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Inter/Intra-Generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources

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Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources

Introduction

This article focuses on the "equity" aspect of sustainable development,[1] especially as it relates to conservation of resources of biological diversity. This article discusses the socio-economic and environmental implications of "intergenerational equity," and analyzes its current applications in international law.

Regular and seemingly obligatory references to the rights and interests of "present and future generations" in contemporary international legal instruments[2] dealing with sustainable development suggest that global society has come to recognize the use of natural resources in an inter-temporal context. These references also indicate that intergenerational equity has become integral to

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[1] The "definition" for sustainable development in this article will be the Brundtland Commission's characterization of the term as: ". . . development that meets the needs of the present without compromising the ability of future generations to meet their needs." *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE, at 43 (1987). Despite criticisms about its adequacy for understanding the full implications of the concept, the above formulation remains a useful starting point for discussing sustainable development. For critical appraisals, *see* Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future? in* GREENING INTERNATIONAL LAW, 106 (1994); and Ismail Serageldin, *Sustainability and the Wealth of Nations: First Steps in an Ongoing Journey* (The World Bank Conference on Environmentally Sustainable Development, Washington, D.C.) (Oct. 1995) (cited with permission of the author).

[2] *See, e.g.*, par. 23, preamble, Climate Change Convention ("CCC"), 31 ILM 849 (1992); par. 23, preamble, Convention on Biological Diversity ("CBD"), 31 ILM 818 (1992); par. 26, preamble, Desertification Convention ("DC"), 33 ILM 1328 (1994).

international law dealing with environmental protection, resource utilization and socio-economic development.[3]

Intergenerational equity, as employed in current international instruments, contains two distinct components regarding the utilization of resources. The first calls for fairness in the utilization of resources between human generations past, present and future. This component will be referred to as "inter-generational" equity. It requires attaining a balance between meeting the consumptive demands of existing societies and ensuring that adequate resources are available for future generations to meet their needs. Striking a balance between current consumption and foregoing use of resources or devoting resources for investment and thus for future generations, has been a consideration for all societies. The inter-temporal aspect of resource use, however, is now a much discussed issue, due to growing threats of environmental degradation and resource depletion arising out of current consumption patterns.[4]

The second component is referred to as "intra-generational" equity, namely, fairness in utilization of resources among human[5]

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[3] A UNEP Expert Group on International Environmental Law identified intergenerational equity as among the "Concepts and Principles in International Law." *See Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development,* at 10-14, UNEP/IEL/WS/3/2, (1996).

[4] *See* OSCAR SCHACHTER, SHARING THE WORLD'S RESOURCES, at 11-12 (1977). *See also* Edith Brown Weiss, *Intergenerational Equity in International Law*, 81 AM. SOC'Y INT'L PROC. 127 (1987); EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

[5] A more controversial view seeks to extend "intra-generational equity" beyond the human species to include fairness toward other life forms. *See, e.g.*, Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L., Jan. 21, 1991. *See also* CRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LEGAL RIGHTS FOR NATURAL OBJECTS (1974); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972) (Douglas J. dissenting); C. Giagnocavo and H. Goldstein, *Law Reform or World Reform: The Problem of Environmental Rights*, 35 MCGILL L. J. 345 (1990).

members of present generations, both domestically and globally. The "intra-"generational aspect is directed at the serious socio-economic asymmetry in resource access and use within and between societies and nations that has exacerbated environmental degradation and the inability of a large part of humanity to meet adequately even its basic needs. Schachter suggested in the late 1970s the bare minimum entailed by "intra-generational" equity:

> It has become virtually platitudinous to suggest that everyone is entitled to the necessities of life: food, shelter, health care, education, and the essential infrastructure for social organization . . . It is scarcely startling to find that a similar principle has been advanced on the international level . . .[6]

He further averred that it had become a de facto legal norm for developing countries and generally for many industrialized countries:

> What is striking is not so much its espousal by the large majority of poor and handicapped countries but that the governments on the other side, to whom the demands for resources are addressed, have also by and large agreed that the need is a legitimate and sufficient ground for preferential distribution . . . It is undeniable that the fulfillment of the needs of the poor and disadvantaged countries has been recognized as a normative principle which is central to the idea of equity and distributive justice.[7]

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[6] *See* SCHACHTER, *supra* note 4, at 16.

[7] "This agreement is evidenced . . . by their concurrence in many international resolutions and by their own policy statements [and] more convincingly, by a continuing series of actions to grant assistance and preferences to those countries in need . . ." *See* SCHACHTER, *supra* note 4, at 8.

The "intra-" and "inter-" generational dimensions have distinct international, national and local implications. Fulfilling the requirements of either the "inter-" or "intra-" generational component could possibly complement or prejudice the achievement of the objectives of the other;[8] meeting this diversity of needs contains potential tensions and conflicts.[9] For example, what are considered national needs must take into consideration the interaction between needs of states as collective entities and needs of individual persons.[10]

Proponents of intergenerational equity as a legal norm have emphasized that equitable utilization, and in particular, its "inter-" generational dimension, concerning management and utilization of global as well as national resources, is the primary factor defining sustainable development. They also suggest that intergenerational equity renders sustainable development a distinct objective transcending the rigid confines of conventional views on economic development and environmental protection. For example, the World Commission on Environment and Development ("WCED") (also known as the Brundtland Commission) characterized sustainable development in inherently intergenerational terms that distinguished it from other previous types of development that focused merely on economic growth.[11] Also, Brown Weiss has represented that:

> [t]he notion that future generations have rights to inherit a robust environment provides a solid

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8 *See* BROWN WEISS, *supra* note 4, at 128-129.

9 *See* L.A. Thrupp, *Draft Social Justice As A Key Element of Sustainable Development.* Text of presentation given at international congress "Down to Earth" sponsored by the International Society of Ecological Economics, San Jose, Costa Rica, October, 1994. Text on file with L.A. Thrupp, World Resources Institute, Washington, D.C.

10 *See* SCHACHTER, *supra* note 4, at 11.

11 *See* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 1 at 43, 47. *See also* WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 1, at 8, 156-157, 160 (focusing on ensuring equitable sharing of natural resources and their benefits with the world's poor).

> normative underpinning for environmentally sustainable development. In its absence, sustainable development might depend entirely on a sense of noblesse oblige of the present generation."[12]

Intergenerational Equity: Focus for Convergence of Human Rights, Environmental and Economic Law

In both its "intra-" and "inter-"generational dimensions, intergenerational equity constitutes a bridge for recognized mutual interests between environmental protection, socio-economic development and human rights law. This evolving complementarity is a new phenomenon, as suggested by proponents of environmental justice in general[13] and indigenous peoples' rights[14] in particular.

Convergence regarding Indigenous Peoples' Interests

In their efforts to protect the interests of indigenous communities, human rights proponents have begun to find allies in the environmental and development[15] communities. The

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12 *See* Edith B. Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 YALE L.J. 2123 (1993).

13 *See* David A. Sarokin and Jason Schulkin, *Environmental Justice: Co-evolution of Environmental Concerns and Social Justice*, 14 THE ENVIRONMENTALIST 121 (1994).

14 *See* MARCUS COLCHESTER, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, SALVAGING NATURE INDIGENOUS PEOPLES, PROTECTED AREAS AND BIODIVERSITY CONSERVATION (1994). *See also* R. K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J.INT'L ENVTL. L. & POL'Y 1 (1994). *See also generally* BRUCE RICH, MORTGAGING THE EARTH (1994).

15 *See, e.g.*, SECOND IBERO-AMERICAN SUMMIT OF HEADS OF STATE AND GOVERNMENT, PROPOSAL FOR THE ESTABLISHMENT OF THE FUND OF THE INDIGENOUS PEOPLES OF LATIN AMERICA AND THE CARIBBEAN, FINAL VERSION (1992). *See also* HUMAN RIGHTS WATCH AND NATURAL RESOURCES DEFENSE COUNCIL, DEFENDING THE EARTH: ABUSES OF HUMAN RIGHTS AND THE ENVIRONMENT (1992); YALE LAW SCHOOL, EARTH RIGHTS AND RESPONSIBILITIES:

interdependent relationship between intergenerational equity and sustainable development of natural resources is highlighted in situations involving protection of fragile ecosystems inhabited by long-term occupant communities. Well-publicized examples of cooperation between human rights and conservation advocates in enhancing this relationship include recent concerns about the effects of pollution by domestic and multinational oil companies in indigenous tribal areas in Ecuador's biologically rich Amazon region. The issue is the subject of two recent class action suits brought by Amazonian communities in U.S. federal courts.[16]

Integration of environmental, development and human rights objectives is also manifest in recent instruments concerning indigenous peoples, such as the United Nations[17] and Inter-American Commission on Human Rights[18] draft declarations on indigenous peoples. These documents reflect a new awareness by human rights proponents that securing the rights of indigenous communities entails protection of their cultural values and knowledge and their genetic and other biological/environmental resources, in addition to their lands and civil liberties vis-à-vis dominant national and international

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HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION CONFERENCE REPORT (1992).

[16] *See Aguinda v. Texaco, Inc.*, 93 CIV 7527 S.D.N.Y.(Nov. 3, 1993). *See also Peruvian Indians sue Texaco, Allege Pollution,* REUTERS, LIMITED, BC Cycle, Dec. 28, 1994, discussing *Jota v. Texaco, Inc.*, (S.D.N.Y.). For examples of collaboration between human rights and environmental groups to protect long-term human occupants and biodiversity, *see* B.R. JOHNSTON, HUMAN RIGHTS AND THE ENVIRONMENT: EXAMINING THE SOCIOCULTURAL CONTEXT OF ENVIRONMENTAL CRISIS, SUMMARY FINDINGS FROM THE SOCIETY FOR APPLIED ANTHROPOLOGY REPORT ON HUMAN RIGHTS AND THE ENVIRONMENT, at 30-42 (1994); L. Udall, *Irian Jaya's Heart of Gold. Natural Resource Extraction Takes a Heavy Toll on Indonesian Island's Peoples and Habitats*, 10 WORLD RIVERS REVIEW 10 (1995).

[17] Draft United Nations Declaration on the Rights of Indigenous Peoples, *adopted* Aug. 26, 1994, 31 ILM 541 (1995) (1994 U.N. Indigenous Peoples Declaration).

[18] Organization of American States, Inter-American Commission on Human Rights, *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*, art. XX Intellectual Property Rights, OEA/Ser/L/V/II.90 Doc. 9 rev.1. (Sept. 21, 1995).

economic and political structures. For example, the 1994 U.N. Draft Declaration on Indigenous Peoples states:

> Indigenous peoples have the right . . . to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals [Article 24] . . . [and] to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts [Article 29].[19]

Conservation and sustainable utilization of biodiversity, including forests and other habitats both within and outside of protected areas, cannot be effectively secured unless the socio-economic and cultural rights and objectives of local populations are addressed.[20] The international conservation community now recognizes this issue as a practical necessity.

> Biodiversity conservation entails a shift from a defensive posture - protecting nature from the impacts of development - to an offensive effort seeking to meet peoples' needs from biological resources while ensuring the long-term sustainability of Earth's biotic wealth . . . [I]t is pursued in the human interest and for human benefit . . . [I]t seeks to maintain the

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[19] 1994 U.N. Indigenous Peoples Declaration, 31 ILM 541 (1995).

[20] *See, e.g.*, O. J. Lynch and K. Talbott, *Legal Responses to the Philippine Deforestation Crisis*, 20 N.Y.U.J. INT'L. L. & POL. 679, 689 (1988).

> human life support system provided by nature, and the living resources essential for development.[21]

This observation has been confirmed in studies by the World Resources Institute ("WRI")[22] and other organizations, recommending diversification of local economies, improving access of communities to markets, investing in profitable and sustainable uses of natural resources[23] and increased local access to economic-political decision-making as means for facilitating conservation through sustainable community development.

The human rights community has become an influential force in tempering the behavior of major multilateral assistance institutions regarding development activities that could jeopardize resource use rights of local populations. Examples of the impact of human rights considerations include IBRD decisions to cancel involvement in two major water diversion schemes: the Sardar Sarovar project in India[24] and the Arun III project in Nepal.[25] Regarding Arun III, human rights

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[21] *See* WORLD RESOURCES INSTITUTE, ET. AL., GLOBAL BIODIVERSITY STRATEGY, 5 (1992). *See also* NEOTROPICAL WILDLIFE USE AND CONSERVATION, (John. G. Robinson and Kent. H. Redford (eds.)), draft of the Inter-American Declaration on the Rights of Indigenous Peoples, at xv-xvii and 3-5 (1991) (Alfred L. Gardner, *foreword* pp. ix-xiii). *See* R.A. Sedjo, *Ecosystem Management: An Unchartered Path for Public Forests,* RESOURCES FOR THE FUTURE, at 10, 18-20 (1995).

[22] *See* CHARLES VICTOR BARBER, ET AL., BREAKING THE LOGJAM: OBSTACLES TO FOREST POLICY REFORM IN INDONESIA AND THE UNITED STATES, 37 (1994).

[23] *See, e.g.,* Daniel C. Nepstad, *Conclusions and Recommendations. The Challenge of Non-Timber Forest Product Extraction,* 9 ADVANCES IN ECONOMIC BOTANY 143 (The New York Botanical Garden 1992).

[24] *See When the rains come. 'A campaign against a giant irrigation project in India has forced the World Bank to stop funds. Some campaigners are prepared to save their river,'* THE GUARDIAN, Apr. 16, 1993, at 18.

[25] A memorandum of 2 August 1995 from Mr. Wolfenson, the President to the IBRD's Board of Executive Directors, confirmed the cancellation of World Bank involvement in this project. Source of information: Mr. E. Abbott, Executive Secretary, Office of the World Bank Inspection Panel, Washington, D.C., Dec. 12, 1995.

and environmental groups alleged that the project violated World Bank operational policies on the rights of indigenous peoples and contained grossly inadequate compensation measures for resettlement of the affected communities. In order to provide an official channel for affected groups to address concerns regarding the IBRD's compliance with its operational policies, the organization set up an Inspection Panel in 1994.[26]

The development community now has realized pragmatically that ignoring environmental and human rights aspects of socio-economic development schemes threatens the long-term viability and credibility of development efforts.[27] The World Bank has expanded the scope of its agenda for promoting economic growth by increasingly addressing social problems that it now recognizes as negatively impacting on development initiatives in project countries.[28]

Convergence for Sustainable Development in General

The international community appears to have reached a consensus that states must pursue development which is environmentally, socially and economically sustainable.[29] However, perspectives differ on addressing current needs within this paradigm

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[26] *See Inspection Panel for the International Bank for Reconstruction and Development*, adopted Aug. 19, 1994, 34 I.L.M. 503 (1995).

[27] *See, e.g.*, IAN SCOONES, LIVING WITH UNCERTAINTY. NEW DIRECTIONS IN PASTORAL DEVELOPMENT IN AFRICA 1-30 (1994).

[28] *See* David Brown, *World Bank to Emphasize AIDS as Economic Threat*, WASH. POST, Nov. 28, 1994, at A7; George Graham, *Pledge over Female Mutilation: World Bank & IMF Win Commitment by Burkina Faso*, FIN. TIMES, Apr. 22, 1994, at 6; Michael Prowse, *World Bank Cash to Help the Blind*, FIN TIMES, May, 14, 1994 at 4; Nancy Dunne, *World Bank Looks to Policy of "Micro-Loans,"* FIN. TIMES, July 18, 1995, at 4.

[29] *See, e.g.*, SUMMIT OF THE AMERICAS: DECLARATION OF PRINCIPLES AND PLAN OF ACTION, 34 I.L.M. 808 (1995). *See also* I. Serageldin *Sustainability and the Wealth of Nations: First Steps in an Ongoing Journey*, Draft, Sept. 30, 1995, at 1, Third World Bank Conference on Environmentally Sustainable Development, Washington, D.C., Oct. 1995.

without also prejudicing future needs.[30] Although ideally realizing sustainable development entails providing equal attention to environmental, social and economic needs, viewpoints diverge on the methodology for balancing the three phenomenon. For example, I. Serageldin of the IBRD has written:

> We are able to set aside a foolish yet still prevalent view . . . that sustainability requires leaving to the next generation exactly the same amount and composition of natural capital as we found ourselves, by substituting a more promising concept of giving them the same if not more, opportunities than we found ourselves . . . This immediately opens the door for substituting one form of capital for another . . . [I]t is indeed most worthwhile to reduce some natural capital (e.g. reducing the amount of oil in the ground) to invest in increasing human capital (e.g. educating girls) . . . [31]

The difficult question is finding appropriate criteria to balance equitable, environmental and economic considerations in an inter-temporal context. The international instruments to date do not adequately address this challenge as will be discussed below. Also, some have argued that, at least regarding non-renewable resources, rights and responsibilities entailed by intergenerational equity realistically only apply to future generations of one's own country and not toward future generations elsewhere. According to proponents of this view, further extension of the concept would be "politically unmanageable . . . and insupportable as a practical

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[30] Compare the contrasting perspectives presented by M. Pallemaerts, *International Environmental Law From Stockholm To Rio: Back To The Future?*, *in* GREENING INTERNATIONAL LAW, (P.Sands (ed.)) at 13-19 (1993); A. Najam, *An Environmental Negotiation Strategy for the South*, 7 INTERNATIONAL ENVIRONMENTAL AFFAIRS 249 (1995); and *see generally*, I. Serageldin, 1995.

[31] *See* Serageldin, 1995, at 9-10. *See also* Brown Weiss, 1989, at 42-43.

matter."[32] However, in reality the emergence of multilateral broad-based regimes such as NAFTA,[33] MERCOSUR[34] and CEFTA[35] are eroding state social, economic and resource movement strictures by integrating national economies into larger transnational blocs. These regimes are creating a world order in which no nation will be able to achieve sustainable development, or even what is often referred to as "sustainable economic growth" on its own, but rather only as part of the global community.

Arguments that intergenerational equity may relate only to a state's own future citizens, reflect a narrow statist view that does not accord with the current dynamic of increasing socio-economic interdependence among states regarding utilization of resources. The challenge of sustainability is not restricted to activities within a state's own jurisdiction. It is manifest in the international arena with potentially serious transboundary consequences impacting on national sovereignty.[36] Establishing the conditions for achieving sustainable development in light of the divergent perspectives on its realization probably will be the primary task into the next century.

The complexity of the problems presented by sustainable development mandates that decision-makers take more holistic approaches than in the past to solving environmental, development and human rights controversies. This challenge offers a unique opportunity to employ international law creatively and cross-

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[32] *See* R.A. Westin, *Intergenerational Equity and Third World Mining*, 13 U. PA. J. INT'L BUS. L., 181, 182 (1992). *But cf. generally*, Brown Weiss, 1989.

[33] North American Free Trade Agreement (NAFTA), 103d Congress, 1st Sess., House Document 103-159, Vols. I and II, (1993).

[34] Additonal Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR ("Protocol of Ouro Preto"), 34 ILM 1244 (1995). *See in particular*, To Guarantee Sustainable Development and Conserve Our Natural Environment for Future Generations, Section IV, Protocol of Ouro Preto at 832.

[35] Central European Free Trade Agreement ("CEFTA"), 34 ILM 3 (1995).

[36] *See, e.g.*, Matthew Kaminski, *East Counts Cost of a Dirty Legacy. Estonia, Latvia & Lithuania Face a Big Bill After 50 Years of Soviet Army Sloppines*, FIN. TIMES, Mar. 9,1994, at 16; *See also* James Harding, *Oil-Rich Refuge of the Caribou - A Look at U.S. Canadian National Park Links*, FIN. TIMES, Aug. 24, 1994, at 10.

sectorally. Contemporary international instruments concerned with human rights, economic development or environmental protection, such as the Convention on Biological Diversity ("CBD"),[37] Desertification Convention ("DC"),[38] and Vienna Declaration,[39] reflect an emerging integrated approach.[40] These texts seek to incorporate economic, social-equity and environmental protection considerations in varying degrees. However, it is unclear whether existing legal instruments sufficiently address the serious challenges or the real and potential conflicts inherent in competing objectives presented by the three phenomenon.

This inadequacy is most apparent in the multilateral trade regime. Although it contains provisions for assisting in mitigating possible negative effects of liberalized trade on socio-economic conditions in developing countries,[41] the World Trade Organization ("WTO") structure is geared principally toward addressing complex trade concerns of advanced market economies. The GATT/WTO's

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[37] Convention on Biological Diversity (Rio de Janeiro), 31 I.L.M. 818 (June 5, 1992).

[38] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 33 ILM 1332 (1994).

[39] United Nations World Conference on Human Rights: Vienna Declaration and Program of Action [hereinafter "Vienna Declaration"], 32 ILM 1661 (June 25, 1993).

[40] *See* preamble pars. 12 (indigenous and local communities embodying traditional lifestyles), 13 (the full participation of women at all levels of policy-making and implementation for biological diversity conservation), 19 (that economic and social development and poverty eradication are the first and overriding priorities of developing countries), and 23 ("...to conserve and sustainably use biological diversity for the benefit of present and future generations..."), CBD 1992, 31 ILM 818; preamble pars. 8, 9, 20, 21, and 26, DC, 33 ILM 1328 (June 17, 1994); pars. 11 and 14, Vienna Declaration, 32 ILM 1661 (June 25, 1993).

[41] *See Ministerial Decisions on Measures in Favour of Least-Developed Countries* at 759-760, and *Measures Concerning Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing countries* at 771-772 *in* P. RAWORTH & L.C. REIF, THE LAW OF THE WTO. FINAL TEXT OF THE GATT URUGUAY ROUND AGREEMENTS (1995).

principal concession to environmental concerns is a Ministerial Decision on Trade in Services and the Environment. It merely recommends that the WTO Committee on Trade and Environment should examine whether there should be provisions in addition to the existing Article XIV (b) of the GATT referring to measures necessary to protect human, animal or plant life or health, for addressing conflicts between trade and environmental protection measures.[42] The impact of trade and trade policies on human rights is not expressly addressed either in the treaties of the WTO or in supplemental ministerial declarations.[43] In the areas of environmental protection and human rights, the GATT/WTO structure does not adequately facilitate a symmetrical relationship with trade considerations. The existing regime must integrate more effectively and holistically, through side-agreements or otherwise, environmental and social-equity aspects into its operational structure.

Historical Experience and the Meaning of Intergenerational Equity

Human societies have at various times in the past engaged in the utilization or consumption of natural resources by means which today would be characterized as "unsustainable." Anthropologists and archaeologists have attributed the decline of a number of ancient cultures to environmental degradation leading to a collapse of the resource base upon which the communities depended.[44] These

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[42] RAWORTH & REIF at 793.

[43] For an exposé on possible human rights dimensions in the WTO structure, *see* A. H. Qureshi *International Trade and Human Rights from the Perspective of the WTO*, draft, ILA Committee/Dutch ILA working group on Legal Aspects of Sustainable Development, Amsterdam, May 2-4, 1996.

[44] *See generally* ALLAN SAVORY, HOLISTIC RESOURCE MANAGEMENT. (1988). *See also* K. Hess, Jr. and J.L. Holecheck, *Policy Roots of Land Degradation in the Arid Region of the United States An Overview*, delivered in Tucson, Arizona, Oct. 24-29, 1994 at International Symposium and Workshop on Desertification in Developed Countries: why can't we control it?, sponsored by U.S. Dept. of the Interior.

societies have included the ancient Maya of the Yucatan Peninsula, the pre-Colombian culture of Easter Island, and the predecessors of the Pueblo communities in the south-western USA.

> [T]he Anasazis of the American southwest farmed fertile bottomlands into wastelands and left as a legacy of their failed agriculture abandoned cliff dwellings and ghost-like canyon settlements. Today, places like Chaco Canyon, New Mexico, stand as monuments to the environmental misdeeds of early Americans.[45]

Human exploitation of living resources at unsustainable rates, namely rates higher than that at which the resource can regenerate, is therefore not unique to the latter half of the twentieth century.

In the context of wildlife, the histories of the exploitation to the point of near eradication of, inter alia, fur bearing seals and several whale species during the past two centuries, and the rhinoceros during the past thirty years, demonstrate the negative impact of human consumption and management activities upon the survival of living resources.[46]

However damaging to specific species and ecosystems and their dependent human societies environmental degradation may have been in the past, much of the harm was localized to specific species, areas or habitats. Since the end of the last century, however, the degree, character and rate of exploitation of natural resources has increased to levels where environmental degradation originating in one country is now negatively affecting environmental quality in

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45 *See* Hess & Holecheck, *supra* note 44, at 4.

46 *See generally* TIMOTHY M. SWANSON, THE INTERNATIONAL REGULATION OF EXTINCTION (1994).

other jurisdictions or in areas outside of national jurisdiction such as the high seas, the ozone layer and outer space.[47]

This phenomenon of cross border environmental harm, and recognition of liability for resulting damage, was first addressed in the international legal arena in the Trail Smelter arbitration award of 1941.[48] The transboundary aspects of environmental degradation are many and result from, among other anthropogenically-induced factors, air, water and soil contamination, the destruction of forests leading to the release of trapped carbon dioxide into the atmosphere, the widespread illicit trade in endangered flora and fauna, the introduction of exotic organisms, and the depletion of the stratospheric ozone layer. These phenomena suggest a crisis of unprecedented proportions for the health and survival of existing human societies and those to come.

Natural resources are now exploited in unprecedented quantities and rates.[49] In relation to their population sizes, the "Northern" industrialized countries are responsible for a disproportionate amount of the resources consumed and the resulting pollution arising out of the exploitation of these resources. Access to the enjoyment of global resources, and responsibility for resulting environmental degradation and depletion, have become focal points for the current thinking on intergenerational equity. Divergent views on use rights and responsibilities appear to place industrialized and developing countries in opposing camps:

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[47] Celestial bodies have been classified as "common heritage of mankind," a concept which was adopted as a legal norm regarding these outer space areas under the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, art. 11(1), 18 ILM 1434 (Nov. 12, 1979). The common heritage of mankind designation has also been applied to deep sea-bed resources under the 1982 United Nations Convention on the Law of the Sea, art. 136, 21 ILM 1245 (Dec. 10, 1982).

[48] *See Trail Smelter Arbitration (U.S. v. Canada)*, 3 U.N. RIAA 1905 at 1965 (1941).

[49] *See* WORLD RESOURCES INST., WORLD RESOURCES1994-1995, at 3-26 (1994). *See also Global Biodiversity Strategy*, at 12-18, WRI/IUCN/UNEP (1992).

> A great deal of environmental debate on issues of global scale damage - ozone depletion, global warming, biodiversity, rain forests - have taken on a North-South polarization. Some developing countries have coined the term 'green imperialism' to refer to efforts of outside countries to limit the use of their native rain forests, or to ask the countries to forego the advantages of using CFCs when the rest of the world has taken advantage of these for decades.[50]

Developing countries have sought to rectify this asymmetry in the rules regarding resource access, distribution and consumption. It has been a major feature of the international legal[51] and politico-economic agenda of developing countries since at least the early 1970s, as evidenced by the adoption of resolutions in the U.N. General Assembly calling for the creation of a "New International Economic Order",[52] as well as efforts to obtain greater control over natural resources.[53]

The Founex Report[54] in 1971 illustrated one of the primary contentions of the developing countries: that the key environmental problems in the South are poverty and underdevelopment and other issues directly related to these two phenomena. More recently, developing countries have emphasized the link between Third World

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50 *See* Sarokin and Schulkin, *supra* note 13, at 128.

51 *See, e.g.*, UNGA Res. 1803 (Dec. 14, 1962).

52 *See* Declaration on the Establishment of A New International Economic Order, U.N.G.A. Res. 3201 (S-VI), 13 ILM 715 (May 9, 1974); Programme of Action on the Establishment of a New International Economic Order, U.N.G.A. Res. 3202 (S-VI), 13 I.L.M. 720 (May 16, 1974); and Charter of the Economic Rights and Duties of States, U.N.G.A. Res 3281 (XXIX), 14 ILM 251 (1975).

53 *See, e.g., Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 ILM 1 (Int. Arb. Trib.1978); *Kuwait v. Am. Indep. Oil Co. (AMINOIL)*, 21 ILM 976 (Int. Arb. Trib. 1982).

54 *See Development and Environment: The Founex Report* (June, 4-12, 1971) *reprinted in* IN DEFENSE OF THE EARTH (1980).

poverty, environmental degradation and Northern consumption.[55] For developing countries, resource control and maldistribution through financial and other structural levers by the "North" to maintain industrialized countries' lifestyles are the major sources of the widespread poverty and underdevelopment in the "South." An Indian environmentalist commented:

> Which questions should [the world] try to solve first. Why ozone layer depletion or climate change or biodiversity conservation? Why not the international financial system, terms of trade or poverty, all of which have deep ecological linkages with the environmental problems of the South?[56]

H. Daly, former economist at the World Bank, has argued that Northern socio-economic attitudes and practices are not only fueling much of global environmental degradation, but are squandering the world's resources at the expense of the rest of humanity both intra- and inter- generationally.[57] The high level[58] of consumption in

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[55] *See, e.g.,* C. SINGH, INTERNATIONAL ENVIRONMENTAL LAW AGENDA FOR SUSTAINABLE DEVELOPMENT, THE INDIAN PERSPECTIVE, at 9-11 (Indian Law Institute, New Delhi 1992). *See also* Adil Najam, *An Environmental Negotiation Strategy for the South*, 7 INT'L. ENVTL. AFF. 249 (1995).

[56] See A. Najam, *A Negotiating Strategy For The South*, 24 SOUTH LETTER, 17, 18 (1995) quoting statement by A. Agarwil.

[57] *See* HERMAN DALY & KENNETH N. TOWNSEND (eds.), VALUING THE EARTH: ECONOMICS, ECOLOGY, ETHICS, at 25 (1993). "In a poor country, (growth) means more food, clothing, shelter--basic education and security. However in a rich country, 'growth' means more electric toothbrushes, yet another brand of cigarettes, more tension and insecurity, and more force-feeding through advertising. In sum, extra GNP in a poor country, assuming it does not go mainly to the richest class of that country, represents satisfaction of relatively basic wants, whereas extra GNP in a rich country assuming it does not go mainly to the poorest class of that country, represents satisfaction of relatively trivial wants." *Id.* at 26.

[58] *See* WORLD RESOURCES 1994-95, at 19.

industrialized countries continues to be a major issue at international fora and in the resulting instruments produced at these meetings dealing with socio-economic development and environmental protection. It is the subject of Principle 8 of the Rio Declaration: "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption . . ."[59]

Agenda 21 devotes an entire chapter to "changing consumption patterns."[60] Section 4.3 of Chapter 4 affirms the perspective of developing countries on the link between environmental degradation, poverty in developing countries and unsustainable consumption in industrialized countries:

> Poverty and environmental degradation are closely interrelated. While poverty results in certain kinds of environmental stress, the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in industrialized countries, which is a matter of grave concern, aggravating poverty and imbalances.[61]

The global human population is expected to rise from the present 5.5 billion to 8.5 billion during the next 30 years. Approximately 95 percent of the annual population increase is expected to come from developing countries.[62] By the year 2050, it is estimated that the human population will reach 10 billion,[63] even

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59 *See* Rio Declaration, Principle 7, 31 ILM 874, 877 (June 14, 1992).

60 *See* Agenda 21, Chapter 4 at 31, U.N. Doc. A/CONF. 151/26 (1992).

61 *Id.* at Ch. 4 § 4.3. This point was repeated in Copenhagen Declaration on Social Development: Report of the World Summit for Social Development, Annex I at 16(d), U.N. Doc. A/Conf.166/9 (1995).

62 *See* WORLD RESOURCES 1994-95, at 29.

63 *Id.* at 27.

taking into account downward shifts in birth-rates in some developing countries due to improved socio-economic conditions and family-planning programs.

The projected massive population increase will place additional stress on already heavily-exploited environmental resources in Africa,[64] and in demographic heavy-weights such as India and China. In noting that developing countries are the source of much of the world's population, pollution and natural resources, Magraw has aptly described the predicament for much of the Third World.[65] The South does indeed possess a comparative advantage in many mineral and other primary products; in the context of natural resources, the developing world, particularly those countries containing tropical forests, contains a disproportionate share of global biodiversity.[66] Much of this is threatened with degradation or extinction[67] due to a number of related causes including over-harvesting and habitat modification[68] by humans for agricultural and industrial efforts and through pollution.

Despite the apparent natural resource wealth, material living standards for the vast majority of persons in the developing countries are inadequate for enjoyment of the basic necessities identified by Schachter.[69] Part of this disparity is related to shifts in resource

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[64] *See* Jennifer Parmelee, *Losing the Race to Feed Its People Africa's Population Grows Faster Than Its Crops*, WASH. POST, Aug. 24, 1994, at A1, A23.

[65] *See* Daniel Bartow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 69 (1990).

[66] "Around 10 million species live on earth, according to the best estimates and tropical forests house between 50 and 90 percent of this total." *See* GLOBAL BIODIVERSITY STRATEGY, *supra* note 22, at 7.

[67] "Biological diversity is being eroded as fast today as at any time since the extinction of the dinosaurs died out some 65 million years ago. The crucible of extinction is believed to be in tropical forests.... About 17 million hectares of tropical forests--an area four times the size of Switzerland-- are now being cleared annually, and scientists estimate that at these rates roughly 5 to 10 percent of tropical forest species may face extinction within the next 30 years." *Id.* at 7.

[68] *See* WORLD RESOURCES 1994-95, at 132-134.

[69] *See* OSCAR SCHACHTER, SHARING THE WORLD'S RESOURCES, 7-8 (1977).

demand by Northern consumer nations and to international pricing and market control of refining and distribution, which has traditionally been a function of North-South trading relationships.[70]

Debt-servicing has drained a substantial amount of developing country GNP which could otherwise be used for socio-economic improvement. An essential function of governments in developing countries is to create conditions for a better quality of life for their people. Much of the developing world is plagued with considerable external debt.[71] For Least Developed Countries ("LDCs"),[72] overcoming the debt burden appears insurmountable without assistance from the international community.[73] At a 1995 meeting on the issue of Third World debt, Jamaican Prime Minister P. Patterson lamented that: "Many developing countries were still struggling to achieve economic growth while pumping more than 40 percent of their national budgets to service debts."[74] In November 1996, representatives of industrialized states and major international creditors agreed upon a new debt initiative under IBRD auspices for

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[70] *See, e.g.*, Najam, *supra* note 56, at 15-19.

[71] *See, e.g.*, G. Graham, *World Bank is pressed on debt burden: Some African countries disappointed by call from development committee*, FINANCIAL TIMES, Oct. 10, 1995, at 5.

[72] Countries in this category include those states which qualify for assistance through the International Finance Corporation of the World Bank Group. The IBRD refers to these countries as "Highly Indebted Poor Countries" ("HIPCs"). *See Debt relief plan for the poorest countries moves ahead*, THE WORLD BANK, PRESS RELEASE, Nov. 15, 1996.

[73] This issue received high priority in the 1995 Report of the World Social Summit, in "Commitment 7": "(c) [f]ind effective, development-oriented and durable solutions to external debt problems, through the immediate implementation of the terms agreed upon in the Paris Club in December 1994, which encompass debt reduction, including cancellation of other debt-relief measures; invite the international financial institutions to examine innovative approaches to assist low-income countries with a high proportion of multilateral debt..."; *see also* pars. 82 and 90, A/Conf. 166/9, Apr. 19, 1995.

[74] *See* J. Thatcher, *Commonwealth Urges Help For Developing Countries*, THE REUTERS EUROPEAN BUSINESS REPORT, Oct. 4, 1995.

selected LDCs.[75] However, for the foreseeable future, natural resources will remain a "tempting target"[76] for accelerated exploitation by governments and their agents to pay foreign creditors and to meet immediate socio-economic needs, even if this entails sacrificing possibly more economically and environmentally sustainable use options for the future.[77]

Developing countries also engage in what could rightly be characterized as "unsustainable" resource consumption patterns[78] due to infrastructural inadequacies and the inability to meet socio-economic objectives by other channels. Unsustainable exploitation of living resources is engaged in not only by governments but also by members of the general population, including politically and economically marginalized groups such as tribal and other minorities, who often have no other livelihood alternatives.[79] Such resource "mining"[80] patterns undermine not only the ability of poor populations to meet their nutritional and other needs, but also vitiate resource availability for future generations. These factors do not deny the existence of greed, corruption and indifference by governments and their agents in relation to environmental resources, or the role of perverse fiscal and regulatory incentives, which encourage accelerated degradation of biological diversity. For example, a recent study noted:

> With the exception of parts of Central America and Mexico, the main agents of deforestation in Latin America are not so much the masses of poor peasants

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75 *See Debt Relief Plan for the Poorest Countries Moves Ahead.* THE WORLD BANK, PRESS RELEASE, Nov. 15, 1996.

76 *See* Magraw, *supra* note 66, at 69.

77 *See* Richard Rice & Nigel Sizer, *Backs to the Wall in Suriname: Forest Policy in a Country Crisis*, WRI, Wash., D.C. 1995.

78 *Id.*

79 WORLD RESOURCES 1994-95, at 4.

80 Exploitation of a living resource at rates and by means which defeat the capacity of the resource to replenish itself to future harvestable levels and which severely interfere with the functioning of the resource in the ecosystem.

> in search of land, but rather commercial interests including speculators, loggers and cattlemen in search of profits who are, directly or indirectly, supported by the government.[81]

It is in the North's own self-interest to devote a larger share of its energies to assist the South in rectifying the imbalances which are precipitating accelerated environmental destruction and socio-economic inequalities. Schachter recognized this almost two decades ago when he argued that meeting the needs of the poor and of developing countries was a practical necessity on the part of industrialized states for avoiding threats to the "equilibrium and stability of the international order."[82]

Increased global political discord is only one of the crucial issues arising out of the poverty-overpopulation-environmental degradation link. The North is critically dependent upon the biodiversity of the South, including its genetic resources, for improving and developing food,[83] medicines[84] and other products,[85] as well as for the role played by ecosystems, such as rainforests, in maintaining global environmental quality.

In addition to the practical realities for survival of both the industrialized "North" and developing "South", Schachter identified greater fairness in resource access and distribution as a "recognized normative principle . . . central to the idea of distributive justice."[86] He distinguished between meeting need as an act of charity and meeting need as a matter of "justice":

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[81] R. LOPEZ, POLICY INSTRUMENTS AND FINANCING MECHANISMS FOR SUSTAINABLE USE OF FORESTS IN LATIN AMERICA, at 15 (Mar. 1996).

[82] *See* Schachter, *supra* note 6, at 16.

[83] *See* June Starr & Kenneth C. Hardy, *Not By Seeds Alone: The Biodiversity Treaty and the Role of Native Agriculture*, 12 STAN. ENVTL. L. J. 85, 86-98 (1973).

[84] *See* Philip Sheldon, *Hunt in Forests of Borneo Aims to Track Down Natural Drugs. U.S. Scientists are in a Race Against Time and Loggers*, N. Y. TIMES, Dec. 6, 1994 at C4.

[85] *See generally* GLOBAL DIVERSITY STRATEGY, *supra* note 22.

[86] Schachter, *supra* note 4, at 16.

> In the latter case, the satisfaction of needs is perceived as an entitlement, to be embodied in norms and institutions, and the relationship between donor and recipient is seen in terms of mutual rights and responsibilities. On the other hand, when the provision of need is regarded as an act of charity, the relationship between the parties involved tends to be characterized by a sense of inequality, often with expectations of submissive behavior on the part of the recipient.[87]

The emphasis on "entitlement" and "rights and responsibilities" is the language of legal obligation. However, the industrialized states as a whole have not acknowledged this putative obligation. The U.S. Government has denied any legal responsibility to developing countries for financial or other aid as a customary law obligation.[88] The United Nations Charter and most contemporary international treaties refer to the sovereign equality of States. Schachter's comment suggests that one aspect of international equality among States is the right to intra-generational equity as manifest in distributive justice. This would mandate creating conditions to assure among all nations fair access, distribution and consumption of global resources. Provisions in the Convention on Biological Diversity ("CBD") and the Climate Change Convention ("CCC"),[89] on technology transfer between industrialized and developing countries, establish that receipt of developmental

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[87] *Id.* at 9.

[88] *See, e.g.*, U.S. Government's written statement denying any normative obligation regarding "common but differentiated responsibilities" in Report of the United Nations Conference on Environment and Development, Proceedings of the Conference, Vol. II, A/Conf. 151/Rev. 1 (Vol. II) (1992).

[89] *See* Convention on Biological Diversity, U.S., art. 16, 18, 20, 31 ILM 818 (May 22, 1992), and Climate Control Convention, U. N., art. 4, 31 ILM 849 (June 5, 1992).

assistance and meeting environmental treaty obligations are mutually dependent, at least under the terms of these conventions.[90]

The Inter-Generational Component

When referring to issues which writers have called "intergenerational equity,"[91] most international legal instruments use the phrase "for the benefit of present and future generations" or "equitable sharing of benefits" or similar language. However, they generally fail to differentiate between the particular interests of future generations as opposed to those of the present generation, or to specify which groups, either in the present or future, will actually be "equitably sharing" the benefits.

Inter-generational equity is included in the substantive part, rather than just the preamble, of one enforceable text, Article 3 of the CCC. However, that section merely states that: "Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities."[92] It offers no assistance in determining how Parties should behave to protect the interests of future generations in any manner differently from those of present humankind. No other legally binding international

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[90] For further elaboration of developing country perspectives on these obligations, *see* comments by M.C.W. Pinto, *The Legal Context: Concepts, Principles, Standards and Institutions*, presented at Seminar: Towards International Economic Law with a Human Face, An Integrated Perspective on Sustainable Development, International Law Association, Amsterdam, May 2-4, 1996, at 14-15.

[91] The list of legal writers who have employed this terminology in discussing issues of resource management and utilization in international law include, *inter alia*, O. Schachter, E.B. Weiss, P. Thacher, D.B. Magraw. The concept has also been employed and endorsed by Judge C. Weeramantry in *Denmark v. Norway*, 1993 ICJ Reports 38, (separate opinion by Judge Weeramantry at 211-279); *New Zealand v. France*, 1995 ICJ Reports 288, (dissenting opinion by Judge Weeramantry at 341-342); and *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 ILM 809, 888 (1996).

[92] *See* art. 3, par. 1, CCC, 31 ILM 849 (1992).

instruments suggest how the interests of future generations should be considered, or how the interests of future generations may differ from those of present generations with regard to access and utilization of natural resources.

A few hortatory and soft-law[93] texts such as the Goa Guidelines on Intergenerational Equity[94] and the Declaration Universelle Des Droits De L'Homme Des Generations Futures adopted at Laguna, Canary Islands, February 1994,[95] seek to develop a normative framework for protecting the interests of future generations. Otherwise, inter-generational equity has been accorded little more than lip service in the preamble of instruments dealing with environmental protection and development.

Our Common Future ("OCF"),[96] a political treatise which made recommendations for the development of international law,[97]

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[93] For discussion of what is meant by "soft law", *see* P. Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991); and FREDERICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS. ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS, at 201 (1989).

[94] Intergenerational equity is referred to as a "principle" that "...requires that we avoid actions with harmful and irreversible consequences for our natural and cultural heritage..." *See* Goa Guidelines on Intergenerational Equity adopted by the Advisory Committee to the United Nations University Project on "International Law, Common Patrimony and Intergenerational Equity," Feb. 15, 1988, *reprinted in* Brown Weiss, 1989, at 293-294.

[95] Text in French only. The declaration was drawn up at a meeting of experts under UNESCO auspices held at *L'Institut Tricontinental de la Democratie Parlementaire et des Droits de l'Homme* of the University of La Laguna, Canary Islands. Copy on file with E. Brown Weiss, GULC, Wash., D.C.

[96] WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987). The Commsion is also known as the "Brundtland Commission" or "WCED".

[97] *See, e.g.*, OCF, at 312, 332-333. The Brundtland Commission also sanctioned an Experts Group on Environmental Law "to prepare a report on legal principles for environmental protection and sustainable development, and proposals for accelerating the development of relevant international law." *See* EXPERTS GROUP ON ENVTL. LAW OF THE WORLD COMM'N ON ENV'T & DEV., ENVIRONMENTAL PROTECTION & SUSTAINABLE DEVELOPMENT at 12 (R.D. Munro & J.G. Lammers,

expressly recognized that realizing intra-generational considerations may present adverse implications for inter-generational concerns.[98] This point is highlighted in OCF's characterization of "sustainable development" in terms of meeting present needs without compromising the ability of future generations to meet their needs.[99] It therefore acknowledged that there are limits on how present needs are met in order to fulfil the parallel objective of leaving sufficient resources for future generations to meet their needs. It also pointed out that achieving intra-generational equity required a transformation in resource use patterns and decision-making structures between wealthy industrialized and poor developing countries.[100] It also recommended that governance arrangements within developing countries become more democratic, transparent and equitable.

Also, two draft instruments acknowledge potential conflicts between "intra-" and "inter-" generational equity. Article 5 of the draft IUCN Covenant on Environment and Development[101] "qualifies" present generations' use of the environment with the needs of future generations: "The freedom of action of each generation in regard to the environment is qualified by the needs of future generations."[102] This statement acknowledges that intra- and inter- generational equity may not be inherently compatible. Also, Principle 4 of the Draft Principles on Human Rights and the Environment,[103] recognizes a right to an environment "adequate to meet equitably the needs of present generations . . . that does not

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eds.) (1987).

98 *See* OCF, at 43.

99 *See* OCF, at 43.

100 OCF, at 5-6.

101 *See* Draft International Covenant on Environment and Development, IUCN, Gland, Switzerland ("IUCN Covenant") (Mar. 1995).

102 *Id.* at art. 5.

103 This is a draft text attached as Annex I, to the UN ESCOR, Commission on Human Rights, Sub-commission on Prevention of Discrimination of Minorities, Review of Further Developments in Fields with which the Sub-Commission has been concerned, Human Rights and the Environment: Final Report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994).

impair the rights of future generations to meet equitably their needs."[104] Although both of these instruments are draft texts, they suggest emerging trends in international law for addressing meeting resource use needs of present and future humanity.

Brown Weiss has suggested a framework for addressing protection of interests of future generations through her tripartite principles of "conservation of options", "conservation of quality" and "conservation of access".[105] In the context of conserving use options, she proposes re-orientation of legal structural biases which encourage unsustainable resource conversion. For example, concerning logging of biologically valuable tropical forests, the re-orientation would entail "shifting the burden of justification" upon those who seek to deplete the resource by requiring them to "define criteria to justify transformation of forests to other uses, so that areas of rich biological wealth remain and other areas are put to productive, sustainable uses."[106] Her legal framework suggests directions which international law and municipal laws could take to tackle the complex issue of protecting interests of future generations in the light of needs of existing generations.

The Brundtland Commission and others have also discussed the establishment of an "international ombudsman"[107] position under U.N. or other neutral auspices to oversee protection of the interests of future generations. However, no convention or other enforceable instrument to date provides any guidance for reconciling the needs of future generations with those of existing human populations. Among the major obstacles to realizing this objective is the uncertainty regarding the quality, quantity and variety of resources

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104 *Id.* at Principle 4.

105 *See* E. Brown Weiss, *supra* note 4, at 130-131. *See generally* Brown Weiss, 1989.

106 *See, e.g.*, Brown Weiss, 1989, at 225.

107 At present the Earth Council seeks to create an ombudsman position to investigate and address " intra-" and "inter-"generational controversies involving human rights, economic development and environmental protection. Source: personal communication with O. Lynch, WRI, Washington, D.C., May 1996.

required by future generations in light of current resource use demands, particularly in the Third World.

Inter-Generational Equity in Case Law

Outside of law as manifest in treaties and other multilateral instruments, the International Court of Justice has addressed intergenerational aspects of state activities in at least one domestic court case. At the ICJ, Judge Weeramantry has discussed the historico-cultural framework for inter-generational equity in global legal traditions in his lengthy separate opinion exposé on "equity" in the Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*).[108] He also has insisted upon its recognition as an international legal principle in his dissents in *Nuclear Tests (New Zealand v. France) 1995*[109] and *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons ("Nuclear Weapons Advisory Opinion")*.[110]

In *Denmark v. Norway*, Judge Weeramantry referred to intergenerational equity and specifically to "the concept of wise stewardship [of natural resources] . . . and their conservation for the benefit of future generations. . ."[111] These statements were included in his separate concurring opinion as dicta, and were not decisive in the Court's decision regarding delimitation of a maritime boundary. In his dissenting opinion in *Nuclear Tests 1995*, he stated:

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[108] *See Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, 1993 ICJ 38 (Separate Opinion of Judge Weeramantry at 211-279).

[109] *See Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, 1995 ICJ 288 (dissenting opinion by Judge Weeramantry at 341-342).

[110] 35 ILM 809, 888 (1996).

[111] *See Denmark v. Norway*, 1993 ICJ 38 (Separate Opinion of Judge Weeramantry at 274).

> The case before the court raises, as no case before the court has done, the principle of intergenerational equity - an important and rapidly developing principle of contemporary environmental law . . . The court has not thus far had occasion to make any pronouncement on this rapidly developing field . . . [The case] . . raises in pointed form the possibility of damage to generations yet unborn.[112]

The Court in *Nuclear Tests 1995* rendered its decision on other grounds before it had the opportunity to address the normative status of intergenerational equity. In *Nuclear Weapons Advisory Opinion*, in which the ICJ was asked to hold whether the threat or use of nuclear weapons by a state was unlawful per se under international law, Weeramantry opined:

> At any level of discourse, it would be safe to pronounce that no one generation is entitled, for whatever purpose, to inflict such damage on succeeding generations . . . This Court, as the principal judicial organ of the United Nations, empowered to state and apply international law...must, in its jurisprudence, pay due recognition to the rights of future generations . . . [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.[113]

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[112] *See New Zealand v. France*, 1995 ICJ 288 (dissenting opinion by Judge Weeramantry at 341-342).

[113] 35 ILM 809, 888 (1996).

In the main opinion, the Court determined that it could not hold that based on existing international law, in all circumstances use of nuclear weapons would be unlawful, and it also did not discuss the legal status of intergenerational equity. However, it did acknowledge the catastrophic implications for future generations due to environmental harm from nuclear weapons.[114] It is noteworthy that intergnerational equity as a legal norm has been included in the case law of the International Court, albeit in separate opinions. Separate and dissenting opinions such as those provided by Weeramantry in the above cases are useful in offering alternative interpretations on the subject matter and contribute to what many regard as the ICJ's role in developing and clarifying international law on controversial issues.[115] It is likely that in a future case before the ICJ involving international environmental issues, the Court may be confronted with addressing directly the normative status of intergenerational equity.

The relevant domestic court decision on intergenerational equity, in both its "intra-" and "inter-"generational dimensions, is a 1993 Philippine Supreme Court case.[116] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources ("DENR")* addressed intergenerational equity in the context of state management of national forests. In a novel situation under Philippine law, the Philippine Supreme Court permitted a class action - although it has not yet issued a decision on the merits - brought by Filipino children acting as representatives for themselves and future generations. Petitioners sought to halt cutting by government licensees of remaining national forests. Petitioners alleged that present and continued logging violated their right to a healthy environment under the Philippine Constitution and would entail irreparable harm to them and future generations of the nation. The Court expressly considered the issue of intergenerational

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114 35 ILM 809, 821 (1996).

115 *See* H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT, at 66-69 (1958).

116 *See Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*, 33 ILM 173 (1994).

responsibility[117] and recognized that plaintiffs' had *locus standi* for their class action on behalf of present and future generations in the Philippines.

In rendering its ruling the Court accepted petitioners' statistical evidence regarding the amount of forest cover required to maintain a healthy environment for present and future generations. [118] The Court's recognition of the utility of this kind of evidence for determining resource use needs for future generations is a bold and laudable attempt at realizing the demands posed by intergenerational equity. A subsequent critique of the decision in *Minors Oposa* argued that references to intergenerational equity were not decisive in the Court's ruling and that reliance on this issue was a political matter on the part of the deciding Justices.[119] However, this case is significant because it is the only reported ruling by a nation's highest court to address openly intergenerational equity as a factor in rendering its determination[120] and specifically recognizing standing for future generations to bring an action regarding environmental degradation.

The Intra-generational Component

In general, international legal instruments have dealt with the substantive content of "intra-" generational equity with greater detail than with "inter-"generational equity. The inter-state dimension of "intra-" generational equity has been a key element of the agenda of

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117 *See* 33 ILM 174, *supra* note 116, at 185.

118 33 ILM 173, *supra* note 116, at 177.

119 *See* D.B. Gatmaytan, *Half a Landmark Case: Reflections on Oposa v. Factoran*, 6 PHILIPPINE NATURAL RESOURCES LAW JOURNAL 30 (1994).

120 The U.S. Government has previously alleged consideration of future interests in arguments before its own lower courts. *See, e.g., United States v. 18.2 Acres of Land*, 442 F. Supp. 800, 806 (E.D. Cal. 1977). Additionally, in *Cape May County Chapter, Inc., Isaak Walton League of America v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971), a U.S. federal court permitted a local conservation NGO to bring an action in both its own right and as a representative of future generations to block conversion of a marshland. *See* 329 F. Supp. at 514.

developing countries under the rubric of the new international economic order since at least the early 1970s and continues to be so.[121]

Environmental Justice: a Dimension of Intra-Generational Equity

In addition to the inter-state dimension, intra-generational equity also encompasses what is now referred to as "environmental justice" or "intra-generational justice".[122] This is: fairness in utilization and enjoyment of resources as well as in enduring the costs for degradation, disposal and rehabilitation of resources, among all persons and groups both domestically and internationally. It has received widespread attention only since the years leading up to the UNCED. "Environmental Justice" has become a significant legal issue in the United States as a result of allegations that areas inhabited by Native Americans and other socio-economically marginalized groups have shouldered a disproportionate amount of the nation's pollution disposal facilities and other environmentally dangerous activities.[123] In response to this, the Clinton Administration issued Executive Order 12898 of 11 February 1994 requiring that:

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121 *See generally* Singh, 1992.

122 *See* Thrupp, 1994. *See also generally* Sarokin and Schulkin, 14 THE ENVIRONMENTALIST 121 (1994). The Brundtland Commission also advocated environmental justice as a prerequisite for sustainable development. "...[M]eeting essential needs requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those poor get their fair share of the resources to sustain that growth. (OCF, at 8)." Specifically regarding conserving biodiversity, it maintained that industrialized nations seeking to reap economic benefits from flora, fauna and other genetic resources located in developing countries"...should ...seek ways to help tropical nations - and particularly the rural people most directly involved with these species - realize some of the economic benefits of these resources.(OCF, at 63).

123 *See, e.g.*, J.A. Hernandez, *How the Feds are Pushing Nuclear Waste on Reservations*, CULTURAL SURVIVAL QUARTERLY, Winter 1994, at 40, 40-42.

> each Federal Agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories."[124]

An Executive Order has the force of law in the United States. The impact of Executive Order 12898 could have wider transnational ramifications if it is applied in the future to United States Government activities, including foreign assistance programs, in other countries. Calls for environmental justice are not limited to the United States. Other expressions of this phenomenon include the Penang Charter of the Indigenous-Tribal Peoples of the Tropical Forests, and the Baguio Declaration.[125] These are declaratory instruments expressing a normative order by indigenous and other long-term occupant populations and their supporters concerning control and management over the resources which they have traditionally utilized and husbanded. They affirm that much of the conservation and development agenda has not met its goals because of inadequate attention to rights and interests of local populations.

Additionally, a major component of the dispute between Nauru and Australia[126] regarding despoliation of that island state's

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[124] *See* Section 1-101, Executive Order 12898 of February 11, 1994.

[125] Baguio Declaration, NGO Workshop on Effective Strategies for Promoting Community-Based Forest Management: Lessons from Asia and other Regions, Villa la Maja Inn, Baguio, Philippines, May 19-23, 1994. Text on file at WRI, Washington, D.C.; Charter of the Indigenous-Tribal Peoples of the Tropical Forests, Penang, Malaysia, February 1992, *reproduced in* COLCHESTER, M., SALVAGING NATURE: INDIGENOUS PEOPLES, PROTECTED AREAS AND BIODIVERSITY CONSERVATION, DP 55, (Sept. 1994).

[126] The dispute was the subject of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Reports 240; Order of 25 June 1993, 1993 ICJ Reports 316; Order of 13 September 1993, 1993 ICJ Reports 322. The Court did not have an opportunity to address the issue of environmental

environment through lucrative phosphate mining, involved what could be styled as a question of "environmental justice." Nauruans received a substantial financial return resulting from the mining, much of which was conducted by Australia pursuant to a U.N. trusteeship. However, the island's unique ecosystem has been devastated and more than seventy five percent of Nauru is now uninhabitable. The Nauruan Government alleged, inter alia, that Australia, the United Kingdom and other governments received tremendous agricultural benefits from cheap fertilizer obtained through the destruction of Nauru's topography, and that these states had a duty to Nauru for environmental restoration and related compensation.[127]

Intra-Generational Equity in International Instruments

The following discussion evaluates the development and application of intergenerational equity, especially its "intra" generational dimension, in international legal instruments.

Bering Fur Seal Regime

The Bering Fur Seal regime,[128] which arose out of the Fur Seal arbitrations of 1892 between the United States and Great Britain, represents the first instance in which "intra-generational" interests were raised in a modern international resource management agreement. In its pleadings before the arbitration tribunal, the United States Government raised issues of equity in utilization of the seals

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justice and the case was subsequently settled by the Parties.

127 *See generally* C. WEERAMANTRY, NAURU. ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP, (1992).

128 For historical background leading to the creation of the regime, *see Fur Seal Arbitration, Proceedings of the Tribunal of Arbitration convened at Paris under the Treaty between the United States of America and Great Britain*, concluded at Washington, February 20, 1892, Government Printing Office, Washington, D.C., Vols. I-IX, (1895).

at both the international and domestic levels. It contended, inter alia,: 1) that it had managed the Bering Fur Seal (Callorhinus ursinus) herd as a natural resource not only for its own commercial benefit, but for the "common interests of mankind"[129] and "for the benefit of the world"[130] It discussed at length the usefulness of the seal pelts to the fur industry and economies of the USA, the UK and other countries; 2) that indiscriminate pelagic sealing as carried out by British flag ships was not only decimating the seal population, but also threatened the traditional livelihood and the survival of the aboriginal peoples of Alaska:

> not only . . . the wellbeing (sic) but even the existence of the people of the extreme north-east coast . . . [T]he seal fishery is the only resource our people there have; it furnishes all the necessaries of life; without it they perish . . . the doctrine of equal rights of all nations on the high seas rests on the idea that it is consistent with the common welfare and is not destructive of any essential rights of inhabitants of the neighboring coasts;[131]

3) that it was wrong as against the laws of civilization and nature to "exterminat[e] . . . a race of animals, a race that have . . . their own right to live as long as they can live harmlessly."[132] Today this would be classified as an argument for "existence value" of other living

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[129] *See* Argument of the U.S. Government before the Tribunal of Arbitration, *Fur Seal Arbitration (United States v. Great Britain)* in 1 MOORE ARB DIGEST 755, 811 (1898).

[130] *Id.* at 813.

[131] *See* Oral Argument of the United States before the Tribunal of Arbitration, *Fur Seal Arbitration*, Vol. XV, at 11.

[132] *See* Oral Argument of Hon. E.J. Phelps, Representative of the U.S. Government before the Arbitration Tribunal, *Fur Seal Arbitration*, Vol. XV at 10.

creatures, within the context of intra-generational fairness, espoused by writers such as D'Amato and Chopra regarding rights of whales.[133]

At the inter-state level under the subsequent multilateral regime, the 1911 Convention respecting Measures for the Preservation and Protection of the Fur Seals in the North Pacific Ocean,[134] provided compensation[135] for those state Parties, namely Japan and Great Britain (on behalf of Canada), which abandoned unsustainable harvesting methods, so that all shared in the benefits from utilization of the resource. Additionally, aboriginal populations were guaranteed[136] subsistence harvesting rights by all of the state Parties. Recognition of an equitable interest by subsistence users regarding wildlife harvesting has been included also in subsequent wildlife utilization treaties between the U.S. Government and other countries.[137]

Overall, however, in contrast with the Bering Fur Seal regime, throughout much of the twentieth century concern with fairness in the access, distribution and consumption of natural resources on the part of states vis-à-vis other states or regarding particular populations within states has not been a major consideration. Historically, the majority of situations involving use of global resources - namely resources beyond the particular jurisdiction of any nation, such as

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133 *See generally* D'Amato and Chopra, 85 AM. J. INT'L L. 21 (1991), *supra* note 5.

134 104 BFSP 175 (1911). The Parties to this convention were Japan, Russia, the United States and Great Britain.

135 *Id.* at arts. X- XIV.

136 *Id.* at art. IV.

137 *See, e.g.*, preamble and art. 2, Agreement between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd, 1987 Can. T. S. No. 31. For information on the relevant schedule to the International Convention for the Regulation of Whaling, which authorizes aboriginal subsistence harvesting of whales under the regime, *see* P. BIRNIE, 2 INTERNATIONAL REGULATION OF WHALING 620 (1985).

high seas fisheries and Antarctica,[138] applied a "first in time" approach.[139]

European Colonial Conservation Regimes

Under the colonial regimes of European powers earlier this century, the resource access rights and interests of subject populations were often completely ignored, abrogated or severely curtailed.[140] British colonial forest policy in India, which disregarded pre-existing customary rights of locals over forests and other resources,[141] was part of a pervasive attitude sanctioned by law to dispossess local inhabitants from their customarily held forest lands in order to meet imperial colonial needs.

This attitude on the part of colonial authorities was kept intact or replicated by most of the governments in the new independent states in Africa and Asia.[142] In some cases, the new "national" regimes showed even greater disregard for the resource use rights of

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138 The management of Antarctica is now governed under the *Antarctic treaty regime of 1959. See* Antarctic Treaty, 402 U.N.T.S. 71 (Aug. 4, 1961); Convention on the Conservation of Antarctic Marine Living Resources, 1329 U.N.T.S. 47 (1983); Convention on the Regulation of Antarctic Mineral Resource Activities, 27 ILM 859 (1988). High Seas fisheries resources are now governed by the Law of the Sea Convention, 21 ILM 1261 (1982), and supplemental agreements such as the recent Straddling Stocks Agreement, 34 ILM 1542 (1995).

139 *See generally* A.V. Lowe, *Reflections on the Waters, Changing Conceptions of Property Rights in the Law of the Sea*, 1 INT'L J. ESTUARINE & COASTAL L. 1 (1986).

140 *See generally* Lynch and Talbott, 1995. However, Lindley provides a few examples demonstrating some sensitivity to interests of local resource user populations in territories under colonial rule. *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (1926).

141 *Id.* at 62.

142 *Id.* at 61-64 (regarding the post-colonial forest laws in India).

long-term occupant local populations than the colonial powers had done.[143]

The London Convention of 1933

The London Convention[144] of 1933 reflects a colonial policy which, although seemingly directed at conserving habitats and wildlife, served to disenfranchise the rights and interests of local resource user communities:

> The Contracting Governments will give consideration in respect of each of their territories to the following administrative arrangements: . . . [inter alia] [t]he control of all white or native settlements with a view to ensuring that as little disturbance as possible is occasioned to the natural fauna and flora. [145]

This text is particularly egregious if one considers that protected areas covered under the instrument were often the long-established home and place of livelihood for long-term occupant communities. The resulting impacts on forests and other resources

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[143] *See* discussion of the employment of the "Regalian Doctrine" in the Philippines to dispossess most rural populations by the post-independence Philippine Government in Lynch and Talbott, *supra* note 20, at 686-687; *see also* Hitchcock, *supra* note 15, at 14-20.

[144] 172 LNTS 241. The African Convention of 1968, which superseded the London Convention of 1933, provides in its preamble that the Parties are, *inter alia* , "..[d]esirous of undertaking individual and joint action for the conservation, utilization and development of [wild fauna, flora and their habitats]...by establishing and maintaining their rational utilization for the present and future welfare of mankind." The test offers no further specifics on meeting this objective. African Convention on the Conservation of Nature and Natural Resources, 1001 UNTS 3 (19680.

[145] *See* London Convention 1993, 172 LNTS 241, superseded by the African Convention on the Conservation of Nature and Natural Resources (1968 African Convention) 100 UNTS 3.

of biological diversity in these areas was often negative. Traditional customary restrictions, based on lineage, totem-identification and religious beliefs, regarding use of resources of biological diversity were ignored or invalidated by national governments, and community-managed resources such as woodlots, sacred forests and other traditionally protected areas were converted by the state into de facto open access spaces. The consequences for resources of biological diversity were: degradation of forest and other wildlife habitats, depletion of biodiversity, and the breakdown of traditional cultures which had often husbanded and protected the local natural resource base.[146]

This scenario of physical expulsion or abrogation of rights was not restricted to lands in the "South" which were formally annexed or colonized by the Europeans. It also occurred in places which had not been annexed by the colonial powers and which were technically independent sovereignties such as Nepal[147] and Thailand.[148]

The Whaling Regime

The Preamble to the International Convention for the Regulation of Whaling of 1946 ("ICRW") contains the proto-type for the standard terminology of "intergenerational equity" in international instruments. It reads as follows: "Recognizing the

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[146] *See generally* INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, WHOSE EDEN ? AN OVERVIEW OF COMMUNITY APPROACHES TO WILDLIFE MANAGEMENT (July 1994); *see also* historical background in M. Poffenberger and C. Singh, *Emerging Directions in Indian Forest Policy: Legal Framework for Joint Management of Forest Lands*, draft, Sept. 30, 1991. Text on file at WRI, Wash., D.C.

[147] *See* K. Talbott and S. Khadka, *Handing it Over. An analysis of the Legal and Policy Framework of Community Forestry in Nepal, Issues and Ideas*, WRI, at 6, Wash., D.C. (1994).

[148] *See* Royal Speech by His Majesty the King Delivered to the Organizing Committee of 'Rapee Day' Chitralada Villa, Wednesday 27 June 1973, Royal Addresses and Speeches, Thailand, copy on file at WRI, Wash., D.C.

interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks."

Although this text refers to the "interest of the nations of the world," the language indicates that the primary focus is the interest in safeguarding whale stocks for "future generations."[149] The preamble to this document appears to address intergenerational equity in both its intra-generational and inter-generational dimensions. As noted by Birnie, the subsequent history of continued unsustainable depletion of whale stocks, even under the convention, renders the practical utility of this landmark language to be little more than a footnote in the history of international law regarding conservation of biological resources.[150]

The Stockholm Declaration and its Impact on other Instruments

The Stockholm Declaration, which was produced at the United Nations Conference on the Human Environment in 1972,[151] is the first international instrument to contain the now well-known formulas seen in contemporary international legal materials: "for the benefit of present and future generations" or "for present and future generations."

The relevant portion of Principle 1 of the Stockholm Declaration states: "Man . . . bears a solemn responsibility to protect and improve the environment for present and future generations."[152] Principle 2 reads as: "The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples

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149 *See* preamble, ICRW 1946, 161 UNTS 72.

150 Unfortunately the prescriptions of the substantive articles did not prevent pursuit of short-term rather than long-term interests. They were open to interpretation...primarily to guard the interests of the industry, not...the interests of all mankind, or both present and future generations." *See* P. BIRNIE, INTERNATIONAL REGULATION OF WHALING, vol. 1, at 172 (1985).

151 *See* Report of the United Nations Conference on the Human Environment, 11 ILM 1416 (1972).

152 *See* Stockholm Declaration, Principle 1 (1972).

of natural ecosystems must be safeguarded for the benefit of present and future generations."[153]

The versions of the language regarding present and future generations, which resulted in the above sections of the Stockholm Declaration, were a compromise reflecting various interests and views on the normative status of the concept of intergenerational fairness. The World Health Organization ("WHO") introduced a proposal[154] stating: "Everyone has a fundamental right to an environment that safeguards the health of present and future generations for the full enjoyment of his basic human rights."[155]

Several developing countries, including Egypt, Zambia and Brazil, submitted a subsequent proposal which suggested a high level of normativity for intergenerational equity by stressing a "responsibility" toward future generations, and classifying adequate living conditions in a quality environment for the present generation as a "fundamental right": "[m]an has the fundamental right to adequate conditions of life, in an environment of quality which permits a life of dignity and well-being and bears a solemn responsibility to protect and enhance the environment for future generations."[156]

Chile found the above language inadequate because it implied that there was a responsibility only to protect the environment for future, but not present, generations. [157] The final text of Principle 1 reflects Chile's stance.

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153 *Id.* at Principle 2.

154 The U.S. Government offered similar language which did not refer however to present and future generations. See UN Doc. A/CONF. 48/PC/WG.1/CRP.4 (1971) at 5.

155 *See* UN Doc A/CONF.48/PC.12, Annex II, at 7, *reprinted in part* in L. Sohn, *The Stockholm Declaration on the Human Environment* 14 HARV. INT'L L.J. 423, 453 (1973).

156 *See* UN Doc A/CONF.48/4, Annex, (1972) at 2, *reprinted in part* in Sohn, *supra* note 155, at 453-454.

157 *See* Sohn, *supra* note 155 at 454, *citing* UN Doc. A/CONF.48/WG.1/CRP.10 (1972).

In the preparatory documents, the U.N. Secretary General opined that in the proposed Stockholm Declaration the international community's concern with "present and future generations" should be expressed in terms of "duty" and as a "trust" relationship: "the duty of all nations to carefully husband their natural resources and to hold in trust for present and future generations the air, water, lands and communities of plants and animals on which life depends."[158]

However, several states objected to the references to "obligation" suggested by "duty" and "trust" on the grounds that this language implied a constraint on developing country development objectives and thus violated national sovereignty.[159] These governments modified the proposed reference to intergenerational equity to state "for the benefit of present and future generations . . . ,"[160] which became the terminology for the final version of Principle 2 and remains the standard formulation in most international texts.

Sohn contrasted the original reference to "trust" with the final "vaguer notion of an unspecified somebody safeguarding the resources for 'the benefit' of [present and future] . . . generations."[161] Replacement of the word "trust" with "for the benefit of" was an attempt to dilute the normative status of the phrase, especially because the latter language was substituted by countries which felt that "trust" implied obligations impacting on national sovereignty.[162]

None of the extant international conventions dealing with conservation and sustainable development of natural resources have used the term "trust" when referring to issues of "inter-" or "intra-"

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158 *See* UN Doc. A/CONF.48/PC/WG.1(II)/CRP.11(1972), *reprinted in part* in Sohn, *supra* note 155, at 456.

159 *See* UN Doc. A/CONF.48/PC.12, Annex I, at 8 (1971), *reprinted in part* in Sohn, *supra* note 155, at 456.

160 *See* Stockholm Declaration, Principle 2 (1972).

161 *See* Sohn, *supra* note 155, at 457.

162 However, the phrase "for the benefit of" is common terminology for creating a trust relationship in common-law jurisprudence. The drafters of Principle 2 apparently did not feel that this was a crucial factor in their decision.

generational equity. Instead they have consistently employed the term "for the benefit of" or similar language.

The above history suggests that the precise language on the status of present and future generations regarding access to and utilization of natural resources was seriously considered in the negotiations and was not merely diplomatic fluff. It also indicates that at the time of the Stockholm Conference in 1972, the international community as a whole was not prepared to recognize a state's legal obligation to conduct its socio-economic affairs in a manner which would necessarily be consistent with the interests of future generations, or even other members of living generations.

Equity and the New International Economic Order ("NIEO")

It has been argued that the Stockholm Conference was in fact one of the first occasions where developing countries had the opportunity to express as a bloc, vis-à -vis the rest of the world, their demands for a more equitable international political and economic order.[163] Previously, this agenda had been articulated in primarily South-dominated fora such as UNCTAD, and the meeting which drafted the Founex Report.[164]

The U.N. General Assembly resolutions dealing with the establishment of a New International Economic Order ("NIEO"), which was primarily a developing country initiative, specifically refer to "equity,"[165] as a standard for ensuring fairness in access, consumption and receipt of the benefits of environmental, financial and technical resources among nations as the means for ushering in

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[163] *See* A. Najam, *An Environmental Negotiating Strategy for the South*, 7 INTERNATIONAL ENVIRONMENTAL AFFAIRS 249, 259 (1995).

[164] *See In Defense of the Earth The Basic Texts on the Environment - Founex, Stockholm, Cocoyoc*, UNEP EXECUTIVE SERIES, Nairobi, 1980. *See also* Pinto, 1996, at 4-5.

[165] *See, e.g.*, UNGA Res. 3281 Chp. I, articles 6,8,10, 14, 26, and 27-29, 14 ILM 251 (1975).

the NIEO. Article 30 of UNGA Res. 3281 of 1974 for example, describes what are now referred to as "intra-" and "inter-" generational equity as the responsibility of all states, and distinguishes responsibilities regarding environmental protection between developing and industrialized countries:

> The protection, preservation and enhancement of the environment for present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development of developing countries.[166]

Common but Differentiated Responsibilities ("CDR")

This above language concerning "state responsibility" anticipates what has come to be called "common but differentiated responsibilities" in more recent international legal instruments such as the CCC. This notion was partially expressed in Principle 23 of the Stockholm Declaration:

> [I]t will be essential in all cases to consider the systems of values prevailing in each country, and the extent of applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.[167]

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166 *See* Article 30, UNGA Res. 3281(XXIX), 14 ILM 251 (1975).

167 *See* Principle 23, Stockholm Declaration (1972).

Principle 23 is advocating differential treatment for developing countries in relation to industrialized states. Likewise, the crux of UNGA 3281 and the other UN declarations calling for a NIEO is that the gap in living standards between the developing and industrialized countries must be bridged. The developing countries' platform alleges that differential treatment favoring developing countries in the form of preferential terms of trade, technical and financial resource transfers and less stringent environmental standards are the means for achieving this objective.[168] The notion of common but differentiated responsibilities is closely linked to intergenerational equity; CDR predicates responsibility for environmental protection on both past consumption of natural resources and present capacity to shoulder the burden of maintaining and improving environmental quality. CDR acknowledges that there are global environmental problems that need to be addressed in partnership by both the North and the South. However, it introduces the issue of equity between the North and South over the issue of cost based on responsibility for past environmental degradation and ability to pay for clean-up and future protection. Najam writes:

> [T]he costs to be borne by different parties, the ability to bear these costs, and the responsibility for causing the problem in the first place, are differentiated . . Serious differences exist between North and South, on all three.[169]

From the standpoint of developing countries, the impact of "common but differentiated responsibilities" is to transform the normative character of financial and technical resource transfers between industrialized and developing countries from the realm of

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[168] *See, e.g.*, Kuala Lumpur Declaration on Environment and Development, *reprinted in* S.P. Johnson, (ed.), THE EARTH SUMMIT, (1993).

[169] *See* A. NAJAM, THE CASE FOR A SOUTH SECRETARIAT IN ENVIRONMENTAL NEGOTIATION, at 24 (1994).

"aid" to the category of international legal obligation.[170] To counter any suggestion that common but differentiated responsibilities might create a legal obligation to developing countries, the United States issued a "written statement" at the UNCED negating any legal obligation that it might entail.[171]

The United States Government's position on the normative status of common but differentiated responsibilities reflects the views of most other industrialized states. It also reveals that despite the incorporation of CDR in the provisions of at least one enforceable treaty, namely the CCC,[172] as well as in the Rio Declaration,[173] industrialized countries in general do not consider it to be a general norm of international law imposing any duties between states. More recently the 1996 Leipzig Declaration on Conservation and Sustainable Utilization of Plant Genetic Resources,[174] a non-enforceable instrument, stated that the participating states confirmed their "common and individual responsibilities" in respect of plant genetic resources, while also recognizing that states have sovereign rights over their plant genetic resources.[175] Whatever its actual legal status, the notion of differentiated responsibilities continues to be represented as an international normative standard.

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170 *See* In. M. Porras, *The Rio Declaration: A New Basis for International Cooperation*, 1993 SANDS at 27-30; *see also* A. Najam, *An Environmental Negotiation Strategy for the South*, 7 INTERNATIONAL ENVIRONMENTAL AFFAIRS 249, 249-287 (1995).

171 *See* Report of the United Nations Conference on Environment and Development, Proceedings of the Conference, A/CONF. 151/26/Rev.1 (Vol. II) (June 3-14, 1992).

172 *See* CCC, Art. 3 par. 1, 31 ILM 849 (1992).

173 *See* Rio Declaration, Principle 7, 31 ILM 874 (1992).

174 ITCCPGR/96/REP

175 *Id.* at par. 2.

Post Stockholm Natural Resource Conservation Regimes

Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES").

The first international treaty to employ the language of intergenerational equity derived from the Stockholm Declaration, is the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[176] in 1973. The Preamble to CITES states: "Recognizing that wild fauna and flora . . . must be protected for this and the future generations to come . . ."[177] It does not elaborate further on how the interests of present or future generations will be protected under the convention. Since the time of the drafting of CITES, language similar to the above phrase has appeared in the preamble in most multilateral conservation agreements. Representative samples include the preambles to the Convention on the Conservation of Migratory Species of Wild Animals, 1979,[178] and the Convention on the Conservation of European Wildlife and Natural Habitats, 1979.[179]

Amazonian Co-operation Treaty

The 1978 Treaty for Amazonian Co-operation, which is intended to be a multilateral socio-economic development and environmental protection agreement, advocates intra-generational equity in its preamble: ". . . to permit an equitable distribution of the benefits of [the harmonious] . . . development [of the Amazon] among the contracting Parties so as to raise the standard of living of their peoples . . ."[180]

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176 12 ILM 1085 (1973).

177 *See* preamble, 12 ILM 1085 (1973).

178 19 ILM 15 (1980).

179 UKTS no. 56 (1982), Cmnd. 8738.

180 *See* Amazonian Co-operation Treaty 1978, 17 ILM (1978) 1045.

However, the text does not address how or with whom the "equitable distribution of the benefits" from the development of the Amazon will occur. The instrument is a framework treaty, and with regard to the issue of "equitable distribution of benefits" from the development of the Amazon, the agreement imposes no duties on the part of the Parties other than the weak commitment ". . . to agree to undertake joint actions and efforts to promote . . . [various activities]." Article 1, which is the section directly addressing the issue of "equitable distribution" set out in the preamble merely states:

> The Contracting Parties agree to undertake joint actions and efforts to promote the harmonious development of their respective Amazonian territories in such a way that these joint actions produce equitable and mutually beneficial results . . . [T]o this end, they would (sic) exchange information and prepare operational agreements and undertakings as well as pertinent legal instruments which will permit the aims of the present Treaty to be attained.[181]

Whatever obligatory impact the above provision could have is obscured by the use of "would" rather than "shall" or even "should."

UNCLOS 1982 and its Aftermath

The United Nations Convention on the Law of the Sea ("UNCLOS 1982")[182] addresses intra-generational equity in its provisions concerning the Deep Sea-Bed Mining regime.[183] The original text for this regime sought to create international obligations on the part of industrialized countries to transfer technical resources

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[181] The only other section of the treaty to focus on equitable utilization of resources is Article XII which suggests equitable prices for locally produced natural resource products.

[182] 21 ILM 1261 (1982).

[183] *See* Art. 136, 21 ILM 1245 (1982).

to enable developing country Parties to exploit deep sea-bed resources,[184] and also to create a fund whereby developing country parties would receive a share of the royalties arising out of the exploitation of deep sea-bed mineral resources. The United States and other industrialized countries refused to become Parties to the convention unless these provisions were modified. The U.S. has found the modified provisions to be acceptable; these provisions do not require mandatory transfer of technical assistance between industrialized and developing country parties. The current "free market" price for resource utilization technology replaces the notion of "equitable sharing" based on need and development level, contained in the previous version of the convention, with classic capitalist market mechanisms. In practice, the new provisions will probably serve to exclude all but an elite of wealthy or technologically advanced states from sharing in the harvesting of these mineral resources.

UNCED Instruments

The documents arising out of the United Nations Conference on Environment and Development ("UNCED"), held in Rio de Janeiro in June 1992, are replete with references to intergenerational equity, and in particular issues encompassing "intra-generational" equity.

The Rio Declaration

The Rio Declaration[185] does not expressly mention either

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[184] *See* U.S. President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary, October 7, 1994 in 34 ILM 1393 (1995); 6 U.S. Department of State Dispatch Supplement, Supplement No. 1 (February 1995); *see also* Letter from the Secretary of State to the President, September 23, 1994 in 34 ILM 1393 (1995).

[185] 31 ILM 874 (1992).

"intra-" or "inter-" generational equity nor use the words ". . . present and future generations". Yet, it focuses on intra-generational concerns in Principles 3, 5, 7, 8, 12 and 14. Principle 5 characterizes the "eradication of poverty" as "an indispensable requirement for sustainable development" and says that: "[a]ll States and all people shall cooperate in [this] . . . essential task . . ." Principle 7 codifies the definition of "common but differentiated responsibilities" among nations. Principle 8, as noted previously, calls for States to reduce and eliminate "unsustainable" production and consumption patterns in order to "achieve sustainable development and a higher quality of life for all people".

Principle 12 says that "States should cooperate to promote a supportive and open international economic environment that would lead to economic growth and sustainable development in all countries. . ." Principle 14 addresses one of the key concerns of proponents of environmental justice, namely the shouldering of poor countries and poor and marginalized communities, with a disproportionate share of environmental degradation or of deprivation of environmental benefits:

> States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.[186]

Convention on Biological Diversity ("CBD")

The CBD makes only a passing reference to inter-generational equity: "for the benefit of present and future generations"[187] in its preamble. As noted previously, this "identikit" phrase is relegated to

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186 31 ILM 874 (1992).

187 *See* preamble, par. 23, 31 ILM 818 (1992).

the preamble of almost every other contemporary international document concerning conservation and sustainable development.

However, in contrast with the single reference to inter-generational equity in paragraph 23 of its preamble, the CBD contains numerous references to issues of intra-generational equity. Paragraphs 19 and 20 deal with socio-economic development and poverty eradication in developing countries, and access and sharing of genetic resources and technologies between states respectively. Article 1 codifies as objectives of the convention the requirement for "fair and equitable sharing of the benefits" arising out of use of resources of biological diversity, the access to genetic resources and "transfer of relevant technologies."[188] Article 8(j) refers to ". . . knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles" and says that Contracting Parties "shall . . . encourage the equitable sharing of benefits arising from the use of such knowledge, innovations and practices . . ."[189]

Article 8[190] of the CBD goes further than the FAO Undertaking[191] in recognizing expressly the rights of host countries to share equitably in the benefits derived from use of biological resources. Article 8 and all other sections of the CBD however fail to specify whether "equitable sharing" of benefits will be extended to the communities from which the biological resources or knowledge regarding resource use were obtained. The CBD leaves open the possibility that biodiversity prospecting enterprises or other interests from one country could obtain knowledge, innovations, practices regarding use of biological resources from an indigenous or other local community in a host country, develop and market those innovations or practices, and share the profits with the government of the host country without giving anything to the community from

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188 *Id.* at Art. 1 Objectives.

189 *Id.* at Art., 8(j).

190 Art. 8, 31 ILM 818 (1992).

191 International Undertaking on Plant Genetic Resources and Establishement of a Commssion on Plant Genetic Resources, FAO (1983).

which the resource was derived and still comply with the letter of the Convention.

Furthermore, Article 8(j) is made expressly "[s]ubject to. . . [the] national legislation [of the host country]". The host country's legislation may contain no law sanctioning the sharing of any benefits derived from biological resources with local populations, but may instead make all such benefits the property of the state.

To borrow a term from traditional international law regarding compensation, the failure to provide "prompt, adequate and effective"[192] compensation to local communities for the use of knowledge concerning biological resources, or for the use of biological resources which they have managed, is a major weakness in the CBD. It provides a disincentive for conservation. Such communities receive no assurances under the relevant international instrument, and may also be offered no protection under national laws, that they will obtain any benefits from continuing to protect biological resources in the face of pressures from logging, mining, poaching and other interests.

The failure of the CBD to go further in securing the interests of local communities circumscribes the full application of the concept of fair and equitable sharing of resources in Article 1, as well as the pronouncements in the preamble regarding eradication of poverty and social and economic development. It also flies in the face of developing theories of "environmental justice," which demand the protection of the interests of the poor and other marginalized segments of society regarding the consumption and distribution of environmental amenities and the burdens of environmental degradation.[193]

Articles 15, 16, 19, and 20 of the CBD together address the major aspects of intra-generational equity at the inter-state level. Article 15 deals, inter alia, with "fair and equitable" sharing of the results of research, development and benefits derived from use of

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192 *See* M.N. SHAW, INTERNATIONAL LAW, 521 (1991).

193 *See* Thrupp, 1994, at 2.

genetic resources obtained from another Contracting Party. Article 16 mandates access to and transfer of bio-technology and other technologies for conservation and sustainable use of biological diversity to developing country Parties "under fair and most favourable terms" including "concessional and preferential terms". Article 19 addresses priority access to developing countries on a fair and equitable basis of the results and benefits from biotechnology derived from the developing country.

Article 20 mandates provision of "new and additional financial resources" to assist developing countries to meet the "full incremental costs" of their obligations under the CBD, and stresses "the importance of burden-sharing among the contributing Parties". This provision mirrors Schachter's views on the emergence of development assistance as a matter of "justice" between equal sovereignties, rather than as a matter of charity between a superior to an inferior.[194] The underlying premise of Articles 16-20 is the position of developing countries that equity in access, consumption and distribution of environmental resources and their benefits will facilitate the conservation of resources of biological diversity and sustainable development.

Climate Change Convention ("CCC")

The CCC[195] contains provisions that can be viewed as addressing intra-generational equity. The CCC is not directed specifically at resources of biological diversity; however global climate change, as acknowledged in the CCC, will have a major impact on ecosystems.[196] The CCC also notes the role of forests as "carbon sinks" and therefore obliges Parties to "promote . . . [their] . . . sustainable management and cooperate in . . . [their] . . . conservation and enhancement . . ."[197]

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194 *See* Schachter, 1977, at 9.

195 *See* 31 ILM 849 (1992).

196 *Id.* at preamble pars. 2, 19, and Art. 4, par. 8(c) and (g).

197 *Id.* at Art. 4 (d).

Along with the CBD, the CCC emphasizes economic growth and poverty eradication as "first and overriding priorities"[198] of developing countries. To accomplish its objective of "stabilizing dangerous anthropogenic interference with the climate system", the CCC emphasizes above all adherence to "equity", especially manifest as CDR on the part of the Parties.[199] These concepts are repeated as principles throughout the CCC.[200] Article 4, which codifies "common but differentiated responsibilities" as a "commitment", "recogniz[es] . . . the need for equitable and appropriate contributions . . ." by each Party for mitigating climate change. Like Article 20 of the CBD, Article 4 of the CCC obliges developed countries to "provide new and additional financial resources" to assist developing countries to meet their obligations under the CCC.

Post-UNCED Approaches

Thress recent instruments seek to incorporate much of the current thinking on intergenerational equity, in both its "inter-" and "intra-" generational dimensions, into new regimes for conservation and sustainable development.

IUCN Draft International Covenant on Environment and Development

The IUCN Covenant contains an Article 5 entitled "Intergenerational Equity" which states: "The freedom of action of each generation in regard to the environment is qualified by the needs of future generations."[201] This statement is perhaps the first acknowledgment in any international legal instrument, albeit a model draft text, that the pursuance of intergenerational equity contains an

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198 *Id.* at Art. 4, par. 7 and preamble par. 21.

199 *Id.* at Art. 3, par. 1.

200 *See, e.g.*, Art. 4, pars. 1, and 2(a), 31 ILM 849 (1992).

201 *See* Art. 5, IUCN Covenant.

inherent tension between its "intra-" and "inter-" generational dimensions.

The commentary to the IUCN Covenant says that Article 5 should be read in conjunction with Article 8 on "the right to development" and Article 9 "eradication of poverty."[202] This would suggest that although intergenerational equity requires that the actions of the present generation should be qualified by the needs of future generations, the eradication of poverty and right to development intra-generational concerns among overall intergenerational objectives. This view would accord with those espousing intergenerational justice.

UNEP Model Law for Environmental Protection and Sustainable Development

The other model instrument to be discussed here is UNEP's "Proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development" ("UNEP Model Law").[203] This document is designed for application in Latin America and the Caribbean. The UNEP Model Law, like the IUCN Covenant, stresses intergenerational equity, both "intra-" and "inter-", in the substantive sections of the document. The "Governing Principles" of the UNEP Model Law include "national priority objectives [which] are to secure [A] healthy and decent quality of life for present and future generations . . .,"[204] and recognize that "environmental resources . . . constitute an irreplaceable base for the development of the country and humanity."[205]

Article 104 is directed at biodiversity conservation. It obliges all authorities of the country to ensure ". . . fair and equitable participation in the benefits derived from the use of genetic

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202 *See* Commentary, IUCN Covenant at 37.

203 *See* Document Series on Environmental Law No. 1, UNEP Regional Office for Latin America and the Caribbean, Mexico D.F. 1993.

204 *Id.* at 18, Art. 2, par. 1, sub. par. d.

205 *Id.* at 18, Art. 2, par.2.

resources." Article 104 follows the model established in the CBD, which does not specify if anyone, in addition to the state Parties, will be actual recipients of equitable sharing.

Desertification Convention ("DC")

Although not primarily directed at sustainable development of resources of biological diversity, the 1994 Desertification Convention ("DC")[206] is the most progressive enforceable international instrument to date to recognize the intra- generational interests, in particular as these relate to local communities, through equtiable sharing of benefits. Article 16 of the DC clearly spells out that adequate protection and equitable sharing of the benefits will be provided "to the local populations" from which the resources were obtained:

> [The Parties] . . . shall, as appropriate: . . . (g) subject to their respective national legislation and/or polices, exchange information on local and traditional knowledge, ensuring adequate protection for it and providing appropriate return from the benefits derived from it, on an equitable basis and on mutually agreed terms, to the local populations concerned.[207]

This convention which also contains obligations for involving local communities in the implementation of the treaty through their direct participation,[208] and the bold statement regarding equitable sharing with them of benefits arising out of their knowledge, anticipate an emerging acceptance of these new normative standards in international law.

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206 *See* International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa ("DC"), 30 June 1994, in force; 33 ILM 1332 (1994), 33 ILM 1328 (1994).

207 *Id.* at Art.16.

208 *Id.* at Arts. 5(d) and 10 (2).

International Case Law and the Intra-generational Component

In addition to the applications of aspects of intra-generational equity, such as environmental justice and common but differentiated responsibilities in international legal instruments, the case law of the International Court of Justice has addressed intra-generational concerns in its employment of equity. As noted earlier in this article, inter-generational equity was mentioned in dicta in a separate opinion in the *Denmark v. Norway*[209] case. However, in the main opinion, the Court squarely addressed intra-generational issues in its discussion of the "need to consider the livelihood of dependent fishing communities" when drawing the maritime boundary between two states in an area of valuable fisheries resources.

The Court also referred to an earlier decision, the *Gulf of Maine*[210] case stating:

> In the Gulf of Maine case . . . the Chamber . . . recognized the need to take into account of the effects of the delimitation on the Parties' respective fishing activities by ensuring that the delimitation should not entail 'catastrophic' repercussions for the livelihood and economic well-being of the populations of the countries concerned.[211]

The ICJ has addressed one additional and related issue impacting on the parameters of intra-generational equity. This also deals with rights to access, and entitlement to natural resources, but concerns the extent to which states can claim a right to resources located in an area of disputed jurisdiction or in another jurisdiction.

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[209] *Denmark v. Norway*, 1993 ICJ 38 (separate opinion of Judge Weeramantry at 211-279).

[210] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 1984 ICJ 246.

[211] *See Denmark v. Norway*, 1993 ICJ 71.

In the 1992 *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), El Salvador argued for a favorable boundary delimitation on the basis of, inter alia, its "demographic pressures...creating need for territory, as compared with the relatively sparsely populated Honduras . . . and the superior natural resources . . . said to be enjoyed by Honduras."[212] El Salvador elaborated that this claim was based on ". . . reasons of crucial human necessity."[213] This argument was rejected by the Court, which cited a similar contention raised by Tunisia in a previous decision (*Tunisia v. Libya*).[214]

In *El Salvador v. Honduras*, the majority opinion made clear that fortuity, or the lack thereof, regarding natural resources within a nation's boundaries, was not a legitimate claim to the rights of a neighboring state over the same resources. However, in his separate opinion in *Denmark v. Norway*, Judge Weeramantry opined that ". . . [economic necessity] . . . is an area in which the jurisprudence of the Court has not thus far been conclusive, despite the trend of recent decisions to treat economic factors as irrelevant."[215] Also, on the similar issue of size and resource use needs of local populations, Weeramantry stated: ". . . no general proposition can be laid down that the population factor is in all cases irrelevant."[216] Weeramantry's alternative perspective on these issues is compelling. It should be considered in the light of future resource use disputes that may be brought before the ICJ in which matters regarding sustainable development and environmental protection are the primary issues. The long-term implications of the Court's statements in *El Salvador v. Honduras* still need to be tested. *El Salvador v. Honduras* suggests that at present under the jurisprudence of the ICJ,

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212 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 1992 ICJ 351.

213 *El Salvador v. Honduras*, 1992 ICJ 396.

214 *See* 1992 ICJ 396, *citing Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ 18, 77.

215 *See Denmark v. Norway* , 1993 ICJ 38, 269.

216 *Id.* at 268.

there are limits as to how far a state can claim entitlement based on its socio-economic or demographic standing.

Conclusion

The above discussion demonstrates that intergenerational equity has become an integral feature in international law and in legal instruments dealing with sustainable development of natural resources. To date, international law has done little to facilitate the realization of the "inter-" generational component, beyond mere pronouncements in the preambles of treaties and other documents. However, the recent statements by Judge Weeramantry, arguing in favor of the customary law status of intergenerational equity, in *Denmark v. Norway, Nuclear Tests 1995*, and the *Nuclear Weapons Advisory Opinion*, suggest that the concept as a whole is already arguably a principle of customary international law. In order to establish whether something constitutes customary international law, the most universally accepted criteria is articulated in Article 38[217] of the Statute of the International Court of Justice, namely that there must be affirming state practice and *opinio juris*.[218] To support his statement that intergenerational equity is now part of international law, Judge Weeramantry cited several treaties,[219] and concluded that " . . . [a]ll of these expressly incorporate the principle of protecting the natural environment for future generations and elevate the

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[217] Article 38 (1) (b) identifies international custom as ". . . evidence of a general practice accepted as law." *See* Statute of the International Court of Justice, UKTS 64 (1946), Cmd. 7015.

[218] This standard was affirmed by the ICJ in *Nicaragua v. United States of America*, 1986 ICJ 14, 554.

[219] The London Ocean Dumping Convention, 11 ILM 1291 (1972); Convention on International Trade in Endangered Species of Wild Fauna and Flora, 12 ILM 1085 (1973); and Convention for the Protection of the World Cultural and Natural Heritage, 11 ILM 1358 (1972).

concept to the level of binding state obligation."[220] He further referred to "juristic opinion", the multiplicity of traditional legal systems around the world protecting the environment for future generations, as well as the Stockholm[221] and other major international declarations.[222] The other members of the ICJ have not yet expressed their opinions on the legal status of intergenerational equity. However, in the *Nuclear Weapons Advisory Opinion* last year, in which the Court was unable to hold that existing international law prohibited the use of nuclear weapons in all circumstances, the main opinion recognized the catastrophic implications for future generations due to environmental harm arising out of the deployment of such weapons.[223]

Additionally, the bold step by the Philippine Supreme Court in using intergenerational considerations as a basis for its decision regarding national resource exploitation indicates that rights and interests of future generations are being treated as a legal issue in some national jurisdictions, including developing countries.

The specific dimensions of the "intra-"generational component are much more meaningfully elaborated in international instruments, largely as a result of the interests of developing countries in pursuing their long-term objectives for a new international economic order. The Rio Declaration, Agenda 21, as well as the CBD and DC, embody major normative expressions of intra-generational equity, such as CDR, "equitable sharing" and "environmental justice."

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[220] Dissenting opinion of Judge Weeramantry, 35 ILM 809, 888 (1996). In previous case law, the ICJ has stated that the adoption by states of a text, such as a declaration or a treaty ". . . affords an indication of their *opinio juris* . . ." regarding the customary law status of norms expressed by that text. *See Nicaragua v. United States*, 1986 ICJ 14, pars. 183, 189, 191. However, it would appear to be more difficult to find that inclusion in treaties alone would confirm a norm's customary law status.

[221] The Stockholm Declaration, *reproduced in* Report of the United Nations Conference on the Human Environment; 11 ILM 1416 (1972).

[222] *See* dissenting opinion of Judge Weeramantry, 35 ILM 809, 888 (1996).

[223] *See* 35 ILM 809, 821 (1996).

Additionally, the contentions presented by *Tunisia*[224] and *El Salvador*[225] before the International Court of Justice reveal that some states have used intra-generational fairness arguments to support their claims over resources. In contrast, the ICJ's determinations regarding arguments for access to natural resources based on national demographic pressures and use needs as put forth by those two states, indicate the current parameters of the ICJ's willingness to consider legal demands for greater access to natural resources in an intra-generational context. Judge Weeramantry's statements that such contentions are not necessarily devoid of merit in all circumstances indicates that this is an area which remains open for further elaboration through judicial opinions and state practice.

In conclusion, the international community has acknowledged that socio-economic development and environmental protection endeavors must take into consideration the interests of present and future generations. This is clearly a non-controversial proposition if one reviews the large number of treaties, declarations, resolutions and other instruments dealing with the environment and development containing references to "intra-" and "inter-" generational considerations throughout this century. State arguments for "intra-generational" equity can be traced as far back as the end of the last century in the United States Government's pleadings in the Bering Fur Seal arbitration. Considerations of intergenerational equity, in either its "intra-" or "inter-" generational dimensions are not represented as mere "nice idea" policy expressions in the international instruments. Instead they are phrased in high level normative terms - suggesting notions of justice and fairness despite the ambiguities in actually operationalizing them.

As described in the World Conservation Strategy[226] and Our Common Future, achieving sustainable development will require

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224 *Tunisia v. Libya.*

225 *El Salvador v. Honduras.*

226 *See* Chp. 1, par. 5, World Conservation Strategy. Living Resource Conservation for Sustainable Development, IUCN/UNEP/WWF, Gland, Switzerland, 1980.

protection of the interests of present and future generations. However, at the moment, the methods for achieving this objective remain undecided. For example, when the Convention on Biological Diversity was initially open for signature in June 1992, Northern-based pharmaceutical and agro-industrial companies expressed argued to their governments, that the technology transfer and related provisions in the CBD compromised their intellectual property rights and economic prosperity. This view was reflected in the U.S. Government's refusal to sign the instrument at the UNCED.[227] Although the United States is still not a Party to the convention, the CBD is in force. The disputed provisions regarding intellectual property and technology transfer as means for establishing greater equity in North-South relations are accepted by the large number of signatories, including most industrialized states.

However, the CBD and most other instruments fail to address the interests of local communities which, in many cases, are the stewards of these genetic and other resources. The only international convention which mandates equitable sharing with the local level players is the Desertification Convention, which recently entered into force. The more contentious concept of common but differentiated responsibilities, as a means for ensuring greater equity in shouldering the responsibility for environmental degradation, is not accepted by industrialized states as entailing any legal obligations to developing countries. However, it is incorporated in the Climate Change Convention, which the major OECD states have signed.

The difficult challenge for states, international organizations and international fora such as the ICJ, will remain for the foreseeable future, determining politically acceptable, appropriate and effective normative structures for protecting interests of future generations while also meeting present resource use needs.

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[227] *See* par. 4, United States: Declaration made at the Adoption of the Agreed Text of the Convention on Biological Diversity, 31 ILM 848 (1992).