

# Principle 4

## SUSTAINABLE DEVELOPMENT THROUGH INTEGRATION

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### **Principle 4**

*In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.*

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## I. ORIGINS AND RATIONALE OF THE PRINCIPLE

Principle 4 of the Rio Declaration is a key principle in the operation of sustainable development. The idea it enshrines, that of integration of economic and environmental concerns, pre-dates Rio however and can be traced back to the early 1970s.

The importance of integrating environmental concerns into the development process was first underlined in the 1971 Founex Report.<sup>1</sup> This report was the result of a meeting of experts arranged by Maurice Strong, the Secretary-General to the Stockholm Conference, and it contributed to persuading many Southern nations to attend the Conference. The document, which was primarily aimed at helping developing countries design and plan development programmes, highlighted that environmental deterioration arose both out of the process of development and out of the lack of development itself. It insisted in particular that in order to avoid repeating the past mistakes of the industrialised nations in their development patterns, a broader, more integrated approach to development should be adopted;<sup>2</sup> an approach where ‘environmental policies are integrated with development planning and regarded as part of the overall framework of economic and social planning’.<sup>3</sup>

For the Founex experts, the objective for developing countries should be to ‘regard environmental improvement as one of the multiple goals in a development plan’.<sup>4</sup> It is thus little surprise that this use of the language of integration can also be found in the text of the Stockholm Declaration on the Human Environment.<sup>5</sup> In particular, Principle 13 states that:

‘In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population.’

Principle 14 states for its part that: ‘Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.’

At both Founex and Stockholm, however, the idea of ‘integration’ was closely associated to that of ‘planning’, which partly due to its socialist overtones and the realities of the world economy has then disappeared from the Rio documents. Furthermore, if by 1972 the link between environmental deterioration and economic development was fully acknowledged, these concerns were still viewed, to some extent, as opposites that needed to be reconciled. The close and intimate interdependence between the environment and economic and social development put to the fore by global environmental threats such as climate change and the loss

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<sup>1</sup> *The Founex Report on Development and Environment*, Founex, Switzerland, 4-12 June 1971.

<sup>2</sup> *Ibid*, pp. 3-5.

<sup>3</sup> *Ibid*, p. 19.

<sup>4</sup> *Idem*.

<sup>5</sup> ‘Declaration of the United Nations Conference on the Human Environment’, Stockholm, 16 June 1972, UN Doc. A/CONF 48/14/Rev.1 (‘Stockholm Declaration’).

of biological diversity had not yet, at Stockholm, sunk into the conscience of humanity, and State representatives. This element, which is missing from Stockholm but which is a central feature of the Rio process, is essential in understanding the meaning of principle 4.

In the twenty years separating Stockholm from Rio, the increased recognition of the close interconnectedness between environmental and economic concerns, together with the need to adopt an integral approach to these issues, has grown apace. The Helsinki Final Act in 1975 viewed protection of the environment as a task of major importance for the economic development of all countries.<sup>6</sup> In 1982 the UNEP in its Nairobi Declaration advocated an integrated approach to environment, development, population and resources emphasising their interrelationship in order to lead to sustainable development.<sup>7</sup> Nature conservation and/or environmental protection was also viewed as an integral part of economic development activities in many high level international documents such as the 1982 World Charter for Nature,<sup>8</sup> the U.N. General Assembly's 1987 Environmental Perspective to the Year 2000 and Beyond,<sup>9</sup> the 1987 WCED proposed Legal Principles,<sup>10</sup> the 1989 Commonwealth Langkawi Declaration,<sup>11</sup> or the 1991 World Conservation Strategy.<sup>12</sup>

The idea that environmental protection needed to form an integral part of economic development and economic decision-making also started making its way into formally binding international law even before Rio and it is primarily in the area of marine protection that some articulation of the concept of integration can first be found. Several regional conventions dedicated a paragraph in their preamble recognising either the need to adopt an integrated approach to the use of the marine environment in order to achieve both environmental and developmental goals,<sup>13</sup> or the threat posed to the marine environment by the very absence of such integration of environment and development.<sup>14</sup> The 1974 OSPAR Convention even referred to the idea of integration within its substantive provisions as article 6(2)(d) requests the parties to take into account the 'need for an integrated planning policy consistent with the requirement of environmental

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<sup>6</sup> Conference on Security and Cooperation in Europe, Final Act, Helsinki, 1 August 1975, Section 5 Environment, preamble.

<sup>7</sup> Nairobi Declaration, adopted at the 13th meeting of the session on 18 May 1982, para 3.

<sup>8</sup> 'World Charter for Nature', UN Doc. A/RES 37/7, 1982.

<sup>9</sup> 'Environmental Perspective to the Year 2000 and Beyond', UN Doc. A/RES 42/186, 1987.

<sup>10</sup> Report of the World Commission on Environment and Development, *Our Common Future*, 10 March 1987 ('Brundtland Report'), Annex 1: Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law, Sustainable Development and Assistance, para 7.

<sup>11</sup> Langkawi Declaration on Environment, Heads of Government of the Commonwealth, Langkawi (Malaysia), 21 October 1989, para 8.

<sup>12</sup> World Conservation Strategy, 1980, joint IUCN/WWF/UNEP document.

<sup>13</sup> Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution 24 April 1978, 1140 UNTS 133; Jeddah Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment, 14 February 1982, (1982) 9 EPL 56.

<sup>14</sup> Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal environment of the West and Central African Region and protocol, 23 March 1984, 20 ILM 746 (1981); Nouméa Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 24 November 1986, 26 ILM 38 (1986).

protection'.<sup>15</sup> Though it never came into force, Article 2 of the ASEAN Agreement on the Conservation of Nature and Natural Resources<sup>16</sup> also placed, as early as 1985, an obligation of means on its Parties to 'ensure that conservation and management of natural resources are treated as an integral part of development planning at all stages and at all levels'. When States came to the negotiating table at Rio they were thus not faced with an entirely new idea, but one which had emerged and developed over the preceding twenty years.

## II. THE PRINCIPLE AS ENSHRINED IN THE RIO DECLARATION

### 1. Preparatory work and context

In view of the intensely polarised negotiations of the Rio Declaration, it is no surprise that the text of principle 4, as it stands today, has been the subject of wide variations in terms of content, location, or even inclusion in the Declaration proper in the weeks running up to the Conference at PrepCom IV. At PrepCom III, the chairman of Working Group 3 proposed a consolidated draft based on States delegations' proposals.<sup>17</sup> Within this document, the first principle to appear is that of 'integration of environment and development'. It is a rather long principle with an unsurprisingly – as it consolidates various delegations' proposals – wordy content. It essentially provides that States 'shall address environmental issues in the process of development by integrating environmental concerns with the imperatives of economic growth and development'.<sup>18</sup> Mention is also made of the establishment of a global partnership for environmental protection and sustainable development through the implementation of the principles. Recognition of the right to development is then proposed within the same principle but in a subsequent paragraph, whereas another option stresses the need to integrate environmental considerations within planning and policy making as well as the need to stabilise the world's population.

This very dense consolidated draft however did not serve as a basis for negotiation for Working Group 3's work on agenda item 3 during PrepCom IV; where most of the drafting of the Declaration took place. Instead, in the G77 and China's 'Rio de Janeiro Charter/Declaration on Environment and Development' proposal, the principle of integration was relegated from the first to the fourth position and became the following:

'States and international organizations shall address environmental issues in the process of development by integrating environmental concerns with the imperatives of economic growth and development'.<sup>19</sup>

While the environment is seen as an issue or a concern, economic growth and development are viewed as imperatives. Such phrasing emphasises the primacy

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<sup>15</sup> Convention for the Protection of the Marine Environment of the North East Atlantic, 22 September 1992, 2354 UNTS 67.

<sup>16</sup> 9 July 1985, (1985) 15 EPL 64.

<sup>17</sup> Principles on General Rights and Obligations, Chairman's Consolidated Draft, A/CONF.151/PC/WG.III/L.8/Rev.1.

<sup>18</sup> *Ibid.*, p. 3.

<sup>19</sup> See Report of the Preparatory Committee for the United Nations Conference on Environment and Development on the Work of its Fourth session, A/CONF.151/PC/128, p. 83.

given to economic development over environmental protection, which also, it seems, needs to be dealt with within the overarching aim of development.

Following criticism and in an effort by the developing countries to found their proposal as the basis for negotiation, the G77 soon proposed a revised version of its principle 4 which lost its title in the process and now read: 'Environmental protection shall be viewed as an integral part of the development process and cannot be considered in isolation from it'.<sup>20</sup> Although very close to the final text's wording, it was still met with a number of counter proposals.

At the same meeting, on 5 March 1992, the United States proposed that the reference to integration be stated in the first principle which should read:

'Environmental protection and economic and social development ultimately cannot be achieved at the expense of each other. Environment and development goals should be pursued simultaneously, in an integrated fashion.'<sup>21</sup>

As opposed to the G77's proposal, such phrasing clearly places environment and development on an equal footing. Japan also introduced a proposal devoting its first principle to the issue of integration but added a reference to sustainable development and to the need to adopt a long-term perspective.<sup>22</sup> To the contrary, in Canada's tabled proposal for an 'Earth Charter' the reference to integration disappears altogether.<sup>23</sup> Australia for its part preferred to view integration as a goal rather than a principle and accordingly located its reference to integration in the preamble to the document.<sup>24</sup> Lastly, in the EU's proposal, the reference to integration would be located in a second principle entitled 'sustainable development'. This read:

'In order to ensure sustainable development in all countries, environmental considerations shall be integrated into the formulation of policies and into decision-making processes at local, national and international levels.'

This variety of phrasing reflects the disagreements pervading the negotiations of the Rio Declaration altogether, although disagreements on the issue of integration were less intense than as regards other principles such as the right to development for example. In fact, because of the industrialised world's reluctance towards that principle, attempts were made to combine it with the principle of integration, but such attempts were firmly rejected by the G77 and China.<sup>25</sup> Eventually, an informal contact group had been formed to try and overcome the opposition between developed and developing countries and this group agreed to work on the basis of the G77 and China's proposal.<sup>26</sup> Although a reference to sustainable development was later added, it is this phrasing that the formal contact group later established to solve the remaining divergences finally adopted. This

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<sup>20</sup> *Ibid.*, p. 88.

<sup>21</sup> *Ibid.*, p. 92. Such phrasing and location was also adopted in Denmark's, Iceland, Norway and Sweden's proposal of 11 March 1992.

<sup>22</sup> See *ibid.*, p. 96.

<sup>23</sup> *Ibid.*, p. 97-99.

<sup>24</sup> *Ibid.*, p. 99.

<sup>25</sup> Del Lujan Flores, M., 'Algunas Reflexiones en torno a la Declaración de Río sobre el Medio Ambiente y el Desarrollo', in *Le droit international dans un monde en mutation. Liber Amicorum en Hommage au professeur Jiménez de Aréchaga* (Montevideo : Fundación de cultura universitaria, 1994, vol. I and II), pp. 815-843, p. 828.

<sup>26</sup> While at the same time keeping other proposals on an equal footing. See *ibid.*, p. 826.

contact group managed to put together a final text including the current version of principle 4 adopted without change at the Conference itself.

## 2. Scope and dimensions

### 2.1. Conceptual nature

Beyond any question relating to their formally binding character,<sup>27</sup> it is not enough to conclude that because the Rio Declaration is made up of twenty seven ‘principles’, these twenty seven enactments do actually reflect legal ‘principles’ rather than goals, rules, or procedures.

A generally accepted distinction between principles and rules revolves around the degree of precision of the provision in question. If the wording of the provision is sufficiently specific to allow for immediate application with well-defined consequences, then it may be characterised as a rule. Often such rule may be a ‘practical formulation’<sup>28</sup> of a more abstract and general ‘principle’. Indeed, principles are characterised by their high level of abstraction and the generality of their formulation.<sup>29</sup> Legal principles may even be so abstractly formulated that they can be expressed as a concept, with no practical reference whatsoever to the circumstances in which they may be applied.<sup>30</sup>

As far as ‘principle’ 4 is concerned, its wording might not be sufficiently specific to fall in the category of ‘rules’. In fact, whereas the Tribunal in the *Iron Rhine Railway* arbitration accepted that there was a distinction in international law between rules and principles,<sup>31</sup> it then referred to principle 4 as a ‘principle’.<sup>32</sup> Principle 4 does reflect a relatively high degree of generality and abstraction which indeed suits the category of principles. It is however more than a goal or concept with no legal grounding. Australia’s failure to have it included as a goal in the preamble rather than the text of the Declaration itself is testimony to the international community’s consensus as to its ‘principled’ nature.

Another distinction that can be subject to debate with respect to the nature of principle 4 is whether it reflects a process or an outcome. In other words, by integrating environmental considerations into the development process does the principle require States to achieve a specific environment-related result or outcome? That is, does the principle have an autonomous and substantive content? Or does it simply require States to take environmental considerations into account in the process of development decision-making (or vice versa), irrespective of the outcome achieved?

There is ample recognition of the procedural nature of principle 4 in that the very action of integration of environmental and socio-economic considerations is

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<sup>27</sup> See *infra* [section 2.4. (Legal nature)].

<sup>28</sup> *Gentini* case (Italy v. Venezuela) 10 RIAA 551, p. 376.

<sup>29</sup> See Dupuy, P.-M. and Y. Kerbrat, *Droit international public* (Paris: Dalloz, 2010, 10<sup>th</sup> ed.), p. 376.

<sup>30</sup> Virally, M., ‘Le rôle des “principes” dans le développement du droit international’, in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Geneva: Institut universitaire de hautes études internationales/Faculté de Droit de l’Université de Genève, 1968), pp. 531-554, p. 534.

<sup>31</sup> *Award in the Arbitration regarding the Iron Rhine (‘Ijzeren Rijn’) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35, para 58.

<sup>32</sup> *Ibid.*, para 59.

primarily located within the process of decision-making.<sup>33</sup> It is also on the decision-making process that Chapter 8 of Agenda 21, the ‘how to’<sup>34</sup> guide for the integration of environment and development, focuses. Agenda 21 thus indicates that States should:

‘improve the processes of decision-making so as to achieve the progressive integration of economic, social and environmental issues in the pursuit of development that is economically efficient, socially equitable and responsible and environmentally sound’.<sup>35</sup>

And according to Agenda 21 the principle of integration may well be limited to its procedural dimension, requiring a process to be put in place rather than an outcome to be achieved. This is so because in suggesting activities that States may pursue to achieve an integrated decision-making process it specifies that: ‘Countries will develop their own priorities in accordance with their national plans, policies and programmes’.<sup>36</sup> In other words, States need to integrate environmental considerations in the development decision-making process but the outcome of this integration falls within the realm of State sovereignty.

There is an argument however that the principle of integration may require more than a process to be followed and actually impinge on the outcome to be achieved, thus vesting it with substantive content. This is apparent in both the meaning and the mode of application of the principle.<sup>37</sup>

## 2.2. *Meaning*

A simple textual interpretation of principle 4 generates a number of remarks as to its meaning. Principle 4, like most principles of the Rio Declaration, is laid out in mandatory language as it stipulates that ‘environmental protection *shall* constitute an integral part of the development process.’ It thus intends to lay down an obligation on its recipients, an obligation to integrate the environmental component within the development process. There is no priority granted to environmental protection over the development process or vice versa. Although, via their integration, environmental considerations may limit or impinge on the development process, it is also added that environmental protection cannot be considered in isolation from it. Environmental policies may thus not be developed at the expense of development needs. A fine balance is struck between environmental and developmental considerations. As Sands puts it:

‘The principle might mean that development decisions which failed to take any, or adequate account of the environmental consequences could not contribute to sustainable development. Or it might mean that environmental decisions should not be used to limit developmental decisions

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<sup>33</sup> See e.g. Boyle, A. and D. Freestone, ‘Introduction’, in Boyle, A. and D. Freestone (eds.), *International Law and Sustainable Development. Past Achievements and Future challenges* (Oxford University Press, 1999), pp. 1-18, pp. 10-11, 17; Jodoin, S. ‘The Principle of Integration and Interrelationship in relation to Human Rights and Social, Economic and Environmental Objectives’, Draft working paper, CISDL, *Recent developments in International Law Related to Sustainable Development Series*, 50p, pp. 9 and 20.

<sup>34</sup> Jodoin, *supra* n. 33, p. 19.

<sup>35</sup> Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol. I), Agenda 21, pp. 9-480 (‘Agenda 21’), p. 96, para 8.4.

<sup>36</sup> *Idem*.

<sup>37</sup> See also Nollkaemper, A., ‘Three Conceptions of the Integration Principle in International Environmental Law’ in Lenschow, A (ed.) *Environmental Policy Integration: Greening Sectoral Policies in Europe* (London: Earthscan Publications, 2002) pp. 22-32, pp. 29-31.

which aim to address fundamental human needs, such as the provision of clean water or adequate housing.<sup>38</sup>

It is also clear that the concept of development referred to is a wide one embodying both the economic and social pillars, as confirmed by Chapter 8 of Agenda 21.<sup>39</sup> Chapter 8 also confirms that it is primarily, though not only, at the decision-making level that integration should happen.<sup>40</sup>

One crucial question that remains however is that of the kind of actions that will be sufficient to qualify as adequate integration of environmental and development considerations for the purpose of principle 4. Does principle 4 merely require environmental protection to be ‘taken into account’ in the development decision-making process (or vice versa), or does it require more and imply a modification of the contents of the decisions made? As underlined earlier, if such considerations only need to be taken into account, without necessarily having an impact on the outcome, then principle 4 would essentially lay down a procedural rather than a substantive obligation. And that could be so if the principle simply read: ‘Environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’.

However the drafters have decided not to lay down this principle in the abstract without reference to the context in which it is to take place. If integration must happen, it is ‘in order to achieve sustainable development’ as specified by the first part of principle 4. It is thus integration for a purpose, integration as an effort, a contribution, in the achievement of an objective, the objective of sustainable development. In that sense, rather than being sustainable development itself,<sup>41</sup> the principle of integration is an essential tool for its realisation.<sup>42</sup> And this anchoring of integration within the broader matrix of sustainable development in principle 4 can actually confer a substantive content to the obligation to integrate.

A purely formal process of integration whereby environmental considerations are simply ‘taken into account’ within the development decision-making process with no actual impact on the decision outcome may well fall short of being considered a sufficient effort in striving to achieve sustainable development.<sup>43</sup> Surely, if the principle of integration were to have solely a procedural content, the *status quo* may be forever perpetuated and progress towards sustainable development never be achieved. In fact, the principle could altogether be meaningless as States could formally ‘take into account’ say environmental considerations, but then discard them as irrelevant or not sufficiently relevant to modify the development decision. States could thus continue with their business as usual, continue ignoring the intimate interdependence between socio-economic development and environmental protection and frustrate the attainment of the

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<sup>38</sup> Sands, P., ‘International Law in the Field of Sustainable Development’ (1994) 64 *BYIL* 303, p. 338.

<sup>39</sup> Agenda 21, *supra* n.35.

<sup>40</sup> On the various manners in which integration may happen, see *infra* [section 2.3. (Modus operandi)].

<sup>41</sup> See Fitzmaurice, M., ‘International Protection of the Environment’ (2001) 293 *RCADI* 9, p. 52.

<sup>42</sup> See Barral, V., ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23 *EJIL* 377, p. 381. For Dupuy it is ‘à la base du développement durable’, see Dupuy, P.-M., ‘Où en est le droit international de l’environnement à la fin du siècle?’ (1997)101 *RGDIP* 873, p. 891.

<sup>43</sup> Although the level of balancing required can still depend on the specific circumstances of each State.

objective of sustainable development.<sup>44</sup> By positing sustainable development as an objective to be achieved via the medium of integration, the drafters of the Rio Declaration have thus opted to confer a substantive content to the principle of integration and the process of integration may, as a result, require more than considerations being ‘taken into account’, it may indeed require a modification of the outcome of decisions.

Beyond any reference to sustainable development, an interpretation of the principle of integration in the light of current environmental standards would lead to the same conclusion.<sup>45</sup> It is indeed unlikely that an ‘integrative’ decision-making process that allows for development decisions to remain unchallenged by environmental considerations would not conflict with accepted international standards regarding say acceptable noise levels or the protection of endangered species. Certainly the alternative may not be between the decision to build a new railway line or not (though in certain circumstances it could), but it may be between deciding to build a new railway line with no mitigating environmental measures and the decision to build a new railway line provided certain mitigating environmental measures are adopted. Yet, the integrative decision-making process would still have modified the decision outcome. Such conclusion is confirmed by the Arbitral Tribunal’s interpretation of the meaning of the principle of integration in the *Iron Rhine Railway* case as it indicated, after citing principle 4, that:

‘Importantly, th[ese] emerging principle[s] now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.’<sup>46</sup>

In other words, through the process of integration of environmental and development considerations, States are required at a minimum to mitigate environmental harm. This reading of integration by the Arbitral Tribunal does not seem to be in tension with principle 4 of the Rio Declaration. After all, if its drafters had intended that environmental or development considerations be only ‘taken into account’ in the decision-making process, that is what they would have provided for rather than insisting on the need that they be ‘integrated’.<sup>47</sup>

## 2.3. *Modus operandi*

### 2.3.1 Overview

There are different dimensions to the realisation of the principle of integration. One such dimension is organisational in nature. To achieve better integrated outcomes, adequately organised institutions are paramount, be it at the local,

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<sup>44</sup> In the context of discarding the relevance of environmental considerations though formally they have been taken into account, environmental deterioration could go unabated. The reverse may also apply by rejecting the relevance of basic human needs in the making of environmental policies and thus hampering economic and social development.

<sup>45</sup> As permitted by article 31(3)(c) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (‘VCLT’).

<sup>46</sup> *Iron-Rhine*, *supra* n. 3131, para 59.

<sup>47</sup> Note that according to the *Concise Oxford English Dictionary*, (Oxford University Press, 11<sup>th</sup> ed., 2006) the verb to integrate is defined as: ‘combine or be combined to form a whole’, which suggests a merging of elements to create a unique result, hence a specific outcome.

domestic or international level. This means that specific institutions may need to be created, or existing institutions reorganised and restructured, for example via the ‘appointment of personnel skilled in environmental and/or social policy in traditionally economic-growth focused organisations.’<sup>48</sup> It also means that Institutions at different levels (vertical integration) or across sectors (horizontal integration) will need to cooperate to achieve the integration of the economic, social and environmental dimensions of development.

Reorganisation and cooperation however is only a small aspect of what the principle of integration involves. Another key dimension of the principle is substantive integration as opposed to institutional (i.e. organisational) integration, substantive integration at the decision-making level, at the norm-creation level and at the norm application/interpretation level. These will be the focus of this section.

### 2.3.2 Integrative decision-making

One essential way in which integration of economic, environmental and social factors can happen is through the decision-making process. As pointed out by the ILA and evidenced by the focus of Agenda 21 Chapter 8,<sup>49</sup> it is probably ‘what Principle 4 of the Rio Declaration had principally in mind’.<sup>50</sup>

Concretely this means for example that before the decision to build a dam is made, or before approving the operation of pulp mills on the banks of a river, the institutions involved in that decision will have to carefully balance all relevant, economic, social and environmental factors at stake. Environmental and social impact assessments will need to be carried out. Additionally, the decision-making institution(s) will need to cooperate with other institutions with specific competences or attributions relating to such factors; adequate information should be disseminated to the public; and those potentially affected by the decision should be given an opportunity to participate in the decision-making process.<sup>51</sup> This is because not only must all relevant factors be considered but also because all relevant actors must be involved.<sup>52</sup>

Integrative decision-making ensuring a balancing of environmental, economic and social factors and adequate involvement of concerned actors may take place at the project-specific level, as well as at the level of policy-making or even broader levels such as the setting-up of long term national or international programmes.<sup>53</sup> Irrespective of the level at which it happens however, the actual weighing of the different factors will depend upon the circumstances of each case and the socio-economic and cultural specificities of each State.

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<sup>48</sup> ILA, Toronto Conference (2006), International Law on Sustainable Development (‘ILA 2006’), p. 12.

<sup>49</sup> Entitled ‘integrating environment and development in decision-making’.

<sup>50</sup> ILA 2006, *supra* n. 48, p. 8.

<sup>51</sup> In line with the principle of public participation in the decision-making process.

<sup>52</sup> See ILA 2006, *supra* n. 48, p. 9.

<sup>53</sup> Such as the Millennium Development Goals or Agenda 21. For an account of the specific tools available to achieve integration at each level see ILA 2006, *supra* n. 48, pp.10-12.

Undoubtedly in this respect States retain a significant level of sovereignty in determining their development priorities.<sup>54</sup> Sustainable development, which, as emphasised by principle 4, integration aims to achieve, is also evolutive in nature and what it requires may vary in time, space and content. These considerations necessarily add some uncertainty as to what the outcome of an integrated decision-making process will be. This level of uncertainty is slowly narrowing though as States are increasingly constrained by internationally accepted environmental and social standards and as the requirements of sustainable development become more specific.

### 2.3.3 Normative integration 1: norm-creation

The principle of integration implies that in areas that impinge on the achievement of sustainable development, when new norms are created, they should reflect an adequate weighing of economic, social and environmental factors, whether at the national or international level.

At the international level this may take place when new treaties are negotiated (or potentially when new customary rules are developed). Integration can also take place through the renegotiation of pre-existing regimes whether via amendment or other means of renegotiation.<sup>55</sup> The scope of existing treaty systems can thus be broadened to incorporate previously neglected dimensions such as environmental or social factors.

Trade-related treaties incorporating an environmental chapter within their provisions are examples of integration at work.<sup>56</sup> So is the inclusion of environmental considerations within energy law, investment law or the law of commodities. Conversely, primarily environmental regimes may widen their scope by incorporating economic concerns, such as for example the efforts made by the COP within the Ramsar Convention on wetlands' regime.<sup>57</sup> According to the ILA however, progress in environmental regimes with integration of economic and social factors remains rather slow.<sup>58</sup> Nonetheless, the increasing inclusion of extraneous considerations (i.e. environmental and social) within traditionally closed regimes such as the WTO system or other free-trade agreements are testament to the substantive effect of the principle of integration.

### 2.3.4 Normative integration 2: norm application and interpretation

Because of its transversal nature, the principle of integration may also be used as an instrument to facilitate inter-normative relations across legal regimes.<sup>59</sup>

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<sup>54</sup> As confirmed by Principle 2 of the Rio Declaration.

<sup>55</sup> Such as decisions of the Conference of the Parties (COPs).

<sup>56</sup> See e.g. U.S.-Morocco Free Trade Agreement 15 June 2004, (2005) 44 ILM 544.

<sup>57</sup> On the incorporation of sustainable development concerns within the Montreal Protocol, Basel Convention and Ramsar Convention, see Barral, V., *Le développement durable en droit international: Essai sur les incidences juridiques d'un concept évolutif* (PhD dissertation, European University Institute, 2007), pp. 264-269.

<sup>58</sup> It notes that 'whilst non-environmental treaties have begun to be modified to take greater account of conservation and environmental protection concerns, the same has not necessarily been true of nature conservation treaties', ILA 2006, *supra* n. 48, p. 18.

<sup>59</sup> See Rodrigo Hernández, A., 'El Principio de Integración de los Aspectos Económicos, Sociales y Medioambientales del Desarrollo Sostenible' (2012) 64 *REDI* 133, p. 138.

Integration of environmental and social considerations into a rule with a strong economic focus for example can thus happen through the application and interpretation of that norm (rather than via the creation of a wholly new norm). As far as interpretation is concerned, such integration could be the result of an authentic interpretation of the parties.<sup>60</sup> It could also be the result of a judicial pronouncement.

The principle of integration, as a means to achieve sustainable development, can indeed be a useful tool in the hands of judges to resolve a conflict of norms or to found a balancing exercise between considerations that are in tension. This is in fact how the principle was used by the arbitral Tribunal in the *Iron Rhine Railway* case. Whereas Belgium was relying mainly on a Treaty-based right to reactivate an old railway line passing through the Netherlands, the Netherlands argued that such reactivation was to be subject to a range of environmental protection measures to be borne financially by Belgium. By relying on the principle of integration, the Tribunal argued that Belgium's economic interests and the Netherlands' environmental concerns had to be reconciled.<sup>61</sup> It also concluded that each parties' interests were legitimate, and that meant that Belgium had a right to reactivate the railway line, but that appropriate mitigating environmental measures also had to be adopted. This led it to conclude that in view of the legitimacy of each party's interests and the need to reconcile them, the associated financial costs of the environmental measures had to be carefully balanced between the parties.<sup>62</sup>

On other occasions, judges have invoked the objective of sustainable development rather than the principle of integration to justify a balancing exercise or the need to reconcile economic and environmental considerations.<sup>63</sup> In these circumstances, even if no reference is made to the principle as such, it is via their integration that economic and environmental considerations are to be reconciled or balanced, (whether the judges engage with the balancing themselves<sup>64</sup> or enjoin the parties to do so<sup>65</sup>) as integration is the mechanism 'par excellence' to achieve sustainable development.<sup>66</sup>

#### 2.4. *Legal nature*

Beyond the existence of treaty-based obligations of integration, there is some authority for the proposition that the principle of integration also reflects customary or general international law.

It is well accepted that the fact that principle 4 is inserted in a formally non-binding legal instrument is not an obstacle to the recognition of the customary

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<sup>60</sup> Under article 31(3)(a) or 31(3)(b) of the VCLT, *supra* n. 45. Arguably, decisions, recommendations and resolutions of COPs or MOPs widening the scope of the treaty basis could fall under that banner, see Barral, *supra* n. 57, pp. 266-269.

<sup>61</sup> *Iron-Rhine*, *supra* n.31, para 221.

<sup>62</sup> *Ibid*, para 220.

<sup>63</sup> See *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, paras 140-141; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para 177.

<sup>64</sup> As they did in *Iron Rhine*, *supra* n. 31.

<sup>65</sup> As they did in *Gabcikovo-Nagymaros*, *supra* n. 63.

<sup>66</sup> See further section III relations with other principles.

nature of the principle it embodies. So long as ‘evidence of a general practice accepted as law’<sup>67</sup> relating to the principle is ascertained, that is that both *opinio juris* and consistent practice can be proven, then it will meet the criteria of customary norms.

As far as the subjective element is concerned, the Rio Declaration itself can be viewed as evidence of an emerging *opinio juris* of the international community in respect of principle 4. This is because it has been adopted by consensus, without any State objection; because it is laid down in mandatory language, thus confirming its norm-creating capacity; and because mechanisms have been put in place to monitor the implementation of its provisions.<sup>68</sup> Aside from the Rio Declaration, the principle of integration has also been repeated many times in a vast number of international legal instruments whether treaties or *soft law* instruments,<sup>69</sup> all reflecting the consolidation of the required *opinio juris*.

Regarding the objective or material element, the existence of a consistent practice of States relating to the principle of integration is somewhat more difficult to ascertain. Proving the existence of a practice as such is unproblematic. At the domestic level many States have adopted national sustainable development strategies or other tools endeavouring to integrate economic, social and environmental considerations. Some have created specific institutions to this effect. The generalisation of the use of environmental impact assessments and public participation in the decision-making process are also concrete examples of an integrative decision-making process. Instances of integration at work are also notable at the international level, for example at the World Bank where environmental considerations have been widely incorporated in the Bank’s lending practices. The negotiation or renegotiation of international instruments including previously ignored considerations, be they environmental, social or economic, are also evidence of practice relating to the principle of integration. However, the wide divergence in the situations in which such action takes place means that it is more difficult to prove that they reflect an effective practice, i.e. a practice that is uniform and coherent.

Because of the difficulties that come with proving the existence of a custom, the international community relies heavily on judicial pronouncements in this regard. In fact, a judicial affirmation of the existence of a customary rule will often be considered as the most authoritative evidence of the existence of norms of general international law.<sup>70</sup>

With respect to the principle of integration, the findings in the *Iron Rhine Railway* case are particularly noteworthy. According to the Tribunal, ‘both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities’.<sup>71</sup>

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<sup>67</sup> Article 38(1)(b) of the Statute of the ICJ, 24 October 1945, 33 UNTS 993.

<sup>68</sup> Such as Agenda 21 and the Commission on Sustainable Development.

<sup>69</sup> See *infra* [section 3 (Normative impact).]

<sup>70</sup> See Jennings, R. ‘What is international law and how do we tell when we see it?’ (1981) 37 *Annuaire suisse de droit international* 59, p. 74.

<sup>71</sup> *Iron-Rhine*, *supra* n. 31, para 59.

This statement stands for the proposition that the principle of integration is vested with binding nature in international law. The Tribunal further specified that:

‘Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm [and that] This duty, in the opinion of the Tribunal, has now become a principle of general international law.’<sup>72</sup>

Although it may seem that the Tribunal is here referring to the duty of prevention, a closer look would suggest a different interpretation. At the time of the Award the customary nature of the duty of prevention had indeed already been ascertained by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion of 1996,<sup>73</sup> as acknowledged by the Tribunal itself.<sup>74</sup> It thus appears unlikely that the Tribunal would choose to use language indicating judicial innovation<sup>75</sup> to refer to the customary status of an already well-established principle of general international law. Rather, the language used suggests that it is in fact to the principle of integration that the Tribunal is referring. Thus, it is the principle of integration that has now, in the eyes of the Tribunal, become a principle of general international law.

### **3. Normative impact**

#### *3.1. Overview*

The principle of integration has deeply influenced the content of treaties, as demonstrated by the substantial number of international conventions that have either incorporated environmental considerations or expressly adopted an integrated approach to govern the areas/resources they aim to regulate. Beyond this impact on international instruments, the principle of integration has also started to exert its influence on international jurisprudence, as will be discussed in [section 4] below.

#### *3.2. Environmental clauses in non-environmental treaty contexts*

Certain instruments have given effect to the principle of integration by incorporating traditionally extraneous considerations within their text or treaty system.

This is the case where, for example, classic economic-growth oriented treaties, such as free-trade agreements, have been negotiated or renegotiated to include an environmental chapter. Similarly, bilateral investment treaties and investment chapters in free-trade agreements increasingly refer to environmental considerations in their text.<sup>76</sup> Another example concerns international humanitarian law instruments, which, in some cases, expressly refer to the

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<sup>72</sup> *Idem.*

<sup>73</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226, para 29.

<sup>74</sup> *Iron-Rhine*, *supra* n. 31, para 222.

<sup>75</sup> As suggested by the use of the expression ‘in the opinion of the Tribunal.’

<sup>76</sup> See Viñuales, J. E., *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012), chapter 1.

protection of the natural environment.<sup>77</sup> Still another illustration is, arguably, the reference to environmental protection in some human rights treaties, particularly those concluded after the Stockholm Conference.<sup>78</sup> Although in the two latter examples the principle of integration was implemented *avant la lettre*, they are nevertheless noteworthy because they show the wide span of integration as a concept.

Even in those cases where the treaty body does not explicitly refer to environmental protection, some treaty regimes have expanded to include such previously extraneous considerations through ‘secondary’ decision-making or legislation.<sup>79</sup>

In all these examples, the principle of integration is not referred to as such, but it is, in fact, directly implemented by the very fact that environmental considerations are specifically taken into account. Exceptionally, the principle of integration may be expressly stated in this type of treaties. An example is the preamble of the Convention on the Rights of Persons with Disabilities.<sup>80</sup>

### 3.3. *Integration in multilateral environmental agreements*

The principle of integration has been expressly incorporated into the body of numerous multilateral environmental agreements.

Not surprisingly it is included in the ‘Rio treaties’. The United Nations Framework Convention on Climate Change<sup>81</sup> thus states in its article 3(4) that:

‘Policies and measures to protect the climate system against human-induced change should be [...] integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.’

Similarly, under the Convention on Biological Diversity, parties are required, according to their capacities, to: ‘[i]ntegrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies’<sup>82</sup> and ‘[i]ntegrate consideration of the conservation and sustainable use of biological resources into national decision-making’.<sup>83</sup> Integration is also a central feature of the Convention to combat Desertification. It is through an integrated approach ‘addressing the physical, biological and socio-economic aspects of the processes of desertification and drought’ that the objective to combat desertification is to be achieved.<sup>84</sup>

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<sup>77</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 6 August 1977, 1125 UNTS 3, art. 35(1).

<sup>78</sup> African Charter on Human and Peoples' Rights, 27 June 1981, 21 I.L.M. 58 (1982), art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 16 November 1988, OAS Treaty Series No. 69, art. 11(1); ASEAN Human Rights Declaration, 19 November 2012, available at: [www.asean.org](http://www.asean.org) (visited on 3 February 2014), art. 28(f).

<sup>79</sup> See e.g. the legislative activity of the EU that has over the year expanded its legal regime to social and environmental considerations. On these points, see *supra* [section 2 (Scope and dimensions).]

<sup>80</sup> 13 December 2006, 2515 UNTS 3, preamble, recital (g).

<sup>81</sup> 9 May 1992, 1771 UNTS 107.

<sup>82</sup> 5 June 1992, 1760 UNTS 79, art. 6(b).

<sup>83</sup> *Ibid.*, art. 10(a).

<sup>84</sup> 17 June 1994, 33 ILM 1328], art. 4 (2)(a) (general obligations). See also art. 2(1) and 2(2).

As ‘sustainable development’ treaties negotiated over the same period as the Rio Declaration, the inclusion of integration in the text of these conventions will not come as a surprise.

#### 3.4. *Integration in mixed regimes*

The principle of integration also finds its way into a number of treaties aimed at governing areas where both socio-economic as well as environmental considerations naturally arise, such as the management of international watercourses, lakes, regional seas or mountain areas. Because they will necessarily involve a balancing between the economic uses of these areas and the preservation of their often fragile ecosystem, they are typical examples of why an integrated approach to the management of these resources and ecosystems needs to be adopted in order to achieve sustainable development.

Integration is thus key to the Protocol on the Integrated Coastal Zone Management in the Mediterranean,<sup>85</sup> which is no less than the principle of integration made operational at the ecosystem management level. Not only does the Protocol dwell upon the necessary elements to an integrated management approach (Part II), but it also defines the necessary instruments for its achievement (Part III), which include environmental assessments and economic and financial instruments.<sup>86</sup> An integrated approach is also prominent in the Escaut and Meuse Protection Agreements,<sup>87</sup> the SADC Protocol on Shared Watercourses,<sup>88</sup> the Convention on the Sustainable Management of Lake Tanganyika,<sup>89</sup> the Framework Agreement on the Sava River Basin,<sup>90</sup> the Carpathian Convention,<sup>91</sup> the Mountain Farming Protocol to the Alpine Convention,<sup>92</sup> and the Spatial Planning and Sustainable Development Protocol to the Alpine Convention.<sup>93</sup>

#### 3.5. *Integration in natural resource treaties*

Beyond sustainable development treaties or treaties that specifically call for an integrated approach, the principle of integration also appears in treaties regulating the use of natural resources.

Examples include the International Tropical Timber Agreement,<sup>94</sup> and the International Treaty on Plant Genetic Resources;<sup>95</sup> in nature protection conventions such as the SADC Protocol on Wildlife or the European Landscape

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<sup>85</sup> 21 January 2008, (2009) OJ 434/19.

<sup>86</sup> *Ibid*, art. 19 and 21.

<sup>87</sup> 3 December 2002, (2005) 116 JORF 8731, art. 2 and 3 December 2002, (2005) 116 JORF 8731, art. 2 respectively.

<sup>88</sup> 7 August 2000, 40 ILM 321, art. 2(c).

<sup>89</sup> 12 June 2003, FAOLEX (FAO legal database online), art. 2(1) and 13.

<sup>90</sup> 3 December 2002, FAOLEX (FAO legal database online), art. 11 and 12.

<sup>91</sup> Framework Convention on the Protection and the Sustainable Development of the Carpathians, 22 May 2003, available at:

[http://www.carpathianconvention.org/tl\\_files/carpathiancon/Downloads/01%20The%20Convention/1.1.1.1\\_CarpathianConvention.pdf](http://www.carpathianconvention.org/tl_files/carpathiancon/Downloads/01%20The%20Convention/1.1.1.1_CarpathianConvention.pdf) (accessed on 12 May 2014), art. 2(e), 3 and 4(4).

<sup>92</sup> 20 December 1994, (2006) OJEU L271/63, art. 13.

<sup>93</sup> 20 December 1994, (2006) 32 JORF 1960, art. 10. The principle also appears in the preamble of the Protocol for the Sustainable Development of the Lake Victoria Basin.

<sup>94</sup> 27 January 2006, 2801 UNTS Doc. TD/TIMBER.3/12, art. 24(1).

<sup>95</sup> 3 November 2001, 2400 UNTS 303, art. 5.

Convention;<sup>96</sup> pollution prevention treaties such as the Stockholm Convention on Persistent Organic Pollutants and the Aruba Protocol Concerning Pollution from Land-Based Sources and Activities;<sup>97</sup> or procedural treaties such as the Kiev Protocol on Strategic Impact Assessment to the Espoo Convention.<sup>98</sup> Instruments at the junction between environmental and Human Rights protection have also made reference to the principle of integration. This is for example the case of the Aarhus Convention and its Kiev Protocol on Pollutant Release and Transfer Registers;<sup>99</sup> as well as of the Protocol on Water and Health to the Helsinki Convention.<sup>100</sup>

### 3.6. *Integration in European law*

Another noteworthy treaty system to have widely incorporated the principle of integration is the E.U. legal order.

Beyond its trickle down effect in secondary legislation, the principle appears at article 11 of the TFEU which states that:

‘Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development’<sup>101</sup>

It is also stated in Article 37 of the Charter of Fundamental Rights, according to which:

‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’<sup>102</sup>

Integration also features throughout the EU-ACP Cotonou Partnership Agreement, which equally incorporates economic, social and environmental considerations.<sup>103</sup>

## 4. **Jurisprudential relevance**

### 4.1. *Overview*

As for Treaties, international courts and tribunals have on occasions, though still rather rarely, expressly referred to the principle of integration and used it in their reasoning process to come to a specific conclusion. However, even where judicial bodies do not use the language of integration in their findings, such findings may still, in practice, be an application of integration.

### 4.2. *The jurisprudence of the ICJ*

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<sup>96</sup> 14 August 1999 available at: [http://www.sadc.int/files/4813/7042/6186/Wildlife\\_Conservation.pdf](http://www.sadc.int/files/4813/7042/6186/Wildlife_Conservation.pdf) (accessed on 12 May 2014), art. 7(1) and 20 October 2000, CETS 176, art. 5(d) respectively.

<sup>97</sup> 22 May 2001, 2256 UNTS 119, art.7(3) and 6 October 1999, available at: <http://www.cep.unep.org/cartagena-convention/lbs-protocol/lbs-protocol-english> (accessed 12 May 2014) III(2) respectively.

<sup>98</sup> 21 May 2003, Doc. ECE/MP.EIA/2003/2, Preamble.

<sup>99</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 and 21 May 2003, Doc. MP.PP/2003/1, Preamble in both cases.

<sup>100</sup> 17 June 1999, 2331 UNTS 202, art. 4(1), 5(j) and 6(2).

<sup>101</sup> 1 December 2009, (2012) OJEU C 326/47, art. 11.

<sup>102</sup> 7 December 2000, (2000) OJEC C 364/1, art. 37.

<sup>103</sup> 4 November 2010, OJEU L 287.

The I.C.J. itself has given effect to some extent to the principle of integration on two occasions.

In the *Gabcikovo-Nagymaros Project* case, the Court recognised the need to reconcile economic development with the protection of the environment. Specifically, it considered that new environmental norms and standards have to be given proper weight when States:

‘contemplate new activities [and] [...] when continuing with activities begun in the past’; and concludes that this means that ‘the Parties should look afresh at the effects on the environment of the operation of the Gabcikovo power plant’<sup>104</sup>

Thus, the Court it did nothing less than enjoin the parties to give effect to the principle of integration by negotiating an agreed solution incorporating such considerations into the original treaty. In fact the Court does actually go so far as using the language of integration and adds that:

‘It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and *integrated* way, as well as [of] the norms of international environmental law...’<sup>105</sup>

In the *Pulp Mills* case<sup>106</sup> again, by recalling its findings on the need to reconcile economic development and environmental protection in the *Gabcikovo-Nagymaros Project* case<sup>107</sup> and requesting the Parties to cooperate in order to ‘jointly manage the risks of damage to the environment’,<sup>108</sup> it in effect asks the parties to apply the principle of integration.

Although the recent *Whaling in the Antarctic* decision<sup>109</sup> does not mention either the principle of integration or sustainable development, it confirms that the conservation of whales, together with their sustainable exploitation, forms part and parcel of the object and purpose of the International Convention on the Regulation of Whaling.<sup>110</sup> This reading of the object and purpose thus endorses the evolution of the ICRW from a treaty regime originally intended for the development of the whaling industry to one that now integrates nature protection and conservation considerations.

#### 4.3. *The Iron-Rhine Arbitration*

The clearest and boldest application of the principle of integration however is attributable the Permanent Court of Arbitration in the *Iron Rhine Railway* case. The Tribunal indeed not only affirms that ‘international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities’<sup>111</sup> but it then immediately

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<sup>104</sup> *Gabcikovo-Nagymaros*, *supra* n.63, para 140.

<sup>105</sup> *Ibid.*, para 141 (emphasis added).

<sup>106</sup> *Pulp Mills*, *supra* n. 63.

<sup>107</sup> *Gabcikovo-Nagymaros*, *supra* n.63, para 76.

<sup>108</sup> *Pulp Mills*, *supra* n.63, para 77.

<sup>109</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, ICJ, 31 March 2014, not yet reported, available at <http://www.icj-cij.org/docket/files/148/18136.pdf> (accessed on 12 May 2014).

<sup>110</sup> 2 December 1946, 161 UNTS 72. See in particular *Whaling in the Antarctic* case, *supra* n. 109, para 56.

<sup>111</sup> *Iron-Rhine*, *supra* n. 31, para 59.

adds that principle 4 of the Rio Declaration reflects this trend. It then goes on to clarify the specific implications of the principle by adding that:

‘these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.’<sup>112</sup>

Importantly, it is later on the basis of this requirement that the solution to the dispute is founded. In a pure application of the principle of integration and of the requirement of sustainable development, the Tribunal finds both Belgium’s economic interests and the Netherlands’ environmental preoccupations to be legitimate and in need of reconciliation, thus necessitating a careful balancing.<sup>113</sup> However this time, the balancing is carried out by the Tribunal itself, rather than by the parties as was the case in the *Gabcikovo-Nagymaros Project* decision. And in fact the Tribunal concludes that even though Belgium has the right to reactivate the Iron Rhine, such reactivation may well necessitate environmental protection measures since:

‘The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs.’<sup>114</sup>

Not only does the tribunal, on this basis, integrate the required Dutch environmental measures into the project, but it also further allocates the financial burdens of such measures by balancing out each Party’s legitimate interests and benefits from the railway, thus reintegrating economic interests in the apportionment of costs.<sup>115</sup>

#### 4.4. *The jurisprudence of the WTO Dispute Settlement Body*

Express references to the principle of integration can also be found in the WTO’s Appellate Body ruling on the *Shrimp-Turtle* case when the Appellate Body refers to the concept of sustainable development and the Ministerial Decision on Trade and Environment.<sup>116</sup>

More significantly, by incorporating a definition of natural resources based on modern environmental instruments into the WTO Agreement text, it does in practice integrate environmental considerations into a primarily economic treaty. This is all the more so as this evolutive interpretation is grounded in the acknowledgement of the objective of sustainable development in the Preamble to the WTO Agreement, which the Appellate Body defines as the integration of economic and social development and environmental protection.<sup>117</sup>

The objective of sustainable development, and the integration of the various considerations that it requires, also informed the interpretation of the notion of

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<sup>112</sup> *Idem.*

<sup>113</sup> *Ibid.*, para 220-221.

<sup>114</sup> *Ibid.*, para 223.

<sup>115</sup> *Ibid.*, para 224-234.

<sup>116</sup> See *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 1998, at footnotes 107 and 147.

<sup>117</sup> *Ibid.*, at para 129.

conservation in article XX(g) of the GATT in the *Raw Materials* case.<sup>118</sup> The acknowledgment of this objective in the Preamble to the WTO Agreement meant for the Panel that:

‘a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development.’<sup>119</sup>

This, in turn, required the making of policy choices and prioritisation among different objectives (economic, social, environmental) which could not be viewed in isolation as they were ‘related facets of an integrated whole’.<sup>120</sup> In the same dispute, the Appellate Body also noted that in view of the various objectives listed in the preamble to the WTO Agreement (including the preservation of the environment and the objective of sustainable development), the WTO Agreement as a whole should be understood to reflect the balance struck between trade and non-trade related concerns.<sup>121</sup>

The definition of the notion of conservation in the light of these considerations was then further elaborated in the *Rare Earth* case.<sup>122</sup> In this dispute, the Panel confirmed that the principles of sovereignty over natural resources and sustainable development embodied in principles 2 and 4 of the Rio Declaration needed to be taken into account when interpreting article XX(g) and the notion of conservation.<sup>123</sup> According to the Panel, a definition of conservation in the light of these principles meant that conservation could not be read as being limited to the mere preservation of natural resources but also included the need to use them in a sustainable manner.<sup>124</sup> Interestingly, the Panel carefully added that the definition of conservation thus adopted:

‘strikes an appropriate balance between trade liberalization, sovereignty over natural resources, and the right to sustainable development.’<sup>125</sup>

It is, in other words, the product of an integrative judicial decision-making process.

#### 4.5. *The jurisprudence of Investment Tribunals*

In contrast to trade related disputes the principle of integration is at pains to find its way into the jurisprudence of arbitral tribunals adjudicating on investment related disputes. In fact, these are mostly silent about either integration or sustainable development. A notable exception is that of the *SD Myers v Canada*

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<sup>118</sup> *China-Measures Related to the Exportation of Various Raw Materials*, Panel Report, WT/DS 394/12, 2011.

<sup>119</sup> *Ibid*, para 7.375.

<sup>120</sup> *Ibid*, para 7.376. The Panel also concluded that article 31(3)(c) of the Vienna Convention on the Law of Treaties meant that in interpreting article XX(g) of the GATT it had to take into account the principle of sovereignty over natural resources which ‘affords Members the opportunity to use resources to promote their own development while regulating the use of these resources to ensure sustainable development’ at para 7.381.

<sup>121</sup> See *China- Measure Related to the Exportation of Various Raw Materials*, Appellate Body Report, WT/DS 394/AB/R, 2012, at para 306.

<sup>122</sup> *China- Measures Related to the Exportation of rare earths, Tungsten, and Molybdenum*, Panel Report, WT/DS 431/R, 2014.

<sup>123</sup> See *ibid*, para 7.262.

<sup>124</sup> See *ibid*, para 7.267.

<sup>125</sup> *Ibid*, para 7.277.

case<sup>126</sup> were the Tribunal considered that the legal context of Article 1102 (on national treatment) included the various provisions of the NAFTA, the NAAEC and principles that are affirmed by the NAAEC, including those of the Rio declaration, and notably the principle that ‘environmental protection and economic development can and should be mutually supportive’.<sup>127</sup>

#### 4.6. *The jurisprudence of the European Court of Justice*

The principle of integration also finds expression in European jurisprudence. As one of the treaty based principles of EU law<sup>128</sup> it is not surprising that it has been applied and made operational by the European Court of Justice.

In its *Greece v Council* case the Court first made clear that what is now article 11<sup>129</sup> meant that ‘all Community measures must satisfy the requirements of environmental protection’<sup>130</sup> and that this obligation implied more than merely taking such requirements into consideration since it added that this: ‘implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.’<sup>131</sup>

This reading of the principle of integration was soon confirmed in the *Titanium dioxide* case where the Court clarified that: ‘That principle implies that a Community measure cannot be covered by Article 130s merely because it also pursues objectives of environmental protection.’<sup>132</sup> According to EU case law, the principle of integration thus seems to require more than environmental protection to be taken into account but that it be satisfied. In the words of one Advocate General, it may even be vested with direct effect.<sup>133</sup>

As far as its application is concerned, an example can be found in the *Concordia* case where it was used to allow the integration of environmental considerations in a public procurement directive that was silent on the matter.<sup>134</sup>

#### 4.7. *The jurisprudence of the European Court of Human Rights*

The idea of integration, if not the word as such, can also be found in European human rights case law. The requirement by the E.C.t.H.R. that a fair balance be struck between individual rights and the State’s general interest, could indeed, in cases involving individuals’ environmental concerns,<sup>135</sup> reflect a variant of the principle of integration. In the *Hatton* case, the Court noted that:

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<sup>126</sup> *SD Myers, Inc. v Canada*, UNCITRAL case, Partial Award, 13 November 2000, 121 ILR 173.

<sup>127</sup> See *ibid.*, para 247.

<sup>128</sup> See TFEU, *supra* n.101, art. 11.

<sup>129</sup> The Court was then referring to article 130 (r)(2) last sentence which read ‘Environmental protection requirements shall be a component of the Community’s other policies.’

<sup>130</sup> *Hellenic Republic v Council of the European Communities*, Case C-62/88, 29 March 90, para 20.

<sup>131</sup> *Idem.*

<sup>132</sup> *Commission of the European Communities v Council of the European Communities*, Case C-300/89, 11 June 91, para 22.

<sup>133</sup> Advocate General Cosmas Opinion in case C-321/95P *Greenpeace v Council*, delivered on 23 September 97, para 62.

<sup>134</sup> See *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and HKL-Bussiliikenne*, Case C-513/99, 17 September 2002, para 57.

<sup>135</sup> Under article 8 generally.

‘a governmental decision-making process concerning complex issues of environmental and economic policy [...] must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake.’<sup>136</sup>

In such situations however the Court does not carry out the balancing itself, rather, as confirmed in *Fadeyeva*, it controls whether such balancing has taken place at the State level and whether in doing so the State has not exceeded its margin of appreciation.<sup>137</sup> Although there are clear practical connections between the fair balance requirement and the principle of integration, viewing this case-law as an example of integration *per se* remains may be perceived as an overstretch. At the time of the recognition of the principle of integration in the Rio Declaration, the balancing of competing rights and interests had already long been an element of the ECtHR’s jurisprudence.

In practice however, the principle of integration and the fair balance requirement may well pursue the same objectives, i.e. a reconciliation of economic and environmental considerations.<sup>138</sup>

### III. RELATIONS WITH OTHER PRINCIPLES

Certain key principles of the Rio Declaration are intimately connected to the integration principle in that they serve as integrative tools and their application thus forms part and parcel of any duty to integrate environmental protection and socio-economic development.

This is most notably the case of Principle 17 on environmental impact assessments. The conduct of an EIA of an economic development project is indeed central to an integrative decision-making process and has even been referred to as ‘one of the most powerful integrative tools currently available to decision-makers’.<sup>139</sup>

Probably on an equal footing with Principle 17 is Principle 10 on participative decision-making. An integrative decision-making process clearly involves the adequate participation of all concerned actors and the collection and dissemination of all necessary information. The respect of Principle 10 is thus also necessary to the respect of Principle 4.

Beyond EIAs and participative decision-making, an integrative decision-making process may also involve the respect of Principle 16 establishing the polluter-pay principle; Principle 15 on the precautionary approach; or Principle 19

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<sup>136</sup> *Hatton v UK*, Grand Chamber, ECtHR Application no. 36022/97, Judgment (8 July 2003), para 128.

<sup>137</sup> See *Fadeyeva v Russia*, ECtHR Application no. 55723/00, Judgment (9 June 2005), para 128: ‘it is not the Court’s task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the Court’s jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests’, and at para 134: ‘The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life’. See also *Hatton v UK*, *supra* n. 136, para 129: ‘In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole’.

<sup>138</sup> The fair balance requirement remains nevertheless much wider in scope than the principle of integration as its application is not limited to environmental cases but is meant to apply to all the qualified rights of the ECHR, beyond their potential environmental implications.

<sup>139</sup> See ILA (2006), *supra* n.48, p. 8 and ILA, Sofia Conference (2012) International Law on Sustainable Development, p. 34.

on notification and consultation with other States on activities that may have a significant adverse transboundary environmental effect.

The principle of integration finally entertains a special relationship with the objective of sustainable development. Although not technically one of the principles of the Rio Declaration, the Declaration can still overall be understood as being about sustainable development and in particular Principle 4 is commonly seen as the core philosophy underlying the concept.<sup>140</sup> For some commentators:

‘Principle 4 is the closest the Rio Declaration comes to a definition of ‘sustainable development’, generally succeeding at finding the balance between development and environment considerations. At its best, the principle reflects a more action-oriented approach toward defining sustainable development than many of the Declaration’s other principles.’<sup>141</sup>

Although it would be unduly restrictive to conclude that integration is neither more nor less than sustainable development, as it would make most of the other principles of the Declaration redundant, it is still the essential means by which sustainable development may be achieved. A useful way to describe the relationship between sustainable development and integration is to see sustainable development as the substantive objective to be achieved and integration as the technique for the realisation of this objective. As such the assessment of whether adequate integration of socio-economic and environmental considerations took place provides a useful standard of measure of the efforts States make towards achieving sustainable development.

#### IV. ASSESSMENT

Whether integration as embodied in principle 4 of the Rio Declaration proves to be an effective technique in achieving sustainable development will ultimately depend on whether States, and relevant institutions at the domestic level, apply the principle properly. In most circumstances, integration should require a modification of the outcomes of decisions reflected by an inclusive decision-making process, rather than by merely taking all considerations into account.

The principle of integration also reflects a potentially powerful tool in the hands of judges, both at the domestic and international level, to review the outcome of decisions impinging on sustainable development. The effectiveness of the principle of integration as a standard of review however will depend on the extent to which judges are willing or able to make use of it. Despite a few applications of the principle of integration, it is at pain to properly take off in international jurisprudence. Will courts and tribunals be willing to control the application of the principle of integration in terms of outcome rather than merely in terms of process? Should judges only review whether a balancing of different considerations took place or should they go further and review the adequacy of

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<sup>140</sup> See Maljean-Dubois, S. and R. Mehdi, ‘Environnement et développement, Les Nations Unies à la recherche d’un nouveau paradigme’, in Maljean-Dubois, S. and R. Mehdi (eds.), *Les Nations Unies et la protection de l’environnement: La promotion d’un développement durable* (Paris : Pedone, 2000), pp. 9-68, p. 24; Boyle, Freestone, *supra* n.33, pp. 10-12; Fitzmaurice, M., *supra* n.41, p. 52; French, D. *International Law and Policy of Sustainable Development* (Manchester University Press, 2005), p. 54; ILA, *supra* n. 48, p. 2.

<sup>141</sup> Kovar, J. D., ‘United Nations Conference on Environment and Development (UNCED). A Short Guide to the Rio Declaration’ (1993) 4 *Colorado JIELP* 119, p. 127.

such balancing? In other words are judges to review whether all considerations have been given proper weight? Or should they go even further and carry out the balancing themselves, as they seem to have done in the *Iron Rhine Railway* arbitration?

There is little indication of any consistent approach in international case-law so far. Inspiration could however be drawn from the standards followed by the ECtHR when reviewing the legitimacy of a State interference with a qualified right.<sup>142</sup> The crux of this standard of review is that of the proportionality of the interference in the light of the objective pursued. In such matters, although the Court does not purport to carry out the balancing itself, it does review and scrutinise closely the weight attributed to each relevant consideration by the State and not only whether they have been taken into account. It is also for the Court to determine whether, in each particular case, a fair balance has been struck or not.<sup>143</sup>

As far as the principle of integration is concerned, the greater the intensity of the review, the more effective the principle will be in achieving sustainable development. And arguably, the flexibility of the objective of sustainable development correlatively grants judges a wide margin of discretion in determining whether adequate efforts have been demonstrated or not. In that sense the principle of integration could indeed be a powerful tool in the hands of judges in reviewing whether a fair balance has been struck between competing interests, that is obviously, should judges be willing to make use of it.

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<sup>142</sup> A human right that States may interfere with provided that this interference is in accordance with law, for a legitimate aim and necessary in a democratic society.

<sup>143</sup> See the references cited *supra* n.137.

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