

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<sup>66</sup> WCED, above n 36, 87.

<sup>67</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 201 (1988).

<sup>68</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 201 (1988). See A-Khavari and Rothwell, above n 60, 520.

<sup>69</sup> WCED, above n 36, 10. See M Pallemarts, ‘International Environmental Law from Stockholm to Rio: Back to the Future?’ in P Sands (ed) *Greening International Law* (1993) 1, 14.

<sup>70</sup> WCED, above n 36, 10.

<sup>71</sup> Ben Boer, ‘Implementing Sustainability’ (1992) 14 *Delhi Law Review* 1, 2.

participation of people in peaceful coexistence and in harmony with nature, without prejudice to and ensuring the quality of life of future generations.<sup>72</sup>

The abovementioned definition takes into account the whole ecosystem and not just the resource in question. The difficulty with the concept of sustainable development is that there is a lack of agreement about its meaning and how to ensure that the concept can be given practical effect.<sup>73</sup> This problem is reflected in the use of sustainable development in the *United Nations Framework Convention on Climate Change (Climate Change Convention)*. Consider Article 2:

The ultimate objective of this Convention ... is to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.<sup>74</sup>

The implication here is that economic development must be sustainable. Further, in Article 3(5): ‘The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties.’<sup>75</sup>

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<sup>72</sup> *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific*, opened for signature 18 February 2002 (not in force) <<http://www.intfish.net/treaties/nepac.htm>> at 27 February 2006.

<sup>73</sup> Birnie and Boyle, above n 33, 85; Sands, above n 62, 58 states: ‘There exists no generally accepted definition of sustainable development...’ G Handl, ‘Sustainable Development: General Rules versus Specific Obligations’ in W Lang (ed) *Sustainable Development and International Law* (1995) 37. Handl states: ‘a major obstacle to the progress along the course chartered at Rio is the lack of date of clarity with regard to the specific legal implications of sustainable development....Rather, the problem is the concept’s latent ambiguities and internal inconsistencies – whether intended or not – which undermine its policy guidance function and its role as a conceptually clear platform for initiatives for detailed follow-up or implementing legislation.’

<sup>74</sup> *United Nations Framework Convention on Climate Change* [hereinafter *Climate Change Convention*], opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>75</sup> *Climate Change Convention*, above n 74. Article 4(2)(a) also refers to ‘the need to maintain strong and sustainable economic growth’. Article 3(4) states: ‘The parties have a right to, and should, promote sustainable development...’ See the *Protocol to the Framework Convention on Climate Change (Kyoto Protocol)*, opened for signature 11 December 1997, 37 ILM 22 (1998) (entered into force 16 February 2005). Article 2(1) which refers to the aim of carrying out policies to reduce greenhouse gases in ‘order to promote sustainable development...’ can be read with Article 2(3) which states, ‘The parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties especially developing country Parties ...’ This is a broader approach to sustainable development because it takes into account adverse effects on other members of the present generation in developing countries; however, there is no reference to future generations in this context.

The risk is that a narrow definition of globalisation which focuses on economic development could limit the effectiveness of the application of sustainable development. According to Pinto, this emphasis on the use of 'sustainable' in connection with economic growth and development leads to a 'distortion' of the definition of sustainable development<sup>76</sup> so that it is not focused on the management of resources but on economic development.

The World Summit Report included a Political Declaration as well as a Plan of Implementation. In the Political Declaration the parties agreed to be responsible for strengthening the three pillars of sustainable development, namely, economic development, social development and environmental protection.<sup>77</sup> So the definition of sustainable development has been broadened by the WSSD because social development is one of the main pillars.<sup>78</sup> This could be viewed as part of the globalisation process where the ambit of sustainable development has expanded to cover other issues of importance to the international community such as human rights and good governance. Unfortunately, no guidance is given about how to integrate these areas into the international law of sustainable development. Indeed the problem becomes one of how to prioritise these concerns with other areas of international law such as trade.<sup>79</sup>

The *Rio Declaration*<sup>80</sup> provides for the integration of the environment with development in Principle 4:

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.

However this Principle must also be read with Principle 3:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

These two principles indicate that the right to development takes into account both economic and environmental issues. The important principle of interrelationship and integration underlies Principles 3 and 4.<sup>81</sup>

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<sup>76</sup> M Pinto, 'Reflections on the Term Sustainable Development and its Institutional Implications' in K Ginther, E Denters, and P de Waart (eds) *Sustainable Development and Good Governance* (1995) 75.

<sup>77</sup> *WSSD Report*, above n 5, Resolution 1, annex, 'Johannesburg Declaration on Sustainable Development', 1, para 5.

<sup>78</sup> International Law Association, *Report of the Seventy-First Conference* (2004) 578.

<sup>79</sup> See Kiss, above n 7, 9

<sup>80</sup> *Rio Declaration*, above n 28.

<sup>81</sup> *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* Geneva, Switzerland, 26-28 September 1995, prepared by the Division for Sustainable development for the CSD Fourth Session, para 15 <<http://www.un.org/gopher-data/esc/cn17/1996/backgrnd/law.txt>> at 10 February 2006.

Interrelationship and integration reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development, and could lead to the development of general rules of international law in which these separate fields retain their distinct characters but are subject to an interconnected approach. However it is understood that this approach does not subsume the distinct fields of international law into international law for sustainable development.<sup>82</sup>

The aim of developing countries was to ensure that they could continue to develop in the future and this aim is reflected in the *Climate Change Convention*<sup>83</sup> and in the *United Nations Convention on Biological Diversity (Biological Diversity Convention)*.<sup>84</sup> However this aim in the *Rio Declaration* is also made subject to the achievement of environmental protection for present and future generations through Principle 3.<sup>85</sup> Sands considers that Principle 4 of the *Rio Declaration* is likely to play a significant role in determining whether environmental obligations take a central position in international affairs so that all development decisions are subject to 'critical environmental scrutiny' including those of states and organisations such as the World Trade Organization (WTO).<sup>86</sup>

The CCH could operate to prioritise international areas of law of common concern to humanity in priority to other of lesser importance such as trade. This would mean, for example, in the case of the WTO, decision-makers would be obliged to take into account environmental principles and treaty obligations when making decisions about trade issues. One possible solution would be to ensure that environmental experts with adequate experience are represented on the WTO. The problem remains of how to integrate international legal norms and principles, particularly also the principle of common but differentiated responsibility, along with human rights and other norms. Another possibility would be the development of a hierarchy of norms at international law with procedures to prioritise issues of common concern of humankind over others in the event of a conflict of norms. So the WTO would no longer primarily focus on the objective of liberalising trade, rather ecologically sustainable trade would become the primary objective.<sup>87</sup>

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<sup>82</sup> Ibid.

<sup>83</sup> *Climate Change Convention*, above n 74, para 22, preamble.

<sup>84</sup> *Convention on Biological Diversity*, above n 21, para 16, preamble.

<sup>85</sup> The integration of environmental protection with sustainable development in Principle 4 implies that environmental protection must form part of all development decisions, planning and activities. The words 'so as' in Principle 4 can be interpreted so that development does not take priority over environmental protection, see Malanczuk, above n 64, 30-31.

<sup>86</sup> Sands, above n 61, 290.

<sup>87</sup> See S Charnovitz, 'WTO Dispute Settlement as a Model for International Governance' in Alexandre Kiss, Dinah Shelton, and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (2003) 252. 'What the WTO is committed to is trade reciprocity and the gradual liberalization of trade through a negotiated reduction of trade barriers.... The environment regime sees sound ecology as an ultimate objective that every nation can share. In contrast, the trade regime tends to see trade as a zero-sum game in which winning nations export more than they import. Thus, in expressing world community values, the WTO is normatively hollow in comparison to the environment regime.'

## V THE STATUS OF THE CONCEPT OF SUSTAINABLE DEVELOPMENT

This section explores the role of sustainable development and the need for the international community to further refine the standards required to achieve sustainability. Birnie and Boyle point out that whether or not sustainable development is a legal obligation, it represents a goal which can influence the decisions in cases, the interpretation of treaties and the practice of states and organisations and it may lead to changes in the present law.<sup>88</sup> On the other hand Sands declares that:

There can be little doubt that 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.<sup>89</sup>

Other commentators are reluctant to endorse sustainable development as an emerging legal principle because of the failure to agree on the meaning and application of this concept.<sup>90</sup>

In the *Gabčíkovo Case* the court accepted sustainable development as a concept of international law.<sup>91</sup> This implies that the concept is not yet adequately defined to have achieved a greater status. However the majority judgement in this case did not clarify whether the court considered that this concept is an emerging principle of international environmental law.<sup>92</sup> The majority judgement did indicate that sustainable development has a role to play in reconciling economic development and protection of the environment:

This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the *Gabčíkovo* power plant.<sup>93</sup>

In fact, the majority judgement of the *Gabčíkovo Case* indicated that states must take sustainable development (together with other new norms and standards) into account when engaged in both new and continuing activities.<sup>94</sup>

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<sup>88</sup> Birnie and Boyle, above n 33, 96-97. G Handl, 'Environmental Security and Global Change: the Challenge to International Law' (1990) 1 *Yearbook of International Environmental Law* 3, 25.

<sup>89</sup> Sands, above n 61, 254.

<sup>90</sup> Malanczuk, above n 64, 25. See also Birnie and Boyle, above n 33, 85; Handl, above n 73, 37; J Ayling, 'Serving Many Voices: Progressing Calls for an International Environmental Organisation' (1997) 9 *Journal of Environmental Law* 243, 244; Hoelting, above n 63, 135.

<sup>91</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 201 (1988).

<sup>92</sup> A-Khavari and Rothwell, above n 60, 520, state 'By referring to sustainable development as a concept, the court left unanswered the question of whether sustainable development is a principle in embryo or at best a political objective.'

<sup>93</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 201 (1988).

There is support for the view that sustainable development is a principle of international environmental law.<sup>95</sup> Judge Weeramantry, in his separate opinion in the *Gabčíkovo Case*, considered sustainable development to be a principle of customary international law.<sup>96</sup> Judge Weeramantry, when referring to sustainable development, states:

It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection and that neither of these rights can be neglected.<sup>97</sup>

In spite of the problems of defining this concept, sustainable development does play an important role in international environmental law by acting as a constraint on policy makers.<sup>98</sup> This concept, together with the rights to life and health, has been discussed in national cases in the United States even though the plaintiffs did not demonstrate the existence of rules of customary international law or that there was universal acceptance of the rules by the international community.<sup>99</sup> On the other hand, in some cases in the Indian Supreme Court and in the Court of Justice of the European Communities, there have been attempts to give meaning and application to sustainable development.<sup>100</sup> Sands considers that whether sustainable development operates as a principle or as a concept in international law, there are a range of procedural and substantive commitments which states must recognise, such as the need to take into account intragenerational and intergenerational equity and limits placed upon natural resources, that the environment and development should be integrated and that the rules of international law should be interpreted in an integrated manner.<sup>101</sup> Sustainable development, like the CCH, is related to other environmental principles.

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<sup>94</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 201 (1988): ‘Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such intervention at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.’

<sup>95</sup> Sands, above n 62, 57, states: ‘An emerging international legal principle requires states to ensure that they develop and use their natural resources in a manner that is sustainable.’ See Sands, above n 61, 266. See also McGoldrick, above n 61, 802.

<sup>96</sup> *Gabčíkovo Case*, above n 59, 37 ILM 162, 204, 207 (1988).

<sup>97</sup> *Ibid* 207.

<sup>98</sup> Handl, above n 88, 27: ‘Irrespective of the concept’s international weakness at the moment, it is evident that ‘sustainable development’ is shaping environmental policy debates in a fundamental way. More significantly, it has begun to act as a de facto constraint on environmental decision-makers, both internationally as well as domestically.’

<sup>99</sup> *Flores v Southern Peru Copper Corporation* 414 F 3d 233 2003 (2d Cir 2003). *Flores v Southern Peru Copper Corp* 253 F Supp 2d 510 (SDNY 2002).

<sup>100</sup> India: *KM Chinnappa and TN Godavarman Thirumalpad v Union of India & Ors* [2002] 4 LRI 521, *MC Mehta v Union of India & Ors* [2002] 2 LRI 1; European Communities: *European Commission v European Council*, Case C-176/03 [2006] All ER (EC) 1.

<sup>101</sup> Sands, above n 61, 266.



There continues to be some uncertainty about the legal status of sustainable development so the next step for the international community is to further determine the rules on sustainable development (currently in the form of soft law) and enable specific rules to emerge in appropriate definition so that, in the future states and TNCs could be held internationally accountable for achieving sustainable development at both global and national levels. In order to achieve this aim, 'the criteria for measuring this standard must be made clear, as must the evidential burden for assessing the performance of individual states.'<sup>102</sup> The focus on sustainable development in both international and national legal systems indicates that the ethical view of sustainable development should be taken into account as discussed in the following section. The interaction of the CCH with the sustainable development concept encourages an ethical perspective to be adopted.

## VI THE EMERGENCE OF TWO CONTRASTING VIEWS OF SUSTAINABLE DEVELOPMENT

There are, in fact, many different perspectives of sustainable development<sup>103</sup> but we will focus here upon two contrasting philosophical views. The first is sustainable development as an economic ideal, where the concept may be limited to the conservation of natural resources. Secondly, as an ethical ideal, sustainable development may be defined more broadly to include an ecological-ethical view.<sup>104</sup>

The Brundtland report is very general and has been criticised because of its emphasis on economic development to achieve sustainable development and the indication that growth in both developing and industrial countries is necessary to assist the alleviation of poverty in developing countries.<sup>105</sup> The proceeds of this growth would then be used to improve the environment. This leaves the possibility open for corporations and governments to misinterpret these ideas to advocate continued growth as usual whilst taking into account that there are environmental consequences to be countered.<sup>106</sup> Sustainable development is also often limited to the conservation of resources and the perspective of human needs.<sup>107</sup>

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<sup>102</sup> Birnie and Boyle, above n 33, 85.

<sup>103</sup> D Pearce, A Markandya, E Barbier, *Blueprint for a Green Economy* (1990) 173.

<sup>104</sup> SR Sterling, 'Towards an Ecological World View' in JR Engel and JG Engel (eds) *Ethics of Environment and Development* (1990) 78.

<sup>105</sup> See R Goodland, 'The Case that the World has Reached Limits: More Precisely that Current throughput Growth in the Global Economy cannot be Sustained' in R Goodland, H Daly, S Serafy, and B Von Droste, *Environmentally Sustainable Development: Building on Brundtland* (1991) 9-15, especially at 16: 'It seems unlikely that the world can sustain a doubling of the economy, let alone Brundtland's five- to ten- fold increase. Throughput growth is not the way to reach sustainability; we cannot 'grow' our way into sustainability.'

<sup>106</sup> W Rees, 'The Ecological Basis for Sustainable Development in the Fraser Basin' in A Dorsey (ed) *Perspectives on Sustainable Development in Water Management: Towards Agreement in the Fraser River Basin* (Research Program on Water in Sustainable Development Vol 1) 456.

<sup>107</sup> See SE Serafy, 'Sustainability: Income measurement and Growth' in R Goodland, H Daly, S Serafy, and B Von Droste, *Environmentally Sustainable Development: Building on Brundtland* (1991) 59-70. Serafy proposes methods of including the environment in accounting calculations.

A broader definition of sustainable development can include an ethical view of the environment. According to Kothari, sustainable development has four main elements as a moral concern. These are a holistic approach to development, equity, responsibility for future generations and an appreciation of life as sacred.<sup>108</sup> This broader view is not adequately indicated in the *Brundtland Report* or in the *World Conservation Strategy*.

The concept of sustainable development remains unclear as a legal concept at international law<sup>109</sup> and is in fact still developing. There are, however, some conclusions which can be drawn from existing international agreements. The following core elements were extracted by a group of thirty-three international legal experts in consultation:

- a) the idea that the needs of the present and future generations must be taken into account;
- b) the need to ensure that renewable and non-renewable environmental resources are conserved and not exhausted;
- c) the requirement that access to and use of natural resources must take equitable account of the needs of all peoples; and
- d) a recognition that issues of environment and sustainable development must be treated in an integrated manner.<sup>110</sup>

Other legal considerations are the potential for international surveillance of national economic development in a similar way to that currently in operation for human rights questions. The Commission on Sustainable Development (CSD) was established on 14 June 1993 to carry out monitoring and review functions to ensure the satisfactory progress of *Agenda 21*.<sup>111</sup> This role continues after the *WSSD*, and has been enhanced so that the CSD has functions which include fostering the implementation of *Agenda 21* and promoting partnerships.<sup>112</sup> Further, the CSD should take into account significant legal developments and promote best practices in the field of sustainable development.<sup>113</sup> Although the current international perspective is not at present in accord with a broad ethical and holistic approach to sustainable development,<sup>114</sup> there is the possibility that this concept may evolve

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<sup>108</sup> R Kothari, 'Environment, Technology, and Ethics' in JR Engel and JG Engel (eds), *Ethics of Environment and Development* (1990) 34.

<sup>109</sup> Birnie and Boyle, above n 33, 85; Sands, above n 61, 260: 'Although attempts at definition have been made, no generally accepted definitions exist, and it is unlikely that distinguishable legal definitions could be agreed'; A-Khavari and Rothwell, above n 60, 522-23.

<sup>110</sup> 'Sustainable Development: The Challenge to International Law: Report of a Consultation Held at Windsor 27 to 29 April 1993' (1993) 2 (4) *Review of European Community and International Environmental Law* r2, r5. See also Sands, above n 61, 253, where a similar list of obligations is outlined.

<sup>111</sup> *Agenda 21*, above n 27, para 38.11.

<sup>112</sup> *WSSD Report*, above n 5, Plan of Implementation, 72, para 145.

<sup>113</sup> *Ibid*, paras 148-50.

<sup>114</sup> See the *Gabčíkovo Case*, above n 59, 37 ILM 162, 215 (1988), per Judge Weeramantry: 'The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the

towards this view in the future. In the *Draft Covenant*<sup>115</sup> the objective of this document sets out a holistic approach reflected in paragraph (1) of the preamble:

Recognising the unity of the biosphere, a unique and indivisible ecosystem, and the interdependence of all its components.

There is also a distinct recognition of other forms of life in Article 2:

Nature as a whole warrants respect. The integrity of the Earth's ecological systems shall be maintained and restored. Every form of life is unique and is to be safeguarded independently of its value to humanity.

In fact, the statement 'independently of its value to humanity' was inserted to ensure that a utilitarian interpretation would not apply to this Covenant.<sup>116</sup> The recent view of the Court of Justice of the European Commission also indicated the growing importance of environmental ethics as follows:<sup>117</sup>

71. The foregoing overview clearly illustrates the importance which 'ecological consciousness' has acquired in recent decades. Neither the actual nor the potential impact of the changes which human activity has brought about in ecosystems is known with certainty, but there is an intuitive awareness of their capacity to degrade life on earth or render it impossible. The fact that humankind and its assaults on nature are endangering its survival as a species has highlighted the urgency of facilitating guidelines for conduct and of implementing 'environmental ethics', aiming at the harmonious integration of humankind in the environment in which it exists.

Obviously then, the elements constituting the broader ethical view of sustainable development have the potential to be incorporated into international agreements in the globalisation era. This broader view of environmental ethics is explored in the next section.

## VII ENVIRONMENTAL ETHICS

An example of the change in ethical approach to the environment is revealed in the views of Bosselmann who develops the common heritage for all life principle based upon the application of the ecocentric view to the common heritage of humankind.<sup>118</sup> Bosselmann explains the ecocentric environmental ethic which

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standards of yesterday.' A-Khavari and Rothwell, above n 60, 524-25 consider that Judge Weeramantry 'conceives of the environment instrumentally, in terms of human happiness'.

<sup>115</sup> *Draft Covenant* above n 24.

<sup>116</sup> *Ibid* 36.

<sup>117</sup> *European Commission v European Council*, Case C-176/03 [2006] All ER (EC) 1, para 71.

<sup>118</sup> 'Common heritage of humankind' is the gender neutral version of the 'common heritage of mankind'. K Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995) 277. K Bosselmann, 'Governing the Global Commons: The Ecocentric Approach to International Environmental Law' in M Prieur and S Doumbé-Billé, *Droit de l'Environnement et*

awakens humans to the realisation that they are currently living in a system of their own construction which takes an anthropocentric approach to nature, placing humans in a position of 'predominance'.<sup>119</sup>

According to Bosselmann, the ecocentric environmental ethic:

states that this predominance can only be lowered to a level which is ecologically sound if we invest nature with intrinsic values that are principally of the same importance. Thus the parameters for weighing up the goods are basically reset. There is no longer just the interest in nature but additionally nature's self-interests. The fact that we can define our human interests relatively precisely does not rule out the possibility that nature has its own interests, independent from us.<sup>120</sup>

Bosselmann considers that the common heritage for all life has the following characteristics of ecocentric ethics:<sup>121</sup>

- a) Biotic reality – the common heritage for all life recognises the interdependence and interaction of all life on Earth and does not impose artificial boundaries on the environment.
- b) Inherent/intrinsic value – this can include both the instrumental value of the use for humanity of the biosphere to sustain its needs and the intrinsic value of the environment itself because the two values are not incompatible.
- c) Role of humanity – this is the role of guardian and protector of the environment and does not indicate any superiority of human beings.

It is arguable that the *UN World Charter for Nature*<sup>122</sup> contains some of these characteristics. The biotic reality is reflected in the first General Principle:

Nature shall be respected and its essential processes shall not be impaired.

Intrinsic value is reflected in the fourth paragraph of the preamble:

(a) Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of actions.

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*Développement Durable* (1994) 93, 99. See P Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (1998) 297-305.

<sup>119</sup> K Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995) 160. See Taylor, above n 118, 41.

<sup>120</sup> Bosselmann, above n 119, 160-61.

<sup>121</sup> K Bosselmann, 'Global Environmental Treaty: The Ecocentric Approach to International Environmental Law' 7-8, Draft Paper, not dated, on file with the Australian Centre for Environmental Law, Library, University of Sydney. Taylor, above n 118, 299-301. Taylor includes the concept of intergenerational equity in the common heritage for all life, at 301.

<sup>122</sup> The *World Charter for Nature*, GA Res 37/7, UN GAOR, 37<sup>th</sup> sess, supp no 51, at 17, UN Doc A/37/51 (1982); 22 ILM 455 (1983) does not specifically refer to concern but does indicate that humans must respect nature (General Principle 1). This is a non-binding instrument.

An implied reference to the role of humans as guardians can be found in the ninth paragraph of the preamble.<sup>123</sup>

There is potential for the CCH to have the same characteristics as the common heritage for all life based upon the development of Kiss' view of trust in the common heritage of humankind<sup>124</sup> and the gradual recognition at international law of the value of the environment itself. An environmental ethic could be formulated which is not based solely upon anthropocentric grounds but which takes into account the interconnectedness of nature. However, the acceptance of an environmental ethic leads to further normative difficulties which must be analysed. Problems will arise not only about the identification of natural objects which deserve human moral regard but also over what means are required to safeguard these areas of the environment and how to resolve internal environmental conflicts. An illustration of this problem is the case where a choice must be made between which one of two species should be protected if only one or the other can survive.<sup>125</sup>

Bosselmann argues that the common heritage for all life could be implemented in an Earth Charter and/or in a global environmental treaty or in regional environmental treaties.<sup>126</sup> Unfortunately, Bosselmann and Taylor fail to distinguish the CCH as a distinct concept which can be further developed in international environmental law.<sup>127</sup> In fact, the CCH is more likely to gain the consensus of states than the common heritage for all life because it has already been accepted in the preamble of multilateral conventions. Also the concept that Bosselmann and Taylor rely upon, the 'common heritage of humankind' was rejected because it applied to a different international management regime<sup>128</sup> and was also unsuitable to be used in the *Convention on Biological Diversity* where most biological diversity is located in areas of national jurisdiction.<sup>129</sup>

Overall, the CCH has the potential to protect the biosphere as a basis for a global environment convention<sup>130</sup> but the issues of intergenerational equity and intragenerational equity would need to be resolved. It would be unfortunate if the

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<sup>123</sup> Ibid. The preamble states: 'Reaffirming that man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations' (original emphasis).

<sup>124</sup> See Alexandre Kiss, 'The Common Heritage of Mankind: Utopia or Reality' (1985) 40 *International Journal* 423, 439.

<sup>125</sup> CD Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (1993) 276.

<sup>126</sup> Bosselmann, above n 119, 278. Bosselmann, 'Governing the Global Commons: The Ecocentric Approach to International Environmental Law' in M Prieur and S Doumbé-Billé, *Droit de l'Environnement et Développement Durable* (1994) 93, 101. Taylor, above n 117, 305-09.

<sup>127</sup> Taylor, above n 118, 278.

<sup>128</sup> *Draft Covenant*, above n 24, 37.

<sup>129</sup> Glowka, Burhenne-Guilmin, Synge, McNeely, and Gündling, above n 46, 3.

<sup>130</sup> See, eg, *Draft Covenant*, above n 24, Article 3. The commentary, at 36, states: 'Worldwide cooperation to establish a global strategy involving concerted action is necessary to avoid environmental disaster. This implies acceptance of both the right and the duty of the international community to have concern for the global environment.'

CCH became so general a concept that it would be too imprecise to have any useful legal application. The other difficulty is the actual extent to which states will be willing to limit their sovereignty to implement broad global principles of environmental protection.

Bosselmann is proposing that the common heritage for all life can apply to the whole of the Earth's biosphere regardless of state boundaries and he is also advocating that this concept should not be associated with the protection of property rights.<sup>131</sup> These attributes are necessary for the development of a guiding environmental principle and the CCH also has these characteristics. In fact, the *Earth Charter* (a code of ethics which provides a guide to the progress towards sustainable development) indicates in the preamble that '[t]he global environment with its finite resources is a common concern of all peoples. The protection of Earth's vitality, diversity, and beauty is a sacred trust.'<sup>132</sup>

One of the difficulties in environmental protection has been the need to consider economic reforms in the examination of sustainable development.<sup>133</sup> There had been a tendency of economic analysis to fail to take into account environmental decision making.<sup>134</sup> Humanity will need to recognise the change in attitude towards the environment in order to make ecologically sustainable development effective. This requires reconsideration of the relationship between human beings and nature.

Unfortunately, there are problems with the lack of clarity about the meaning of sustainable development, which can lead to those relying upon the concept to interpret it to suit themselves.<sup>135</sup> Obviously, it is crucial that action for living sustainably is focused upon the introduction of sustainable development. The controversy about the meaning of this concept should not delay its implementation. In fact the lack of precise definition has enabled the emergence of consensus in support of sustainable development.<sup>136</sup> There is, however, presently a need for ecologically sustainable development to be more carefully defined.<sup>137</sup> The vague definition could be linked to the failure to take account of changing ethical

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<sup>131</sup> K Bosselmann, 'Governing the Global Commons: The Ecocentric Approach to International Environmental Law' in M Prieur and S Doumbé-Billé, *Droit de l'Environnement et Développement Durable* (1994) 93, 100.

<sup>132</sup> This is a non-binding instrument. <<http://www.earthcharter.org>> at 26 July 2006.

<sup>133</sup> See R Costanza, 'The Ecological Economics of Sustainability' in R Goodland, H Daly, S Serafy, and B Von Droste, *Environmentally Sustainable Development: Building on Brundtland* (1991) 83. 'To achieve sustainability we must develop an *ecological economics* that goes well beyond the conventional disciplines of ecology and economics to a truly integrative synthesis' (original emphasis).

<sup>134</sup> H Daly and J Cobb, *For the Common Good: Redirecting the Economy toward Community, the Environment and a Sustainable Future* (1989).

<sup>135</sup> See Pallemmaerts, above n 69, 14. Pallemmaerts refers to the expression sustainable development being used interchangeably with 'sustainable growth'.

<sup>136</sup> Malanczuk, above n 64, 26.

<sup>137</sup> Hand in Lang, above n 73, 26. The concept of 'ecologically sustainable development' has been adopted in legislation in Australia. See, eg, *Protection of the Environment Administration Act 1991* (NSW) s 6(2).

principles and the need to make provision for these changes not only at the state and international level but also at that of the individual.<sup>138</sup> This has been one of the problems that have led international and national governments to have difficulty in implementing sustainable development.<sup>139</sup> There has also been the problem of viewing social justice as a separate consideration from environmental ethics. By linking the two, much environmental damage could be prevented.

A change in human behaviour is necessary to achieve sustainable development and so the acceptance of the need for sustainability requires an ethical shift.<sup>140</sup> There has also been a movement in international law away from sovereignty and the focus upon state interests towards the implementation of sustainable development. This can be demonstrated by examining the international response to loss of biological diversity. The preamble of the *Biological Diversity Convention* affirms that the conservation of biological diversity is a common concern of humankind.<sup>141</sup> Only after this affirmation does the preamble indicate that states have sovereign rights over their biological resources, thus indicating that the conservation of biological diversity is a common concern to the international community.<sup>142</sup>

In order for sustainable development to be an effective operational principle there are important considerations such as the extent of the principle, the ethical component, the need to take present and future generations into account and the integration of economic and environmental policy. The latter issue is fundamental to the effectiveness of sustainable development in the modern globalised society. The following section explores the problems and challenges encountered in the efforts to further the progress of the CCH and sustainable development concepts in international environmental law.

## VIII GLOBALISATION AND SUSTAINABLE DEVELOPMENT

Apart from the main areas which can be considered as subject to the CCH such as the climate change and biological diversity, there is a broad range of areas, which is included in *Agenda 21* and *WSSD* and could also form the subject matter of the CCH. These include forests,<sup>143</sup> agriculture,<sup>144</sup> mountains,<sup>145</sup> oceans,<sup>146</sup> fresh water

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<sup>138</sup> GD Meyers and SC Muller, 'The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy', paper presented at the International Conference on a Sustainable Society, Kobe, Japan, March 19-21, 1994, 1; Malanczuk, above n 64, 25, argues that 'the concept of sustainable development, although useful as a general idea, has not yet been sufficiently clarified and, as yet lacks legal content.'

<sup>139</sup> Meyers and Muller, above n 138, 25.

<sup>140</sup> Ibid, 24.

<sup>141</sup> *Convention on Biological Diversity*, above n 21, para 3, preamble.

<sup>142</sup> Glowka, Burhenne-Guilmin, Syngé, McNeely, and Gündling, above n 46, 3.

<sup>143</sup> *Agenda 21*, above n 27 para 11.2(a); *WSSD Report*, above n 5, Plan of Implementation, 37, para 45.

<sup>144</sup> *Agenda 21*, above n 27, para 14.2; *WSSD Report*, above n 5, Plan of Implementation, 31, para 40.

resources,<sup>147</sup> the movement of toxic chemicals<sup>148</sup> and the storage of hazardous wastes.<sup>149</sup> There are also indications that a holistic approach is appropriate to counter some of these environmental threats.<sup>150</sup>

Globalisation presents both opportunities for sustainable development as well as challenges. There will be opportunities for trade, investment and advances in technology. On the other hand some of the challenges are likely to include serious financial crises, insecurity, poverty, exclusion and inequality within and among societies.<sup>151</sup> The Plan of Implementation points out the inequities as a result of globalisation:

Globalization has added a new dimension to these challenges. The rapid integration of markets, mobility of capital and significant increases in investment flows around the world have opened new challenges and opportunities for the pursuit of sustainable development. But the benefits and costs of globalization are unevenly distributed, with developing countries facing specific difficulties in meeting this challenge.<sup>152</sup>

The Plan of Implementation indicates that there is a need for policies and measures at national and international levels to ensure that globalisation is fully inclusive and equitable.<sup>153</sup> States are encouraged to promote corporate responsibility and accountability based upon the principles set out in the *Rio Declaration*.<sup>154</sup> Urgent action is required to promote equitable multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development.<sup>155</sup> Action is also required to enhance the capacities of developing countries to benefit from liberalised trade opportunities, to support the International Labour Organization and

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<sup>145</sup> *Agenda 21*, above n 27, para 13.4; *WSSD Report*, above n 5, Plan of Implementation, 33, para 42.

<sup>146</sup> *Agenda 21*, above n 27, para 17.1; *WSSD Report*, above n 5, Plan of Implementation, 24, para 30.

<sup>147</sup> *Agenda 21*, above n 27, para 18.7; *WSSD Report*, above n 5, Plan of Implementation, 22, para 25.

<sup>148</sup> *Agenda 21*, above n 27, para 19.9, 19.7; *WSSD Report*, above n 5, Plan of Implementation, 20, para 23.

<sup>149</sup> *Agenda 21*, above n 27, para 20.26(d); *WSSD Report*, above n 5, Plan of Implementation, 20, para 23.

<sup>150</sup> *Agenda 21* above n 27, para 9.24(e): 'Replace CFCs and other ozone-depleting substances, consistent with the Montreal Protocol, recognising that a replacement's suitability should be evaluated holistically and not simply based on its contribution to solving one atmospheric or environmental problem'. Paragraph 11.1 states: 'This is especially important to ensure a rational and holistic approach to the sustainable and environmentally sound development of forests.' Paragraph 17.1. states: 'The marine environment – including the oceans and all seas and adjacent coastal areas – forms an integrated whole that is an essential component of the global life-support system...' See also para 18.68.

<sup>151</sup> *WSSD Report*, above n 5, Plan of Implementation, 39, para 47.

<sup>152</sup> *WSSD Report*, above n 5, Resolution 1, annex, 'Johannesburg Declaration on Sustainable Development', 3, para 14.

<sup>153</sup> *WSSD Report*, above n 5, Plan of Implementation, 39, para 47.

<sup>154</sup> *WSSD Report*, above n 5, Plan of Implementation, 40, para 49.

<sup>155</sup> *WSSD Report*, above n 5, Plan of Implementation, 39, para 47(a).



work on the social dimension of globalisation, to encourage trade related technical assistance and capacity-building programs, and to promote corporate responsibility and accountability.<sup>156</sup>

Difficulties occur where other international organisations and tribunals are involved in the decision-making process and the primary function of these institutions may be to focus on other areas rather than considerations of sustainable development. The Plan of Implementation addresses the role of the WTO:

Recognizing the major role that trade can play in achieving sustainable development and in eradicating poverty, we encourage members of the World Trade Organization (WTO) to pursue work programs agreed to at their Fourth Ministerial Conference. In order for developing countries, especially the least developed among them, to secure their share in the growth of world trade commensurate with the needs of their economic development ...<sup>157</sup>

The members of the WTO were also urged to take additional actions such as to facilitate membership for developing countries and implement trade-related technical assistance and capacity building measures.<sup>158</sup>

In summary, the approach to sustainable development depends upon a change in ethical view towards the relationship of humankind as part of the environment, being adopted in legal norms and principles to provide environmental protection. If this change is incorporated into international and national legal approaches, then it is more likely that the CCH and sustainable development can prove effective concepts for environmental protection in the globalisation era. Both of the recent 'common concern' conventions, the *Climate Change Convention* and the *Biological Diversity Convention* incorporate the concept of sustainability and involve the international community in the protection of the environment. The final section now considers the potential future development of the CCH concept in international environmental law.

#### IX FUTURE DIRECTIONS FOR THE COMMON CONCERN OF HUMANKIND

The operation of the CCH in international environmental law has implications for the ability of states to take action to protect the international community's interest in the environment. So actions *erga omnes*<sup>159</sup> could enable states to have standing in cases where the protection of the environment involves a matter of concern to all states. An alternative means of prosecuting the common concern could be introduced to overcome the problem of state reluctance to bring proceedings. One

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<sup>156</sup> *WSSD Report*, above n 5, Plan of Implementation, 39, para 47.

<sup>157</sup> *WSSD Report*, above n 5, Plan of Implementation, 58, para 90.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Barcelona Traction Case (Second Phase)*, ICJ Rep (1970) 3, 32.

possibility is the enabling of NGOs to gain standing in international courts and tribunals.<sup>160</sup>

Globalisation through the increase in communications networks brings a global awareness to many people about the problems facing the environment of the Earth. The changes in information technology have enabled NGOs to collect and make available information about environmental issues and failures by states to comply with their treaty obligations. This enables the encouragement of action by the public through consumer boycotts or media opinion. The NGOs may also lobby governments for increased regulation to protect the environment.<sup>161</sup> The other advantage of global changes in communication for NGOs is that they have been able to make contributions to major environmental conferences and also applications to strengthen environmental protection when treaties and conventions are negotiated.

Encouraging NGOs to play a greater role in compliance could assist the implementation of environmental conventions and protocols.<sup>162</sup> NGOs can apply to the Court of Justice of the European Community where the issue concerns the interpretation of a secondary environmental law or the implementation of regulations and directives.<sup>163</sup> Permitting NGOs access to international and national courts and tribunals could lead to a more effective means of preventing environmental deterioration and to the further development of international environmental law.<sup>164</sup>

It is possible that the CCH could influence the operation of some principles of customary international environmental law. The CCH could broaden the operation of Principle 21 of the *Stockholm Declaration* (and Principle 2 of the *Rio Declaration*). This extension would result in these principles providing that states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment within the jurisdiction of that particular state as well as to areas beyond state boundaries.<sup>165</sup>

Specifically, the CCH can encourage the further development of other principles and concepts of environmental law such as the precautionary principle and intergenerational and intragenerational equity. The operation of the CCH in this

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<sup>160</sup> See A Rest, 'Enhanced Implementation of the Biological Diversity Convention by Judicial Control' (1999) 29 *Environmental Policy and Law* 32, 37. Rest suggests that an international environmental court could be established which could give standing to NGOs or individual or national courts.

<sup>161</sup> Shelton, above n 1, 38.

<sup>162</sup> See Tanya Sobol, 'An NGO's Fight to Save Ukraine's Danube Delta: The Case for Granting Nongovernmental Organisations Formal Powers of Enforcement' (2006) 17 *Colorado Journal of International Environmental Law and Policy* 123.

<sup>163</sup> Rest, above n 160, 38.

<sup>164</sup> *Ibid* 37-42. Rest argues in favour of the establishment of an International Environmental Court where NGOs would have standing.

<sup>165</sup> Barbosa, above n 15, 31.

way suggests a hierarchy where the CCH acts to guide the operation of other environmental concepts. It is possible that if an ecocentric approach is applied to the interpretation of the CCH, this could lead to an emphasis upon the 'sustainable' element of the sustainable development concept. The resulting focus would be upon the common concern of humankind to achieve sustainability<sup>166</sup> in order to avoid emphasis upon the economic need for development, thus promoting the need for environment and development issues to be integrated at international, regional and local levels.

There are difficulties associated with the establishment of new institutions under recently negotiated environmental treaties as well as the problems because of a lack of financial resources to implement these treaties. Some of these institutions have similar functions so it could be more efficient to centralise the legal, administrative and financial functions of the Conferences of the Parties, Secretariats and subsidiary bodies.<sup>167</sup> The CCH could operate to promote both the enhancement of international institutions<sup>168</sup> and the rationalisation of international bodies which could administer environmental agreements affected by the common concern. So for example, one financial institution could facilitate the financial aspects of different treaties as in the case of the Global Environment Facility (GEF). Similarly the use of the CSD as a single monitoring and data collection body, working closely with the related United Nations bodies, could be promoted rather than creating multiple institutions and data collecting bodies under separate international agreements.

Fundamentally, the elements of the CCH must be satisfied in order to achieve sustainable development. Timoshenko describes the CCH as a 'holistic paradigm.'<sup>169</sup> The important elements of the CCH described by Timoshenko are summarised as follows:

- a) The CCH is a 'consolidating factor' for East-West North-South dialogue.
- b) It has global character (as well as regional application). The obligation to cooperate applies to all countries and to all 'levels of concerted actions.'
- c) The CCH has 'ecological inter-dependence' which has spatial and temporal parameters. So, the CCH can apply to intragenerational equity and intergenerational equity.<sup>170</sup>

The significance of equity amongst states is that it provides a means of enabling developing countries to continue to develop while taking into account that it is necessary to introduce legal measures to protect the environment. So developed states should recognise their responsibility to achieve sustainable development and

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<sup>166</sup> Concerning the term 'sustainability', see Boer, above n 71, 6.

<sup>167</sup> J Werksman, 'Consolidating Governance in the Global Commons: Insights from the Global Environment Facility' (1995) 6 *Yearbook of International Environmental Law* 27, 34.

<sup>168</sup> 'Note from the UNEP Secretariat to the Meeting', above n 35, 46. See *Programme for the Further Implementation of Agenda 21*, GA Res S-19/2, UN GAOR, 19<sup>th</sup> special sess, UN Doc A/RES/S-19/2 (1997), para 117.

<sup>169</sup> Timoshenko, above n 24, 39.

<sup>170</sup> Ibid (original highlights in bold omitted).

also to provide financial assistance and the transfer of technology to developing states.

The relationship between the CCH and sustainable development is revealed in the three dimensions of the CCH referred to previously. In its spatial dimension, the CCH encourages international cooperation to resolve environmental problems. In its temporal dimension, the common concern for the environment requires that there be limitations on the consumption of resources or means of maintaining resources sustainably so that the rights of future generations can be taken into account. Finally, in its social dimension, the CCH requires collaborative decision making and planning by the international community to counter environmental hazards.

The CCH recognises that the focus of legal attention will be to find global solutions to environmental problems. This means that the environmental threat can be viewed globally even though action may be taken locally or regionally. The evolution of the CCH and sustainable development as future principles in international environmental law could further the achievement of social and environmental justice.