THE LEGAL, INSTITUTIONAL AND ORGANISATIONAL FRAMEWORK FOR SUSTAINABILITY LABELLING AND CERTIFICATION SCHEMES[1]

Mar Campins-Eritja and Joyeeta Gupta[2]

ABSTRACT:

There is a gradually developing international law of sustainable development. However, although this law is developing, clearly it is not going far enough. Some intergovernmental organizations, individual countries, industry and NGOs are trying to introduce sustainability labelling in order to promote sustainable development world-wide. This paper examines the question, to which role intergovernmental organizations are playing or can play to develop sustainability labelling and certification schemes and to what extent these developments, although voluntary in nature, may to some extent, breach, complement or promote international law agreements between states.

KEY WORDS: sustainable development, international trade, environment, human rights, labour conditions, labelling and certification schemes.

SUMMARY*:*

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1 This paper has been conceived as a part of a broad research project on “Sustainability Labelling and Certification: Towards an Integrated Legal, Economic, Ecological and Social Approach” (EC Project EVG1-CT-2000-00031, EC V RDT Program)

2 Mar Campins-Eritja is Associate Professor/Tenured of Public International Law (European Community Law) at the Law School of University of Barcelona. Joyeeta Gupta is head of the Programme on International Environmental Governance, and interim head of the Department of Environmental Policy Analysis at the Institute for Environmental Studies at the Vrije Universiteit in Amsterdam

1. INTRODUCTION

In the international context, there has been an explosive development of international laws in the areas concerning economic, social and environmental issues. An examination of these different laws shows that there is a newly emerging international law on sustainable development. However, although this law is developing, clearly it is not going far enough.

Some international governmental organizations, individual countries, and the private sector are trying to introduce sustainability labelling in order to promote sustainable development world-wide. In fact, with the globalisation of markets and the internationalisation of products, sustainability labelling is clearly an international issue and thus becomes a subject for international law.

This paper makes a key distinction between 'spontaneous' and 'governed' globalisation. Spontaneous globalisation refers to the emergence of a number of trends globally which is not necessarily controlled by any international system. Governed globalisation refers to the international negotiations and outcomes leading to policy statements or treaties to control and manage the globalisation trends. Labelling schemes are mostly part of the spontaneous globalisation processes. They are clearly far ahead of the process of governed globalisation.

Against this background, this paper addresses the following questions: What role do intergovernmental organizations play or can play to develop sustainability labelling and certification schemes? To what extent do sustainability labelling and certification initiatives breach, complement or promote international law?

This paper is structured as follows. It first briefly explains some of the trends in the emerging law of sustainable development. It then goes on to discuss the emerging trend of sustainability labelling and certification schemes. It then analyses key issues and draws some conclusions.

2. THE EMERGING LAW OF SUSTAINABLE DEVELOPMENT.

This section first discusses the concept and content of sustainable development in international law, then goes on to elaborate on how this concept has been adopted by intergovernmental organisations, and finally discusses the nature of such legal developments.

a) Concept and content of sustainable development

Ten years after the United Nations Conference on Environment and Development, we can argue that there is a clearly visible emerging law of sustainable development.[3] With the establishment of the Bretton Woods institutions, an international law on investment and finance was born. With the establishment of various social organisations within the UN, the law of social development was initiated. With the negotiation of a number of environmental treaties in the last three decades, the law of environmental protection was stimulated. In between, there was the attempt of the developing countries to promote the law of development. There have been three-four decades of work without much consolidation of the principles at international level. The recognition of the right to develop and the right to development assistance, the principles of the New International Economic Order[4] (NIEO) and many of the other concerns of the developing countries have yet to be accepted internationally.[5] But since 1992, the issue of development is back on the international agenda, but this time in the form of sustainable development.

The overall well-being of the Earth's human population has improved dramatically over the last two generations. However, this improvement has been evenly experienced in all parts of the world, and statistics show that the differences between industrialised and developing countries are constantly increasing. While a part of the world population enjoys better living conditions, a greater part of the population (2.8 billion) survives in severe poverty (less than $2 per day). During the last thirty years, the ratio of the distribution of the world's economic activity has evolved from 30:1 into 60:1 –having reached the 82.7 percent in the 20 per cent on the richest countries, and 1.4 per cent in the poorest countries-. The gap between the 20 richest countries and the 20 poorest countries has doubled in the last forty years with the average person in the rich countries earning 37 times more than the average person in the poorest 20 countries.[6]

Since the sixties, most international actions undertaken to deal with this situation have shared a common starting point: The gap between the rich and the poor can be addressed through promoting economic development by allowing for international trade. [7] The developing countries were in favour of and succeeded on paper to establish a New International Economic Order (NIEO) in 1974 which reflected their views, since it recognised the structural character of the cleavage between North and South and required the modification of the international economic structure. Although the NIEO declarations were adopted, these were

3 Schrijver, N., "On the Eve of Rio Plus Ten: Development – the Neglected Dimension in the International Law of Sustainable Development", Dies Natalis, lecture at the Institute of Social Studies, The Hague, 11 October 2001.

4 Declaration on the establishment of a New International Economic Order, UN Doc. GA Res. 3201 (1974) and Programme of Action, UN Doc. GA Res.3202 (1974).

5 Garcia-Amador, F.V., *The Law of Development: A New Dimension of International Economic Law*, Oceana Publications, New York, 1990.

6 World Bank 2001: 3 (GEO article).

7 See the UN General Assembly Resolutions concerning the UN First Decade for the development (1960-1970): UN Doc. GA Res. 1515 (XV) and 1710 (XVI); and Second Decade (1970-1980): UN Doc. GA Res. 2626(XXV), 2543 (XXIV).

never actually implemented.[8] They certainly influenced the UN strategy for the development for the Third Decade[9], but the failure of the NIEO proposals during the eighties (associated with a general expansion of the implementation of economic policies based upon the premises of liberalism) implied that this approach was not even mentioned in the proclamation of the Fourth Decade[10].

Tension regarding the approach to development was a key undercurrent during the UN Conference on the Human Environment held in 1972 in Stockholm, as well as at the UN Conference on Environment and Development held in Rio de Janeiro in 1992.[11] Instead of priority being given to developmental issues as the South perceived it, a new concept was being developed: sustainable development.

In the eighties, sustainable development garnered political attention around the world, most notably with the work of the Brundtland Commission.[12] The UN Conference on Environment and Development adopted the concept of "sustainable development" in the Rio Declaration attempted at elaborating it in the ambitious Agenda 21.[13] Sustainable development was seen as the new way to integrate the conflict between development and environment. Since then, international law and the activities of intergovernmental organizations have gradually formally accepted the concept of sustainable development and this is increasingly determining the organizational framework for the North-South dialogue.

This brings us to the concept of sustainable development. According to the Brundtland Commission sustainable development has been defined as the social, economic, and political progress "that meets the needs of the present without compromising the ability of future generations to meet their own needs"[14].

However, neither the Stockholm[15] nor the Rio[16] Declarations (both of non-binding character) define or elaborate the concept of "sustainable development". It is, however, worth noting that Principle 3 of the Rio Declaration and the Report of the Brundtland Commission use such a concept in an similar sense: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Similarly, Principle 2a) of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest (1992)[17] establishes that "States have the sovereign and inalienable right to utilize, manage and develop their forest in accordance with their

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[8] Schrijver, N., "Sovereignty over Natural Resources: Balancing Rghts and Duties in an Interdependent World, 1995, Thesis, Rijksuniversiteit Groningen.
9 UN Doc. GA Res. A/RES.35/36
10 UN Doc. GA Res. 45/199 (1990)
[11] See, for example, Chatterjee, P. and M. Finger, "The Earth Brokers", Routledge, London, 1994.
[12]World Commission on Environment and Development., *Our Common Future*, Oxford University Press, Oxford, 1987.
13 UN Doc. A/CONF.151/26 (1992)
14 World Commission on Environment and Development, *Our Common Future*, *op.cit*., at p.47.
15 UN Doc. A/CONF.48/14 (1972)
16 UN Doc. A/CONF.151/26/Rev.1 (Vol.I) (1992)
17 UN Doc. A/CONF.151/26 (Vol.III) (1992)

development needs and level of socio-economic development and on the basis of national policies consistent with sustainable development and legislation (…)".

The existent legally-binding instruments do not provide clearer definitions. For instance, the ninth Whereas of the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa[18] (1994) just states that "(…) desertification and drought affect sustainable development through their interrelationships with important social problems such as poverty, poor health and nutrition, lack of food security, and those arising from migration, displacement of persons and demographic dynamics". The Fifth Whereas of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (1997)[19] justifies the adoption of the Convention on the basis of the need of ensuring (among others) "(…) the promotion of the optimal and sustainable utilization thereof for present and future generations". Whereas 21 of the UN Framework Convention on Climate Change (FCCC, 1992)[20] recognises that "(…) all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development (…)"; and

The FCCC is perhaps the only legal instrument in the world that sees sustainable development as the right of parties: "The Parties have a right to, and should promote sustainable development"[21] At the same time, the FCCC is ambiguous in the way it deals with sustainable development, because it also goes on to say that "economic development is essential for adopting measures to address climate change".[22] Thus economic development is seen as a stepping stone towards sustainable development and not as a competitive concept. This is not just a concession made to the developing countries, for the Article on obligations for the developed countries listed in Annex I, also states that developed countries will need "strong and sustainable economic growth" in order to achieve the obligations in Article 4.2a). This ambiguity in the way sustained economic growth and sustainable development however, disappears in the 1997 Kyoto Protocol to the FCCC and in the Marrakech Accords of 2001. While the terminology has become unambiguous, the definition and elaboration of the concept of sustainable development remain still unclear.[23]

Because of its general formulation, certain authors have questioned the normative character of the principle of "sustainable development", and have argued that this principle does not have an autonomous character[24]. Certain authors have

18 UN Doc. A/AC.241/15/Rev.7 (1994)
19 UN Doc. A/51/869 (1997)
20 UN Doc. A/CONF.151/26 (1992)
21 Article 3.4 of the FCCC.
22 Article 3.4 of the FCCC.
23 See Arts, K. and Gupta, J. "Sustainable Development in Climate and Waste Law: Implications for the Progressive Development of International Law", in Schrijver, N. and F. Weiss (eds.). … forthcoming.
24 Sohnle, J. "Irruption du droit de l'environnement dans la jurisprudence de la CIJ: L'affaire. Gabcikovo-Nagymaros", *Revue Genérale de Droit International Public* 1998-1, p. 85, at p. 109

not referred to this principle as a univocal concept, but as a conceptual matrix[25] "définissant la perspective généralle dans laquelle les principes déjà établis (…) doivent etre resitués"[26]. Moreover, the International Court of Justice (case Gabcikovo-Nagymaros, 1997) considered that the notion of "sustainable development" constituted a mere concept[27]. From this point of view, the principle of "sustainable development" may be used to justify any definition of economic growth, including the maintenance of the current *status quo* under a different formulation.[28]

Judge Weeramantry expressed a dissident opinion in the said case, according to which the principle of "sustainable development" has a normative character[29] as far as it constitutes a principle that allows balancing the environmental concerns and the considerations regarding the economic development. In addition, such a principle presently constitutes a "part of modern international law", not only because of "its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community".[30]

Despite its generality, it can be extracted from the notion of "sustainable development" that it has two components. The first is the need to take international and intergenerational equity into account. The second is the need to take environmental and social considerations into account in the development of the economic activity. For the domestic and international legal policies of the States and the intergovernmental organisations, this principle would imply that they could not consider the environmental and social aspects as mere incidental elements in the process of development, but they would be obliged to incorporate them into this process. This is especially the case when these organisations have adopted sustainable development as a concept in some of their activities but not all. They are then, argue some authors, stopped from claiming that environmental goals apply to only some of their activities.[31] Likewise, the principle of "sustainable development" forms part of the judicial reasoning[32], and allows the judge to delimit the proper and balanced application of other principles and legal provisions. At the

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25 Dupuy,P.-M., "Où en est le droit de l'environnement à la fin du siecle?", *Revue General de Droit International Public* 1997-4, p. 873, at p. 886. Although this author below refers to the legally-binding nature of the principle, at p.887. See also Kamto, M., "Les nouveaux principes du droit de l'environnement", *Revue Juridique de l'Environnement* 1993-1, at p.20

26 Dupuy,P.-M.,"Où en est le droit de l'environnement à la fin du siecle?", *op.cit*. at p. 886-887

27 Case concerning the Gabcikovo-Nagymaros project (Hungry/Slovakia), par. 140, Judgment of 25 September 1997, *ICJ: Reports of Judgments, Advisory Opinions and Orders*, at p.78

28 See Pieratti, G., "Droit, économie, écologie et dévelopement durable: Des relations nécessairement complementaires mais inévitablement ambigúes", *Revue Juridique de l'Environnement*, 2000-3, p. 421, at p. 436

29 Case concerning the Gabcikovo-Nagymaros project (Hungry/Slovakia), *op.cit.,* Separate Opinion of Vice-President Weeeramantry, at p. 88

30 *Ibid*. at p. 95

31 Handl,G., "The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development", *American Journal of International Law*, Vol.92, 1998, p.642, at p.648

32 Lowe,V., "Sustainable Development and Unsustainable Arguments", in Boyle,A.-Freestone,D., *International Law and Sustainable Development*, Oxford University Press, 1999, p. 19, at p. 31 and 34

same time, the implications for the interpretation of international and intergenerational equity are unclear.

Increasingly in the articulation process, the issue is not so much of integrating different values, but of trade-offs between different values, so long as there is compensation for the trade-offs.[33] Thus, sustainable development is a relevant principle for international law-making bodies, as well as for the judicial bodies that must apply it. The words of the International Court of Justice constitute a good example of what we have just stated, since it recognises that: "this need to reconcile economic development with protection of environment is aptly expressed in the concept of sustainable development".[34]

Notwithstanding, as it has been noted by Agenda 21[35], this action should be carried out in accordance with the capacity and priorities of each country. That is why important differences can still be found in the way different international forums deal with sustainability issues, which mostly reflect differing views on what is most important to develop and what most needs to be sustained.[36]

To date, the traditional model of development has been clearly biased in favour of economic development in the developed and developing countries. Financial and technological assistance to developing countries has been focused on promoting such development. This is in line with the UN General Assembly 1986 Declaration on the Right to Development[37] which recognized an "inalienable human right" to development, and describes this development as a global process that brings together political freedoms and the "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income". The concept of sustainable development is in line in that it calls for meeting the needs of present generations, but it is also In contrast, in that it puts more intense emphasis in the continuity of this process in the long term, by means of reorganising the environmental, human and economic resources. In this respect, in the wording of the Principle 3 of the Rio Declaration, the concept of economic development plays an especially important role. By taking into consideration the emphasis given by the Brundtland Commission and the most of the UN bodies to the concept of equality (in particular social equity[38]), the

33 Banuri,T.-Weyant,J., et al., "Setting the Stage: Climate Change and Sustainable Development", in Metz, B.-Davidson,O.-Swart,R.-Pan, E (eds.), *Climate Change 2001: Mitigation*, Cambridge University Press, Cambridge, 2001, at p. 87.

34 Case concerning the Gabcikovo-Nagymaros project (Hungry/Slovakia), *op.cit.*, par. 140, at p.78

35 UN Doc. A/CONF.151/26 (1992), at par. 1.6

36 Clark, W., "Sustainable Science for a Sustainable Environment: A Transition Toward Sustainability", *Ecology Law Quarterly*, 2001-27, p. 1021, at p. 1023. In particular, four types of key differences can be identified: (1) what is to be sustained (nature, life support systems and community), (2) what is to be developed (people, economy, society), (3) the types of links between what is to be sustained and what is to be developed (how equal in importance they should be, which one should be emphasized, is there any conditional constraint?), and (4) the extent of the future envisioned (what is the time horizon?), National Academy of Sciences, Committee on Sustainable Development, *Our Common Journey: A Transition Toward Sustainability*, Report, 1999, at pp. 21-25

37 UN Doc. GA Res. 41/128 (1986), Article 8.1

38 World Commission on Environment and Development, *Our Common Future*, *op.cit.*, at p.43

relevance of the previous statement can be clearly perceived. This also constitutes an essential element of the Political Declaration (Part I) of the document adopted by the UN General Assembly, in its Twenty-fourth Special Session, where member States stressed that "full respect for fundamental principles and rights at work" was one of the "essential elements for the realization of social and people centred sustainable development".[39]

The concept of sustainable development is based upon three main pillars: environmental protection, social cohesion, and economic development capable of modifying production and consumption patterns to make them consistent with the two elements mentioned previously. These are not isolated notions, but closely linked concepts from the sustainable development perspective.[40] Thus, this concept of sustainable development (made up by adding the aforementioned elements) spreads in a multiplicity of principles. Some of them constitute the "hard core"[41] of sustainable development: the principle of integration, the principle of equity, and the principle of sustainable use.[42] Other specific principles include limited sovereignty over natural resources, intergenerational equity, the common but differentiated obligations of countries, the recognition of the special needs and interests of economies in transition and least developed countries, the common heritage and the common concern of humankind, the precautionary principle, the polluter pays principle, public participation and access to information, and good governance including democratic accountability.[43] As for the latter aspect, the report on the 1997 special session of the UN General Assembly reiterates that "democracy, respect for all human rights and fundamental freedoms, including the right to development, transparent and accountable governance in all sectors of society, as well as effective participation by civil society, are (. . .) an essential part of the necessary foundations for the realization of social and people centred sustainable development".[44]

In an effort to elaborate on the concept of sustainable development, the 70th Conference of the International Law Association has adopted the New Delhi Declaration on Principles of International Law relating to Sustainable

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39 "World Summit for Social Development and Beyond: Achieving Social Development for All in a Globalizing World" (2000)

40 Sands,Ph., "Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law", in Boyle,A.-Freestone,D., *International Law and Sustainable Development*, Oxford University Press, 1999, p.39, at p.43

41 *See* Sands, Ph., "International Law in the Field of Sustainable Development", *British Yearbook of International Law*, 1994, p.303, at p.338-348; Sands, Ph., "International Law in the Field of Sustainable Development: Emerging Legal Principle", in Lang, W. (ed), *Sustainable Development and International Law*, Graham & Trotman / Martinus Nijhoff, London, Dordrecht, Boston, 1995, at p. 53

42 See Pieratti, G., "Droit, économie, écologie et dévelopement durable: Des relations nécessairement complementaires mais inévitablement ambigues", *op.cit.*, at p. 427

43 Schrijver, N., "On the Eve of Rio Plus Ten: Development – the Neglected Dimension in the International Law of Sustainable Development", *op.cit.,* and Sands, Ph.,"International Law in the Field of Sustainable Development", *op.cit.*

44 Programme for the Further Implementation of Agenda 21, UN Doc. GA Res. S-19/2, Annex (1997)

Development.[45] Seven sets of principles have been identified focusing on the duty of states to ensure sustainable use of natural resources, the principle of equity and the eradication of poverty, the principle of common but differentiated responsibilities, the principle of the precautionary approach to human health, natural resources and ecosystems, the principle of public participation and access to information and justice, the principle of good governance and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. These principles have been derived from an analysis of international declarations and treaties, the work of jurists, case law and state practice. These principles have differing status in international law, but together they are seen to be an elaboration of the concept of sustainable development.

The above elaboration of the concept of sustainable development goes a long way to allay the fears of developing countries that somehow sustainable development will be used as a tool to prevent their development. The fact that the Kyoto Protocol and the Marrakech Accords unambiguously commit themselves to sustainable development indicates that the polar views on the subject appear to be history. At the same time, the de facto elaboration of this concept may still tend to support economic growth, both in the developing countries and in the developed countries (see, for example, the US withdrawal from the Kyoto Protocol).[46] The challenge is to define a legal methodology that allows determining whether development is sustainable or not. In words of the Judge Weeramantry, "Whether development is sustainable (…) will, of course be a question to be answered in the context of the particular situation involved".[47]

b) The incorporation of sustainable development as an objective of intergovernmental organisations

Intergovernmental organisations and States share responsibility of taking action to achieve sustainable development. In the view of the doctrine of attributed powers, the activities of an intergovernmental organization are in principle limited by the mandate conferred to it by the member States. But in the process of carrying out its mandate, an international organisation can develop and mature and may go beyond such an explicit mandate through the recognition of implied powers in order to perform its functions.[48] Combing the two approaches the powers of intergovernmental organisations can be characterised as follows: (i) They are attributed: the international organisation holds the powers that it has been given by member States (whether express or implied); and (ii) They have a functional

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[45] Resolution 3/2002 of the International Law Association: The New Delhi Declaration of Principles of International Law Relating to Sustainable Development.

[46] See, for details on the US withdrawal from the climate change regime, Gupta, J. (2001). *Our Simmering Planet: What to do About Global Warming*, Zed Publishers, London.

47 Case concerning the Gabcikovo-Nagymaros project (Hungry/Slovakia), *op.cit.*, Separate Opinion of Vice-President Weeeramantry, at p. 92

[48] ICJ, Advisory Opinion of 11 April 1949, Reparation for Injuries Suffered in the Service of the UN, ICJ Rep. 1949, at p.182

character: those powers are governed by the principle of "speciality", which prevent them to be considered as full powers. In this sense, such a functional character justifies the activity of the intergovernmental organisation, and, on the other hand, it constitutes a limit for the said activity.[49]

At the time when the statutory agreements of the main intergovernmental organizations were concluded, just after World War II, sustainable development as a concept did not exist and hence was not included. These agreements only made some generic references to environmental protection and/or human rights. Over time the concept of sustainable development has become important and "inescapable". This is also reflected in the increasing references to this concept by intergovernmental organizations. As a result, the concept of sustainable development has been incorporated in many recent international agreements, conventions and statutes creating new intergovernmental organizations as a guiding concept. This answers the critical need, emphasized by Agenda 21, for a global partnership for sustainable development centred around the United Nations system and involving other international, regional and sub-regional organizations.[50]

Let us present briefly some examples.

The International Labour Organization (ILO) was established after World War I. The ILO, has over the years, prepared an International Labour Code that consists of 170 Conventions and 180 Recommendations. These cover issues such as the freedom of association, the right to organise and bargain collectively, forced labour, migrant workers, the rights of indigenous people, etc.

From then, and particularly, since the conclusion in 1994 of the Uruguay Round of the WTO/GATT, there have been substantial pressures for the ILO to incorporate "social clauses" in trade agreements, and to work on the reconciliation of international labour protection and promotion of free trade.[51] Notwithstanding, and in spite of difficulties in the international process for setting global labour standards and the complexity of the ILO decision-making process, this is a unique system. It involves participation of several bodies of the ILO, specially the Governing Body (executive organ), which determines the agenda, and the International Labour Conference (plenary law-making organ). Both institutions are composed of government representatives, organisations of employers and employees, of each member state (2-1-1). So, the ILO decision-making procedure is governed by the tripartite principle, assuring full participation of all labour agents. This obviously confers a particular political legitimacy to ILO standards, since the final decision is subject to discussion and minimum consensus of the three parties, each of them representing heterogeneous interests inside and among them, since representatives come from different countries and disparate social and economic

49 See Chaumont, Ch. "La signification du principe de spécialité des organisations internationales", Mélanges Rolin, op.cit., p.55, at p.58.

50 UN Doc. A/CONF.151/26 (1992), at par. 1.3

51 See Sánchez,V., "Economic liberalization and labor standards: The vexing question of linking trade to the promotion of labor rights at the international framework", working paper for EC Project EVG1-CT-2000-00031 (Sustainable Labelling and Certification...)

situations. There is pressure on the ILO from the international community to take social and environmental issues into account.

In contrast to the organisations, the subsidiary bodies of the United Nations have less authority. But many of them are committed to sustainability, although they articulate different elements of this term.

Thus, the United Nations Conference on Trade and Development (UNCTAD), which has a clear mandate to establish a new permanent international organisation for regulating the relationship between trade and development, has underlined the need for sustainable growth and development, particularly, in its 9th (Midrand 1996) and 10th (Bangkok, 2000) Conferences.[52] Since UNCTAD was established it has been clear that developing and developed countries defend rather different interests and it was clearly perceived that the (non-binding) decisions adopted without the support of the developed countries would hardly constitute effective decisions. In order to solve such a problem, a rather complex decision-making mechanism was established which in essence calls for consensus decisions.[53] At the same time, the United Nations Development Programme (UNDP) prefers to use the concept of "human development" since 1990.

Similarly, the United Nations Environment Programme (UNEP) has sustainable development as a main objective, and from that perspective it has promoted the progressive development of international law by encouraging negotiations on environmental issues. As a tool for achieving such an objective, it also maintains three successful databases – Global Environmental Monitoring Systems (GEMS), International Registry of Toxic Chemicals (IRTC), Global Resource Information database (GRID) and Infoterra – an information referral system. In addition there are a number of declarations, policy documents and guidelines dealing with all related issues.

Under the UN auspices, the UN Commission on Human Rights has also consolidated sustainable development in the area of human rights law, and we see the progressive development of international law and the gradual universalisation of norms. There is an increasing trend to develop international legal arrangements that are based on some universal principles. Particularly, in 1976 the International Covenant on Civil and Political Rights (1966) and The International Covenant on Economic, Social and Cultural Rights (1966), entered into force. Other human rights conventions related to social dimension of sustainable development include the Convention on the Rights of the Child (1989), The Convention on the Elimination of All Forms of Discrimination against Women (1979), or The Convention on the Elimination of All Forms of Racial Discrimination (1966).

As for intergovernmental organizations devoted to economic cooperation, the Marrakech Agreement Establishing the World Trade Organization stated in its

52 Report of the United Nations Conference on Trade and Development on its Tenth Session, UN Doc. TD/390, 21 September 2000

53 See Schermers, H.G.-Blokker, N.M., *International Institutional Law*, 3rd ed., Martinus Nijhoff Publishers, 1995, at p. 509.

Preamble that relations in the field of trade and economic endeavour should be conducted "(…) while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development".[54] The World Trade Organization (WTO) is intended to promote free trade, and it is based on the assumption that countries should exploit their comparative advantages and that this will lead to an increase in global welfare. Several agreements have been made within the context of the WTO. The Agreement on Sanitary and Phytosanitary Measures states that governments cannot prevent a product from entering its market unless it can prove that the product is dangerous. The WTO Agreement on Technical Barriers to Trade states that a government cannot prevent the entry of a product into its domestic market on the grounds that the process and production methods do not meet the standards of an importing country. The WTO Agreement on Trade Related Investment Measures requires the members to remove domestic conditions on foreign investment. The WTO multilateral agreement on Government Procurement ensures that Parties do not discriminate between companies on the basis of the conduct of those companies. On the other hand, as some authors noted, the use of consensus in GATT 1947 "has proven to be a device to which States can ascribe safely with the knowledge that this consensus ad idem will not jeopardize any previously agreed positions between individual contracting parties and will mask any differences which may exist between them".[55] So, a preference for decision-making by consensus has also been carried over into the WTO, which states in Article IX, that "the WTO shall continue the practice of decision-making by consensus followed under the GATT 1947."

Other treaties or intergovernmental organizations have also incorporated, in one way or other, the principle of sustainable development. The objectives of the North American Free Trade Agreement (NAFTA), include sustainability criteria in the Preamble of the treaty. Moreover, the Organisation for Economic Co-operation and Development (OECD), noted in 1997 that investment of resources in "democratic governance" will contribute to progress with regard to "poverty reduction, promoting gender equality, raising basic education and health standards, and reversing environmental degradation"[56], all key objectives directly related to the goal of sustainable development.

Likewise for the European Union (EU), the Treaty of Maastricht, even though generically, fixed sustainable development as one of the European Community (EC) objectives.[57] In addition, the Amsterdam Treaty of 1997 introduced the concept of sustainable development into EU law, as well as into the secondary law.[58] In particular, art. 2 of the European Community Treaty (ECT) establish now as a task of the EC, among others, "(…) to promote throughout the

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[54] 33 ILM 1254 (1994)

55 Footer,M.E., "Symposium. Institutions for International Economic Integration. The role of Consensus in GATT/WTO Decision-making", *Journal of International Law and Business*, 1996-17, p. 653, at p. 666

56 OECD Ad Hoc Working Group on Participatory Development and Good Governance, Final Report 1997, pt. 1, at 3

[57] Art. 2 ECT

[58] Art.2 EUT

Community a harmonious, balanced and sustainable development of economic activities (…) sustainable and non-inflationary growth (…)". Further on, the European Council -at its meeting in Helsinki (1999)- invited the European Commission to elaborate a proposal of a long-term strategy that integrated sustainable development policies from the economic, social and environmental point of view. However, further conclusions regarding the scope of this principle can be hardly extracted from the Treaty; so for the purpose of determining the kind of measures that could lead to sustainable development, it is necessary to turn to the Communication from the European Commission: "A sustainable Europe for a better world: a European Union strategy for sustainable development" (2001)[59] presented to the Gothenburg European Council of June 2001, which recognises that in the long-term economic development, economic cohesion and the protection of the environment should run in parallel. This is to be facilitated by the transition of the rules applying to the adoption of decisions from unanimity to qualified majorities, introduced by the European Single Act (1986) and ratified by the European Union Treaty (1992) However, the EUT still contains important safeguards concerning the power of the member States for delimiting the principles and the implementation of certain policies through the principle of unanimity. This reinforces the political character of such areas and it ensures that EC decisions will only be made after national governments have reached policy decisions on matters in their vital interest.

One can thus conclude that there are several initiatives taken in the public international sphere to promote sustainable development. That does not mean that intergovernmental initiatives are the best positioned to drive the transition towards sustainability, but sustainable development can be promoted by international actions lead by such international organizations. Probably, their major challenge does not consist of concretising the sustainable development paradigm in specific policies or quantifiable actions, but of adequately defining the role that they should play as agents in the process of transition towards sustainability.[60] In its present state, and probably because sustainable development still remains a broad, undefined, context relevant and often elusive concept, it is not easy to determine the legal stature of such a principle within these international organisations.

In the framework of these intergovernmental organisations, this principle is often referred to in the statutory instruments as one of the principles that must guide their action for achieving their specific objectives. Notwithstanding, the binding legal instruments adopted by these organisations rarely refer to this principle in an express way. On the contrary, references to such a principle are often contained in non-binding instruments adopted by the said organisations. This brings us to the question of the legal nature of these initiatives.

c) The nature of such law: On hard and soft law

59 Communication from the European Commission "A sustainable Europe for a better world: a European Union strategy for sustainable development", COM(2001)264 final

60 Handl,G., "The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development", *op.cit*, at p. 645

One of the main elements to be noted, with some exceptions (i.e. the EC), is the legal nature of measures adopted by intergovernmental organisations in the field of sustainable development, and especially in the field of sustainability labelling and certification schemes.

From the perspective of international law, international measures related to sustainable development adopted by the relevant international organisations are also subject to the principles of international law. The principle of the sovereign rights of States over their own natural resources is a relevant one, because it determines the relativism of this legal regime and justifies the pragmatism of intergovernmental organizations. That is probably a decisive reason to explain why most of such international measures are usually non-mandatory being adopted in non-obligatory instruments.

These non-binding instruments can be described as "soft law". Recommendations, declarations and norms are soft law "as opposed to the binding 'hard law' represented by custom, treaty and the established general principles of international law".[61] Some authors have argued that "Although enforcement of these soft law instruments in a judicial sense may present difficulties, it is a more flexible approach to the progressive development of state practice that promotes defined goals".[62]

While there is no universally accepted definition of soft law, Shelton[63] argues that soft law consists of "normative texts, not adopted in treaty form addressed to the international community as a whole or the entire membership of the adopting institution or organisation". She divides soft law as primary and secondary: where primary soft law calls for the establishment of new standards, reaffirms previously accepted standards in legally binding or non binding documents or further elaborates previously accepted vague or general texts. Secondary soft law consists of recommendations, jurisprudence and decisions of specialised bodies established under international law. In contrast hard law is legally binding and can be only made by states and intergovernmental organisations when the rules of procedure are duly followed. Nevertheless, as this is a typical characteristic of all those spheres of international law related to sustainable development, it should be realised that, in contrast to what used to happen until the eighties, it is becoming more frequent for environmental rules to be included in "hard" instruments, that is, international treaties that are legally binding by definition, even if their contents are considered "soft".

The constitutions of the intergovernmental organisations state up front what is to be the nature of the regulation to be adopted by these organisations. For instance, Article 22 of the World Health Organisation (WHO) constitution states that regulations adopted pursuant to Article 21 enter into force for all member

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61 Birnie, P.- Boyle, A., *International Law and the Environment,* Oxford University Press, Oxford, 1992 at. p.16

62 Dervort, T.R., *International Law and Organization: An Introduction*, *op.cit*, at. p. 219

63 Shelton, D., "Compliance with International Human Right Soft Law", in Weiss, E.B., *International Compliance with Non-Binding Accords*, American Society of International Law, 1998 p. 119, at p. 120

countries after countries have been provided due notice of the adoption of such a law, unless members notify the Director General that they reject it or have reservations. However, “A resolution cannot in any case have a greater effect than that which it was intended by the organisation promulgating it to have. For example, a resolution intended to be less than binding cannot have a binding effect. On the other hand, the constitutional ‘intention’ is hierarchically superior to the intent behind the resolution”.[64]

Thus, the ILO makes legally binding Conventions and softer recommendations. At the end of the World War II, the ILO was faced with a dilemma. Lowering the labour standards in keeping with the new conditions in the newly independent countries would hurt the prestige and role of the ILO; while keeping the higher labour standards might be meaningless as governments may ratify the agreements but be simply unable to implement them. Because you could not have “sub standards for sub humans”[65], the ILO settled for universal norms and introduced “flexibility mechanisms”, which constitutes another peculiar characteristic of this organization. Flexibility aims at facilitating the adaptation of the legal obligations arising out of the specific interest and circumstances of each particular State. Prohibition of reservations to the ILO Conventions is upheld, but the incorporation of mechanisms to modulate the scope of obligations assumed by the parties and their application methods is permitted, thus, allowing the existence of different labour and social standards by the States. The flexibility does not reduce the binding nature of the standards, but it does reduce the “hardness” of the text.

Another example: the UNCTAD. The UNCTAD promotes certain initiatives of a normative character that in some cases have led to the conclusion of an international treaty, and in other cases have resulted in recommendations to the member states. As for the first ones, apart from the international agreements on commodities (tin, sugar, cocoa, rubber, olive oil, wealth), some examples can be mentioned: UN Conventions on Code of Conduct for Liner Conferences (1974) and the International Carriage of Goods by Sea (1978). Among the recommendations, it could be mentioned: The Generalized System of Preferences (1971), the Agreement on a Global System of Commercial Preferences between Developing Countries (1989), the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980), or the Common Fund for Commodities.

Clearly, there is a *de jure* difference between soft and hard law. The question is: Is there any *de facto* difference between hard and soft international law? When hard binding law is weakened by indeterminate text, options to express reservations, flexibility in the implementation of the text, the effect of such binding law is weakened. Even though soft law is by definition weaker than hard law, soft

64 Amerasinghe,C.F., *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge, 1996, at p. 192

65 Ghebali, V.-Y., *The International Labour Organisation: A Case Study on the Evolution of UN Specialised Agencies*, Martinus Nijhoff Publishers, Dordrecht, 1989 at. p. 205 (quoting internal documents)

law obviously represents an important development. First, even though not legally binding, they are deemed to be authoritative guidelines to be followed by States on sustainability issues, and they can influence State practice and thereby enter the realm of customary international law. Second, they may be precedent setting and may become an international, regional or national standard. They are often seen as a precursor to hard law, since soft law often matures into texts in hard law documents, or can be referred to in hard law texts. They are clearly affecting the adoption of public rules since national and international regulations frequently refer to them.

In the final analysis, what counts is not the precise nature of the legal texts but the compliance pull of these texts. This depends on convergence of commitment among States. We can thus conclude that there are different initiatives at the international level to promote sustainable development, environmental protection, labour and human rights. These initiatives include hard and soft law, and while there is a *de jure* distinction relevant for dispute settlement in an adjudication body, it is the *de facto* compliance pull that is more relevant for determining the effectiveness of international legal instruments. While compliance with hard law is eased through flexibility measures, compliance with soft law is difficult to measure and the causality difficult to ascertain.[66] At the same time, unilateral enforcement of soft law measures is also becoming a reality[67].

What is increasingly becoming evident is that although there are a number of specialised bodies focusing on the protection of certain values, making laws and rules that are universally applicable is extremely difficult given the huge differences in circumstances between individual countries. Harmonising policies when living, work and economic conditions are not uniform is like putting the cart before the horse. Attempting to do so under the auspices of intergovernmental organizations is a slow process, although clearly quite legitimate. Hence, for those urging for stronger measures in relation to sustainable development, the international legal process is clearly not moving fast enough. Are there alternative approaches? The private sector and NGOs clearly think so. This brings us to the next section.

3. THE EMERGING TREND OF SUSTAINABILITY LABELLING AND CERTIFICATION

This section first explains the new trend of sustainability labelling and certification schemes and then discusses the role of the different actors engaged in such schemes.

a) The use of labelling and certification schemes as a tool to achieve sustainable development

66 Shelton,D., "Compliance with International Human Right Soft Law", *op.cit.*
67 Parkner 1997

Labelling and certification schemes are increasingly being used to promote sustainable development. Labels are not just messages about a product or a service, but claims stating that such product/service have particular properties or features. A social or ecological label inserted in a product or service states that it has a feature that makes it different to similar products/services in terms of a certain environmental or social value.[68] The rapid growth of interest among consumers and environmentalists, as well as manufacturers and retailers in public and/or private ecological and social labelling schemes has drawn the attention of international organisations, whether governmental or not, on them.

Economic agents are increasingly adopting such schemes as part of their "business strategies and activities that meet the needs of the enterprise and its stakeholders today while protecting, sustaining and enhancing the human and natural resources that will be needed in the future".[69] From this perspective, economic agents must bring together the interests and needs of the economic operators and the interests and needs of the groups either positively or negatively affected by the economic operators' activities. This perspective puts special emphasis on the interdependent relationship between the economic activities of the aforementioned agents, the impact of these activities in the human and natural resources preservation, and the burden that irreparable damages caused to these resources brings about.

Establishing ecological and social labelling schemes may contribute to sustainable development, insofar as they impose, encourage or promote actions addressed to introduce environmental and social aspects and concerns within the decision-making processes of the actors involved. Ecological or social labelling schemes thus constitute an environmental and social quality certification mechanism that goes beyond compliance with either national, regional or international standards regarding environment or human rights –provided that they certify the compliance with even more stringent environmental or social standards than those established by the applicable legislation. For the same reason, ecological and social labelling schemes aim at constituting an additional protection mechanism. Finally, ecological and social labelling schemes might be considered as a horizontal measure, since they are not directly linked to any specific and concrete sector, thus being transversally applied.

Especially important is their compatibility with the rules of international trade. On the one hand, the multilateral trade system is based on the idea that trade and a product's commercialisation have to be independent of external circumstances different to the product's characteristics (i.e. the way a product is produced). Such an approach might be understood in the context of a trade system whose objective is to favour the liberalisation of trade at a world scale, where the most relevant role is played by sovereign States with pretty different politic, economic and social situations. In this context, the multilateral trade system assumes an isolated

68 See Van der Grijp,N. et alt.,Working paper WP2, for EC Project EVG1-CT-2000-00031 (Sustainable Labelling and Certification...)

69 International Institute for Sustainable Development, *Business Strategy for Sustainable Development: Leadership and Accountability for the '90s*, Winnipeg, Canada, 1992, at p.116

perspective of products and trade, and disregards the domestic aspects concerning production processes. In that sense, the establishment of labelling and certification schemes is perceived as a less restrictive measure than, for instance, prohibitions or quantitative limitations, or the technical regulation of products.

In particular, labelling and certification schemes that provide information on the production processes and methods (PPM's) have constituted one of the hottest issues of the debates within the WTO.[70] It is still a rather disputed question whether all the eco-labelling schemes based on PPMs are covered by the definitions of "technical regulation" and "standard" under the Technical Barriers Trade Agreement (TBT Agreement). In accordance with Annex 1 to the TBT Agreement, both definitions refer to "processes and production methods", but they specify that these refer to "related" processes and production methods. So, the question concerning which PPMs are covered by the TBT Agreement is still largely determined by the interpretation of the term "related".[71] The importance of this question for sustainability labelling and certification schemes cannot be understated, due to the fact that there is an increasing number of them that are based on the "life-cycle approach" (LCA), so they are at least partially based on PPMs that are not reflected in the final product in hand. The complexity of this question has resulted in a complex debate among WTO Members that is not yet reflected in a unanimously agreed approach.[72]

Under the GATT 1947 system, the panel decision on the Tuna / Dolphin I case[73] was, in principle, favourable to the compatibility of an eco-labelling scheme based on a non-product-related PPM (like the fishing methods) with the GATT Notwithstanding, this precedent does not imply that similar schemes are compatible with the GATT 1947/1994. This question should be considered on a case-by-case basis, taking into account the peculiar characteristics of each scheme.[74] However, it has to be noted that the WTO Appellate Body repeatedly refers to the need for seeking "a balance (…) between the right of a Member to invoke an ? exception (…) and (...) the treaty rights of the others Members", in such a way that it is necessary to seek for a "line of equilibrium".[75] However, the absence of consensus has implied that the question remains unresolved, and the procedural and substantive characteristics of each peculiar scheme must be taken into account when carrying out a case-by-case analysis.[76]

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70 See on this debate, Tietje,Ch., "Voluntary Eco-Labelling Programmes and Questions of State Responsibility in the WTO/GATT Legal System", *Journal of World Trade*, 1995-5, p.123; Chang,S.W., "GATTing a Green Trade Barrier - Eco-labelling and the WTO Agreement on Technical Barriers to Trade", *Journal of World Trade*, 1997-1, p.137

71 M. A. Cole, "Examining the Environmental Case Against Free Trade",*Journal of World Trade*, 1999-5, p. 183.

72 S. W. Chang, "GATTing a Green Trade Barrier- Eco-labelling and the WTO Agreement on Technical Barriers to Trade", *op. cit*., at p. 141-142

73 GATT Doc. DS21/R; also reported in BISD 39S/155.

74 See, Fernández, X., working paper "The WTO Committee on trade and environment", for EC Project EVG1-CT-2000-00031 (Sustainable Labelling and Certification...)

75 See United States - Import prohibition of certain shrimp and shrimp products, WTO Doc. WT/DS58/AB/R, at pars.156-159.

76 *See* Fernández, X., working paper "The WTO Committee on trade and environment",*op.cit.*

Such a debate is particularly significant for the developing countries, which otherwise must find cost-effective ways to make technical and managerial changes to obtain access to foreign markets or to sell to large international buyers who unilaterally impose environmental and social requirements. They fear that the introduction of ecological and social labelling schemes could harm their competitiveness and negatively affect their exports. Second, they question the environmental and social legitimacy of the arguments used. Third, they argue that such practices are a new form of protectionism indulged in by northern countries to protect their market from the much cheaper products from the South. Fourth, they are afraid that the developing countries will be forced to buy modern technologies from the North. Finally, developing countries also argue that trade measures are inherently unfair, as they can only be used by the economically powerful against the economically weak (see also section 4).

b) The role of intergovernmental organisations, the private sector and NGOs in the establishment of labelling and certification schemes

As is well known, the command and control approach used by some intergovernmental organizations or States has been subjected to criticism. International institutions, as well as national public authorities, have been required to design new instruments from the market perspective (market-based approach).[77] In short, the most widespread argument against the command and control approach relates to its inefficiency from an economic point of view.[78] In this sense, it has been noted that economic agents are required to comply with technical or social standards without taking into consideration the real benefit that may result from the application of such standards, as well as without taking into account the peculiar characteristics of each and every economic agent. It also has been noted that the governmental concerns regarding the establishment of rigid technical standards constitute in practice a relevant barrier to determine the State's environmental and social objectives and the way in which they should be achieved.[79]

An alternative to the command and control approach would consist of promoting industrial self-regulation and the use of market instruments. Although there is no consensus yet about the role of these instruments in contributing to a better implementation and enforcement of environmental and social law, this trend has finally also affected the action of some intergovernmental organisations.

For instance, it is worth mentioning the EC's eco-label award scheme. It was established by Council Regulation (EEC) 880/92 of 23 March 1992 on an EC eco-

77 *See* Steinzor,R.I., "Reinventing environmental regulation: The dangerous journey from command to self-control", *Harvard Environmental Law Review*, 1998-22, p.103, at p.113

78 See Stewart, R.B. "Economics, Environment, and the Limits of Legal Control", *Harvard Environmental Law Review*, 1985-9, p.5; Sunstein, C.R., "Paradoxes of the Regulatory State", *University of Chicago Law Review*, 1990-57, p.407

79 Steinzor, R.I., "Reinventing environmental regulation: The dangerous journey from command to self-control", *op.cit*., at p.117

label award scheme[80], and amended by Regulation (EC) 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised EC eco-label award scheme.[81]

Regulation (EC) 1980/2000 aims to achieve several objectives. On the one hand, it aims to reduce negative environmental impacts as well as to move production and consumption patterns towards more sustainable schemes. On the other hand, eco-labelling aims to provide the necessary information for helping the consumers make conscious choices. Finally, these schemes have relevant implications for the design of products and, therefore, for the development of the market. The articulation of the general objectives shapes the characteristic features of the scheme.[82] In this sense, the EC eco-label award scheme can be characterised as a public and decentralised scheme to which operators adhere on a voluntary basis, although it is developed within a normative context. As for its scope, it is a selective "pass/fail" scheme based upon the product's global assessment. Transparency and participation are also key elements of such a scheme.. The EC eco-label award scheme is compatible with other different national schemes, as well as it can be considered as a complementary instrument regarding other EC labelling schemes, whether already existent or to be established in the future. Finally, it clearly has a European scope and it is in continuous evolution.

On the other hand, the criticism about the command-control approach would explain why, in such a context, private self-regulation predominates and public enforcement mechanisms to defend the collective interests barely operate. That would also explain why, with globalisation, we are increasingly witnessing the proliferation of initiatives taken by different private sector organisations to deal with the issue of sustainable development from their perspective.

The International Standardization Organization (ISO) probably constitutes the clearest example. ISO is a federation consisting of at least 100 national standards organizations and the delegations include producers, consumers, other stakeholders and government representatives. In essence, the ISO standards are documents elaborated by a private organization through a process of consensus forming among stakeholders. The technical committees draft standards and these have to be approved by 2/3 rd of the delegations and should not be opposed (excluding absenteeism) by _ of the delegations. In the ISO, private sector actors dominate, the standards apply voluntarily to private sector actors and they rely on the market for their effectiveness. They have two relevant standards – ISO 9000 on quality control and ISO 14000 on environmental protection, which are not substantive but procedural (they call on companies to follow certain procedures). However, while these standards reflect the differences in national circumstances it is unclear if they make a substantive contribution. It has been argued that the ISO might not be the most appropriate forum to develop multilateral guidelines and that

80 EUOJ L 99, 11 April 1992

81 EUOJ L 237, 21 September 2000

82 *See* Audivert Arau, R., *Régimen jurídico de la etiqueta ecológica*, Cedecs, Barcelona, 1996, at p.130.

developing countries' participation in international standardization still is inadequate. In a way, the most important critique arises precisely from the composition of the committees in charge of adopting standards. Nevertheless, the ISO standards are quite effective for all industries that wish to sell in the international arena since buyers want quality goods. Buyers also take interest in the way ISO standards are implemented, since the sale of their own products will depend on the quality of the inputs. The pressure put by the consumer's organizations, manufacturers, distributors, competitors, etc. may result in a situation in which companies that want to introduce themselves in a specific market must adhere to ISO standards. Besides, such standards may also be used in the context of international trade to judge national and local environmental standards, and they can even replace part of public regulation.[83] So, while ISO standards are strictly speaking not legally binding, they are influential and they can become *de facto* mandatory.

Thus, such standards are not as private and voluntary as they appear to be, since they somehow affect the adoption of public rules: national regulations frequently refer to them, and international agreements, both regional and multilateral, recognize them explicitly. That raises the issue of legitimacy and normative capacity of these private subjects. Particularly, it must be taken into account that such entities do not seem to have any political or democratic legitimisation.[84] They have not even been recognized as organizations for the satisfaction of general interests, but instead only because of their scientific - technical knowledge. On the other hand, those standards are not subjected to any publicity requirement - partly due to their protection as intellectual property-; neither is the participation of all interested parties guaranteed in their adoption process.

On the other hand, these developments have given rise to suggestions that multinational firms might sign codes of conduct agreeing to enforce core labour standards. Firms with good conditions would want to publicize that fact that they market labour friendly products. The Fair Labour Association, CERES, CSR Europe or SAI, after some embarrassing revelations of certain labour practices inside multinational companies, are examples of this trend. The Business Council for Sustainable Development has adopted the Valdez Principles. There is also a Business Charter for Sustainable Development and a Global Environmental Management Initiative. Corporate actors through their own codes of corporate conduct, publicize to consumers that they are acting voluntarily to ensure that workers rights in their global production chain enjoy certain rights. Usually, remedies suggested include pledges to pay at least the minimum legal wage or the prevailing industry wage if higher, bans on child and forced labour, and respect for freedom of association and collective bargaining rights.

The above examples relate to voluntary schemes developed by the private sector. As such international law is not affected by such voluntary schemes. But,

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83 See BEE, ISO 14001: An uncommon perspective. Five public policy questions for proponents of the ISO 14000 series, BEE, Brussels, 1995, at p.11

84 Esteve Pardo,J,*Tecnica, riesgo y derecho*, Ariel Derecho, 1999, Barcelona, at p.123.

as mentioned, voluntary schemes may not necessarily be voluntary in fact. Companies may feel obliged to follow these schemes or lose a substantial section of the market. Such private schemes may influence consumer behaviour to such an extent in importing countries, that they function *de facto* as a constraint on the market, even if they have no real *de jure* status.

There is also an increasing realisation that the private sector is not just developing voluntary schemes, it is promoting some of the concepts behind these schemes as well as hiding and ignoring others. For instance, individual company codes tend not to refer to freedom of association and the rights to bargain collectively (especially individual company codes). Indeed they often do not refer to the ILO Declaration of Fundamental Principles and Rights at Work (1998) or to the specific labour standards that embody these principles. They are also arguably leading to the development of soft law.[85] Shelton believes that the schemes being developed by private actors whether firms or NGOs have a way of entering the policy field and becoming a part of soft law. However, these very concepts and principles are not very legitimate since they are not developed through a legitimate process.

Another problem is that the issues private labelling touches may hardly ever become the subject of international law. This is because international environmental standards are seen as economically inefficient since harmonising policies will lead to a decrease in welfare, environmentally ineffective and may imply trade protectionism.[86] While minimum standards, however difficult they may be, allow governments to collectively control the private sector, ensure a level playing field, expand markets for environment friendly producers and give an opportunity to stakeholders to come together in determining such standards; they can also infringe on the sovereignty of nations, override the fundamental diversity of nations, lead to a lowering of standards, require a long-drawn out process and their success may depend on "unacceptable" trade sanctions for effectiveness.[87]

Another critical issue is that when national governments make regulations in relation to a particular commodity, such regulations may have extra-territorial effects. Let us take the example of the Barbie doll. It is an American toy, made in China, with hair from Japan, plastic from Taiwan which uses oil from Saudi Arabia, made on machines produced in Japan, US and EU, which is packed in US cardboard and the whole system is financed through banking and insurance schemes in Hong Kong. This process sells two dolls every second in over 140 countries.[88] This commodity chain has three features: the structure of inputs and outputs, the territoriality (spatially dispersed or concentrated) and the structure of power and authority that flow from the different parts.[89] Any attempt at governing

85 SeeShelton, D., "Compliance with International Human Rights Soft Law", *op.cit.*
86 See, Parker,R.W., "Choosing Norms to protect Compliance and Effectiveness: The Case for International Environmental Benchmarks", in Weiss,E.B. (ed.), *International Compliance with Non-Binding Accords*, *op.cit*., p.145
87 *Ibid.*
88 (Snyder 2001: 102)
89 Gereffi 1994

the process and the product in any of the countries or by any of the actors has an influence on the entire commodity chain.

4. SUSTAINABILITY LABELLING AND CERTIFICATION SCHEMES AND NORTH-SOUTH RELATIONS

This section examines the evolution of sustainability labelling and certification schemes against the background of North-South relations.

a) Background to North-South relations

Since the end of the sixties, there have been increasing North-South tensions in the fields of political, trade, economic and global environmental cooperation. This tension initially led to the establishment of the G-77 in 1964 to help developing countries effectively argue their common position in international negotiations. However, the G-77 was unable to come up with an effective and well-structured strategy over the years and the unequal bargaining power in other areas of international cooperation has, in the view of many developing countries, led to asymmetrical negotiation outcomes.

This asymmetrical negotiation outcome may manifest itself in *agenda-setting* (determining which issues are given priority at the international level)[90], *forum-shopping* (moving from UN to Bretton Woods Institutions)[91], *non-implementation of inconvenient agreements* (e.g. the New International Economic Order)[92], *manipulation of the rules of procedure* (moving from majority voting to double majority and consensus), *regional negotiations of potentially global issues* (e.g. the ill-fated negotiations of the Multilateral Agreement on Investments), *marginalisation of South-friendly UN organisations* (e.g. UNEP, UNCTAD, Habitat) till they change their practices.[93] For example, when UNEP attempted to link environment with development and lifestyle issues, soon after its conception, the US objected to such a broad development-oriented approach and as a major contributor to the Environment Fund, "it was also in a position to express its displeasure and exert pressure quite effectively. This complex story eventually resulted in the change of course by the UNEP secretariat and thus of the organization as a whole, pulling attention away from the structural causes of environmental degradation and moving

90 Chatterjee,P.-Finger,M., *The Earth Brokers*, Reoutledge, London, 1994; Arnold 1993; Nath,K., *Selected Statements on Environmental and Sustainable Development*, Government of India, 1993; Goldemberg,J., "The Road to Rio", in Mintzer,I.M.-Leonard,J.A. (eds.), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge University Press, Cambridge, 1994, at p. 175

91 Riflin,B., "Development Dilemmas and Tensions at the UN", International Social Science Journal, 1995-2, p. 333; Shiva,V., Monocultures of the Mind, Zed Books, London, 1993, p.76; Bakker,D., "Public versus private rights in international protection of industrial property: An analysis of the current legal framework", Graduation Paper, Law Faculty, Vrije Universiteit, Amsterdam, 1996

92 Schrijver,N., "Sovereignty over natural resources: balancing rights and duties in an interdependent world", Thesis, Rijksuniversiteit Groningen, 1995

93 Gosovic,B., *The Quest for World Environmental Cooperation: The Case of the UN Global Environment Monitoring System*, Routledge, London, 1992, at p.223

into the less controversial and more technical area of methodology, environmental impact assessment, and cost benefit analysis".[94]

The tension that manifested itself primarily in the trade related fields now has a spill-over effect in the environmental regimes. This was fairly explicit in the North-South debates that took place the United Nations Conference on Environment and Development. There is an expectation that the precedents set in the economic and trade fields will be developed further in the environmental and human rights related fields. The South Commission claims: "The fate of the South is increasingly dictated by the perceptions and policies of governments in the North, of the multilateral institutions which a few of those governments control, and of the network of private institutions that are increasingly prominent. Domination has been reinforced where partnership was needed and hoped for by the South".[95] Hence, the former Indian and Brazilian environment ministers stated that an "unjust economic order cannot be replaced by an equally unjust environmental order"[96] and that "the asymmetry of causes should not lead to an asymmetry of solutions", *i.e.* the burden of measures (and sacrifices) should not fall on the South.[97]

These historical experiences lie at the heart of the perceptions of developing country stakeholders that most new schemes and ideas emerging from the North are suspect by definition. At the very first global summit of the G-77 held in April 2000, the heads of state from the developing countries made a listing of all the key issues faced by them. The environmental issues did not get much coverage. The Summit stated:

- "While recognising the value of the environmental protection, labour standards, intellectual property protection, indigenous innovation and local community, sound macroeconomic management and promotion and protection of all universally recognised human rights and fundamental freedoms, including the right to development, and the treatment of each issue in its competent international organisation, we reject all attempts to use these issues, as conditionalities for restricting market access or aid and technology flows to developing countries." (…)

- "We note with deep concern the continuing decline of official development assistance (ODA), which has adversely affected development activities in the developing countries, in particular the LDCs, and we therefore urge developed countries that have not yet done so to act immediately to honour their commitments of directing 0.7 per cent of their e Gross National Product (GNP) to ODA, and within that target, to earmark 0.15 per cent to 0.20 per cent for the LDCs. We also urge that the provision of official and should respect the national development priorities of developing countries, and that conditions attached to ODA should be brought to an end" (…).

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94 *Ibid*. at p.228

95 Nyerere et al. *The Challenge to the South: The Report of the South Commission*, Oxford University Press, Oxford, 1990, at. p. 3

96 Nath, K., *Selected Statements on Environment and Sustainable Development*, *op.cit.*, at p.41

97 Alves,J.,"Statement of Brazil", in Vellinga,P.-Kendall,P.-Gupta,J. (eds.), *Noordwijk Conference Report*, 1989, Vol. II, p. 56, at p.57

- "We advocate a solution for the serious global, regional and local environmental problems facing humanity, based on the recognition of the North's ecological debt and the principle of common but differentiated responsibilities of developed and developing countries."[98]

What becomes increasingly clear from the Summit Declaration, which incidentally hardly received any coverage in Europe, is that the developing countries see the international environmental and human rights agenda of the North as a way for the North to maintain the status quo and to prevent the development of the South.[99] Increasingly the literature from the South on eco-labelling reflects this position. It would be arrogant to assume that these views have no validity, the perceptions clearly exist. However, the key question is: To what extent are these perceptions justified and if these are partly justified what action can be taken to reduce the potential negative effects on the South?

b) Arguments in relation to the sustainability labelling and certification schemes

Environmental problems can, to some extent, be addressed if environmental costs are internalised into the price of the products being sold. This would influence the consumer to choose in favour of environmentally friendly products. However, since internalisation of such costs is not easy, each country tends to deal with the issue in its own manner. Western countries are passing environmental laws and adopting standards that are likely to affect the exports from developing countries. As mentioned, such standards not only relate to the product itself but also to the processes and production methods (PPM) used to manufacture these products. Even though trade rules do not permit differentiation of such products on the basis of the way these are produced; voluntary schemes such as eco-labelling and packaging rules are having an impact.[100]

Jha[101] shows that South Asian countries are apprehensive that, first, such practices will negatively affect their exports. Thus Bharucha[102] writes: "The insistence by some OECD member countries for on-site plant inspection by different certifying agencies is also posing serious difficulties for developing

98 Group of 77 South Summit, Havana, 10-14 April 2000

99 De La Perriere,R.A.B.-Seurat,F., *Brave New Seeds: The Threat of GM Crops to Farmers*, Zed Books, London and New York, 2000; Madeley,J., *Hungry for Trade: How the Poor Pay for Free Trade*, Zed Books, London and New York, 2000; Petrella,R., *The Water Manifesto: Arguments for a World Water Contract*, Zed Books, London and New York, 2001; De Rivero,O., *The Myth of Development*, Zed Books, London and New York, 2001

100 Hewison, G.-Underhill, M., "Introduction", in Jha, V.G.-Hewison, G.-Underhill, M. (eds.), *Trade, Environment and Sustainable Development. A South Asian Perspective*, McMillan Press Ltd., Hampshire and London, 1997, p.1, at p.1-3

101 Jha, V.G., "Conclusions and Policy Recommendations", in Jha, V.G.-Hewison, G.-Underhill, M. (eds.), *Trade, Environment and Sustainable Development. A South Asian Perspective, op.cit.*, at p.217

102 Bharucha, V., "The impact of environmental standards and regulations set in foreign markets on India's exports", in Jha, V.G.-Hewison, G.-Underhill, M. (eds.), *Trade, Environment and Sustainable Development. A South Asian Perspective, op.cit.*, p. 123, at p.126

countries. A number of products exported by developing countries, for instance, are produced in the informal sector where sponsorship of on-site plant inspection is impractical. These difficulties have been compounded by the failure to involve representatives of developing countries in the process of writing eco-criteria". It is also argued that: "In most eco-labelling schemes for instance, only a narrow range of products are able to comply with the new criteria. The selection of criteria can also be so demanding as to specify only one particular kind of technology or production process, which may be out of reach of firms of developing countries".[103] These schemes not only specify what pesticides can or cannot be used; but also in what sort of packages tea can be exported (leading, for example, to high costs to the Indian tea industry). Bharucha[104] goes on to argue: "Indian industry is very concerned about the implementation of ecolabelling in foreign markets, which has been taken without their participation and without technical or financial support being offered to assist developing countries top adapt. The failure of OECD member countries to adopt common standards in this area is frustrating for Indian manufacturers. The residue limits for PCP, for instance, differ markedly between Germany, Italy and France".

Second, they question the environmental legitimacy of the arguments used. For example, Nath[105], the former environmental minister of India, argues that eco-labelling schemes value only environmentally friendly chemical dyes but not natural dyes. Third, they argue that such practices are a new form of protectionism indulged in by Northern countries to protect their market from the much cheaper products from the South. Finally, they are afraid that the developing countries will be forced to buy modern technologies from the North.[106] Nath concludes that: "In fact the whole concept of international eco-labelling based on the processes of by which products are manufactured amounts to a legitimisation of extraterritorial interference by one country over another's domestic affairs. It is a kind of green imperialism".[107]

To what extent are these claims justified and to what extent do the developing countries hide behind these claims to continue to produce products at the cost of their environment? Will eco-labelling schemes lead to improvement of the environmental and social circumstances in the developing countries, or will they further impoverish these countries?

5. CONCLUSIONS: TRENDS ON SUSTAINABILITY LABELLING AND CERTIFICATION SCHEMES

The research and analysis in this paper leads us to make certain conclusions, in terms of complementary and contradictory trends that could serve as hypotheses for more systematic analysis in the future:

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103 *Ibid.*
104 *Ibid.* at p.136)
105 Nath, K., *Selected Statements on Environment and Sustainable Development*, *op.cit.* at p. 17
106 *Ibid.*
107 *Ibid.* at p.18

a) Complementary in trends

On the one hand, sustainable development features not only in the context of international law, but many intergovernmental organisations have committed themselves to sustainable development (e.g. UN, EU, WTO, OECD, etc.) and there are a number of initiatives being taken to protect environmental, social and economic principles, using both soft and hard law. There is a major global commitment to sustainable development at least on paper.

On the other hand, while international law may be able to make minimum standards allowing flexibility to take into account the diversity of countries, it can hardly come up with top-end standards for environmental and sustainable development standards. This leaves room for the non-governmental sector to promote top end standards at international level. These may enter the realm of soft law and may thus influence the process of hard law developments. In other words the action of the non-governmental sectors, in particular, may over time contribute to the development of soft law principles. At the international level, this is not so much a regulated process, but there is spontaneous development of initiatives by several social actors.

With globalisation, however, Southern companies and countries are becoming aware of the critical issues involved and are themselves developing labelling and certification schemes. The development of standards, certification and labelling schemes may force developing countries out of certain markets, thereby protecting their own environmental and social interests from further exploitation. Current generations and the market and government sector may not see any benefit but future generations and NGOs may.

b) Contradiction in trends

Voluntary labelling and certification schemes are based on the assumption that standards can be developed regardless of the context in which the products are produced, and that universal standards are possible. To the extent that this is not so, such standards may actually be misleading and counter-productive.

On the one hand, labelling and certification schemes that intend to protect a specific resource/value exporting country may or may not do so. Thus, for example, a standard that specifies that a football should be made only by adults may be developed with the intention of protecting children from work in such factories. However, it may either lead to a situation where the children lose their jobs and become further marginalised in the society, or to a situation where the factory loses its international market and the circumstances under which the children work deteriorates further. Or it may lead to a situation where the children automatically go to school and their rights are protected. The labelling scheme in itself does not guarantee better rights for the children.

On the other hand, standards established by a labelling or certification scheme may or may not be misused to bypass the free trade rules of GATT. Thus, whenever, a company faces severe competition from cheaper products from

another country, it may try to cultivate values in its customers to condition them into buying products from them that are produced under certain circumstances. Furthermore, voluntary standards may be precedent setting. Voluntary standards have a way of influencing the consumer and the market and may over time have enough social support to become a national standard or even a regional or international standard. But such standards will then have been unilaterally set and there will be no democratic control of the effectiveness of such a standard in either protecting the environment or human rights .

Finally, it must be kept in mind that initiatives from the private sector, if successful, may *de facto* operate as a constraint in the domestic and international market. Such initiatives, however, do not need to follow the principles of good governance and the rule of law at international level. This implies a shift in rule making power from international bodies to other bodies. "The delegation of policy-making powers to politically independent, or non-majoritarian, institutions immediately raises the issue of democratic accountability".[108] We are increasingly witnessing decision-making within informal networks between government and non government officials who need confidentiality and informality to reach decisions. "The essence of a network is a *process* rather than an *entity*; thus it cannot be captured or controlled in the ways that typically structure formal legitimacy in a democratic polity".[109] Labelling and related initiatives are unlikely to be legitimate tools for international policymaking. As such there may be considerable resistance from exporting countries influenced by the extra territoriality of either domestic regulation or domestic private sector initiatives. This poses an interesting research question about the relationship between voluntary initiatives and international law.

108 Majone,G., "International Regulatory Cooperation: A Neo-Institutionalist Approach", in Bermann,G.A-Herdegen,M.-Lindseth,P.L. (eds.), *Transatlantic Co-operation: Legal Problems and Political Prospects*, Oxford University Press, Oxford, 2001, p.119, at p.142

109 Slaughter, A.M., "Agencies on the Loose: Holding Government Networks Accountable", in Bermann, G.A-Herdegen, M.-Lindseth, P.L. (eds.), *Transatlantic Co-operation: Legal Problems and Political Prospects*, *op.cit.* p.521, at p.525.