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ABSTRACT

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Author(s): Christine Frison

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The Principles of Sustainable Development in the Context of the International Treaty on Plant Genetic Resources in Food and Agriculture

Christine Frison*

This article analyzes the main features of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) through the lens of the principles established under the New Delhi Declaration of Principles of International Law Relating to Sustainable Development. The aim of this piece is to demonstrate how the ITPGRFA reflects the textual and implicit principles of sustainable development law as they were intended for the consumption of the international community. Herein, the author defines and locates these principles and highlights the role which they assume in the Treaty.

Cet article présente une analyse des principaux aspects du Traité international sur les ressources phytogénétiques pour l'alimentation et l'agriculture à travers les principes juridiques élaborés sous la Déclaration de New Delhi sur les principes du développement durable en droit international, l'auteur veut démontrer comment le Traité reflète de façon textuelle ou implicite les principes du développement durable tels qu'entendus par la communauté internationale. Il sera ici question de définir et situer ces principes ainsi que de souligner leur rôle dans le contexte du Traité.

* Christine Frison is a Legal Research Fellow in Biodiversity and Biosafety legal issues at the Centre for International Sustainable Development Law (CISDL). The author thanks the following contributors: Kathryn Garforth, CISDL Researcher on Biodiversity and Biosafety Issues, Jorge Cabrera, CISDL Lead Counsel for the Biodiversity Programme, Kent Nnadozie, CISDL Lead Counsel for the Natural Resources Programme, Olivier Rukundo, CISDL Associate Fellow & Marie-Claire Cordonier Segger, CISDL Director.

The *International Treaty on Plant Genetic Resources for Food and Agriculture* (ITPGRFA) was adopted by the Food and Agricultural Organization (FAO) Conference on 3rd November 2001.[1] It was negotiated in order to create a legally binding international instrument addressing the special problems associated with plant genetic resources for food and agriculture (PGRFA). It was discussed within the framework of the FAO and its Commission on Genetic Resources for Food and Agriculture as a revision of the International Undertaking on Plant Genetic Resources of 1983.[2] The ITPGRFA came into force on 29 June 2004, 90 days after the deposit of the 40th instrument of ratification[3] by a signatory member.[4] This new *Treaty* achieves one of the objectives set by *Agenda 21* in the Earth Summit of 1992:[5] the conservation and sustainable utilization of plant genetic resources for food and sustainable agriculture. Its text is in harmony with the *Convention on Biological Diversity*,[6] as requested by Resolution 7/93 of the FAO Conference. The ITPGRFA recognizes that:

> the conservation, exploration, collection, characterization, evaluation and documentation of plant genetic resources for food and agriculture are *essential in meeting the goals of the Rome Declaration on World Food Security* and the *World Food Summit Plan of Action and for sustainable agricultural development for this and future generations* [...]"[7] [emphasis added].

This international context helped in determining the objectives of the *Treaty*, which are:

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1 *International Treaty on Plant Genetic Resources for Food and Agriculture*, 3 November 2001, online: Food and Agricultural Organization of the United Nations < ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe. pdf>.

2 *FAO Conference*, Res. 8/83, FAO, 22nd Sess, (1983), online: Food and Agricultural Organization of the United Nations <ftp://ftp.fao.org/ag/cgrfa/res/c8-83e.pdf>.

3 *Supra* note 1, art. 28.

4 On 3rd January 2006, 81 countries were parties to the Treaty.

5 *United Nations Conference on Environment and Development, Agenda 21*, 14 June 1992, para. 14.60, online: United Nations Department of Economic and Social Affairs <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>.

6 *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 142, Can. T.S. 1993 No. 24 [CBD].

7 *Supra* note 1, at 4th preamble.

> 1.1 [...] *the conservation and sustainable use* of plant genetic resources for food and agriculture and the *fair and equitable sharing of the benefits* arising out of their use, in harmony with the Convention on Biological Diversity, for *sustainable agriculture* and *food security*.
>
> 1.2 These objectives will be attained by closely linking this *Treaty* to the Food and Agriculture Organization of the United Nations and to the Convention on Biological Diversity[8] [emphasis added].

The *Treaty* applies to PGRFA:[9] "any genetic material of plant origin of actual or potential value for food and agriculture."[10]

To attain these goals, the ITPGRFA has created original and innovative rights and obligations. The *Treaty* imposes obligations on Contracting Parties with respect to the conservation, exploration, collection, characterization, evaluation, and documentation of PGRFA (Article 5), and the sustainable use of PGRFA (Article 6). Article 7 requires Contracting Parties to integrate the activities referred to in Articles 5 and 6 into their agriculture and rural development policies and programs, and to cooperate with other Contracting Parties. Furthermore, the *Treaty* recognizes Farmers' Rights,[11] the realization of which rests with national governments. Farmers are thereby recognized as "donors of genetic resources. This recognition, as an incidental benefit of the formal recognition of those rights, happened to counterweight plant breeder's rights (rights of the donors of technology)."[12] The ITPGRFA also provides for the adoption by the Governing Body[13] of a funding strategy[14] for the implementation of the *Treaty*. This agreed-upon strategy aims at mobilizing funding from multilateral, bilateral, and voluntary sources.[15]

In addition, the ITPGRFA provides significantly for the establishment of a Multilateral System (MLS) of Access and Benefit-Sharing[16] for plant genetic resources of the world's major food crops and forage species.[17] These crops, listed in Annex I of the *Treaty*, are crucial for food security and constitute the foodstuff on which countries

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8 *Ibid.*, art. 1.

9 *Ibid.*, art. 3.

10 *Ibid.*, art. 2.

11 *Ibid.*, art. 9.

12 José T. Esquinas-Alcázar, "Genetic Resources for Food and Agriculture: International Treaty on Plant Genetic Resources for Food and Agriculture and Other International Agreements Negotiated Through the FAO Commission on Genetic Resources for Food and Agriculture" in Morten Bergsmo, ed., *Human Rights and Criminal Justice for the Downtrodden* (Leiden: Breill Academic Publishers, 2003) 233 at 235.

13 *Supra* note 1, article 19. The Governing Body composed of all Contracting Parties oversees the implementation of the Treaty. Decisions of the Governing Body are to be taken by consensus, which means that every Contracting Party, however small, has an equal say in the decisions of the Governing Body and the power of veto. See, *Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture and Interim Arrangements for its Implementation*, FAO Conference Resolution 3/2001, online: www.fao.org/docrep/MEETING/004/Y2650e/Y2650e01.htm#3.

14 *Ibid.*, art. 18.

15 The Global Crop Diversity Trust will be an essential element of the funding strategy. It is an endowment fund being set up by FAO and IPGRI under the policy guidance of the Governing Body of the Treaty to provide funds in perpetuity for *ex situ* collections of PGRFA.

16 *Supra* note 1, arts. 10-13.

17 However, many important crops and forages vital to food security like soybean remain excluded of the system.

are most dependent.[18] While the MLS applies exclusively to the crops and forages listed in Annex I, the other rights and obligations deriving from the *Treaty* apply to all PGRFA. The MLS provides that the Contracting Parties, in the exercise of their sovereignty, agree to grant facilitated access to PGRFA under their management and control and in the public domain, in accordance with the terms and conditions set out in Article 12 of the *Treaty*. These terms and conditions include the requirement that recipients shall not claim intellectual property rights that would limit facilitated access to the PGRFA or their genetic parts and components, in the form received from the MLS.[19] Article 13 provides that access to PGRFA, exchange of information, access to and transfer of technology, capacity building, and the sharing of monetary and other benefits of commercialization are part of the benefit-sharing of the MLS.

Concerning commercialization, there is an obligation requiring that a recipient of material from the MLS, who commercializes a PGRFA product that incorporates material accessed from the MLS, must pay an equitable share of the commercial benefits to a fund under the control of the *Treaty*'s Governing Body.[20] This obligation is only triggered if further access to the material or resultant product is restricted by the recipient, for instance through intellectual property rights. Payment is otherwise voluntary. The terms and conditions of the MLS, including details on the type and level of payments to be made, will be set up in a standard Material Transfer Agreement (MTA) to be put together by the Governing Body of the *Treaty*.[21] Parties should take measures to provide such access to other Contracting Parties through the MLS in order to facilitate access to PGRFA within their respective jurisdictions.

In sum, the *Treaty* imposes on its member parties the obligation to conserve and utilize PGRFA in a sustainable manner. It also imposes an obligation on member States to facilitate access to the resources under their management and control and in the public domain.[22] The MLS further guarantees the equitable and fair sharing of the benefits arising from the commercialization of a PGRFA product.

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18 This list of crops and forages is established according to criteria of global food security and interdependence and it is estimated that these crops, combined, provide about 80% of our food from plants.

19 *Supra* note 1, art. 12.3(d). The vagueness of the phrase "genetic parts and components, in the form received…" provides a major definitional challenge for the parties. Clarification of this and other terms are, however, some of the priority issues to be dealt with by the Governing Body of the Treaty during its initial meetings.

20 *Ibid.*, art. 13.2d(ii).

21 *Supra* note 1, art. 12.4.

22 *Ibid.*, art. 12.

1.1 Sustainable development law and the Treaty

The *Treaty* states in its preamble:

> this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to *sustainable agriculture* and *food security* [...][23] [emphasis added].

"Sustainable agriculture and food security" are also part of the explicit objectives of the *Treaty*.[24] Moreover, it recalls that:

> questions regarding the management of plant genetic resources for food and agriculture *are at the meeting point between agriculture, the environment and commerce, and convinced that there should be synergy among these sectors"*[25] [emphasis added].

These provisions exemplify the "highly integrated sustainable development law"[26] orientation of the ITPGRFA. The *Treaty* recognizes from the beginning its multisectoral[27] origin and application. In fact, plant genetic resources constitute the basis of not only many peoples' food, but also that of their livelihood, medicine, clothing, and local economy. This shows that, in addition to the environmental goals of the ITPGRFA – those relating to the conservation and sustainable use of PGRFA – there are very strong social and economic elements in this new international instrument. A basic indication of the *Treaty*'s orientation to the principle of sustainable development is the fact that the word "sustainable" is used 23 times in the text of the first 18 articles.

In addition to the integration of social, economic and environmental issues, the *Treaty* additionally recognizes the interdependence between generations.[28] Sustainable development is defined by the Brundtland Report as

> seek[ing] to meet the needs and aspirations of the present without compromising the ability to meet those of the future.[29]

The preamble of the ITPGRFA states that member parties are aware:

> of their responsibility to past and future generations to conserve the World's diversity of plant genetic resources for food and agriculture."[30]

This reference to past and future generations impacts the ITPGRFA. Farmers' rights have been recognized because of the importance of interdependence between past generations and expected future generations. Farmers are being recognized as central actors in the creation, conservation, and sustainable use of PGRFA and global food security.

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23 *Ibid.*, 9th preamble.

24 *Ibid.*, art. 1.

25 *Ibid.*, 12th preamble.

26 Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (New York: Oxford University Press, 2004) at 108.

27 For an explanation of the integrative character of Access and Benefit-Sharing, see: K. Garforth, M. Toering Sanders and H. Suthan, "A New Regime on Access to Genetic Resources and Benefit-Sharing?", CISDL Legal Brief (Montreal: March, 2003), online: <http://www.cisdl.org/publications/legalbriefs.html>.

28 *Supra* note 12 at 234.

29 *Our Common Future: Report of the World Commission on Environment and Development*, UN GAOR, UN Doc. A/42/427 (1987) at 51.

30 *Supra* note 1, 13th preamble.

This recognition leads to innovative attitudes and developments in the International Community.

Therefore, the ITPGRFA brings together environmental, social and economic issues to reach its objectives of conservation and sustainable use of PGRFA for the good of present and future generations by assuring sustainable agriculture and food security. This demonstrates that the *Treaty* creates a highly integrated international sustainable development law regime.

1.2 Methodology

This article does not aim to analyze the ITPGRFA's negotiation process. Rather, it seeks to interpret the international norms created by the 2001 ITPGRFA in accordance with principles of sustainable development law.

With respect to principles of the sustainable development[31] on which the author relies to examine the *Treaty*, the intent is not to demonstrate whether they are recognized principles in public international law. This article assumes that these principles exist and that they are either recognized or are close to such recognition. Moreover, the sustainable character of the *Treaty*, from a scientific point of view, is not denied. The aspiration of this brief is rather to demonstrate that actual public international norms and instruments are inspired from and apply sustainable development law principles.

2. SUSTAINABLE DEVELOPMENT LAW PRINCIPLES

The International Law Association (ILA) is a worldwide organization composed of academics and practising professionals, who have an interest for international law. The ILA aims to study, clarify and develop both public and private international law. Its International Committees pursue work and research in the different fields and the biennial conferences provide a forum for comprehensive discussion and endorsement of the work of these committees. The ILA adopted by consensus at its Conference in New Delhi, India, 6 April 2002: the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*. Throughout this declaration, the ILA emphasizes that sustainable development is a matter of concern to both developing and industrialized countries. The ILA also points out the growing inequalities between and within States as well as the factors affecting the participation of developing countries in the global economy.

The body of the ILA Declaration consists of Seven Principles:

1. The duty of States to ensure sustainable use of natural resources;
2. Integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives;
3. Equity and the eradication of poverty;
4. Common but differentiated responsibilities;
5. Public participation and access to information and justice;

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31 See International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, ILA Resolution 2/2002, 70th Conference, UN Doc. A/57/329 (2002) [*New Delhi Declaration*].

6. The precautionary approach to human health, natural resources, and ecosystems; and

7. Good governance.

This declaration of principles forms the base of this paper, since it expresses and recognizes the primary principles of sustainable development law. The fact that this declaration has been adopted after the approval of the *Treaty* by the FAO Conference is not relevant, as the author assumes that these are fundamental principles already in existence before the adoption of the International Labour Association (ILA) Declaration of New Delhi, in which they were further recognized and articulated. Indeed, the fact that these principles can be identified in the *Treaty* is evidence of their pre-existing nature. This article will therefore derive a parallel analysis between the ILA principles and the ITPGRFA, nonetheless recognizing that there is no link of causality between the two agreements.

2.1 Duty of States to ensure sustainable use of natural resources

The duty of States to ensure sustainable use of natural resources covers two aspects of public international law. The first lies in the sovereign right of a State over the natural resources located in its territory of jurisdiction (on its jurisdictional soil, underground, at sea, and in air). The second lies in the limit imposed by other States' right to do the same. This limit supposes that a State has the obligation not to cause damage to other States' territory, such as by allowing dangerous pollution to escape into neighboring States. It forms the basis for the well-established principle of *sic utere tuo* under international law.[32] In this context, States must not exploit their natural resources in such a manner as to jeopardize those of neighboring states. This injunction or negative obligation not to cause damage seems to have been re-formulated as a positive obligation[33] to ensure the conservation and sustainable use of natural resources.

To this end, the ITPGRFA imposes an obligation to ensure the conservation and sustainable use of PGRFA. Articles 5 and 6 of the *Treaty* deal with the "conservation, exploration, collection, characterization, evaluation, and documentation of PGRFA"[34] along with the sustainable use of PGRFA. Article 8 contains an obligation to promote "technical assistance" in order to help developing countries implement the *Treaty* obligations. Clearly, these obligations concur with the sustainable development principle articulating the duty of States to ensure a sustainable use of natural resources,[35] which includes

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32 *Sic utere tuo ut alienum non laedas,* a common law maxim meaning, literally "so use your property as not to injure your neighbour's" (see Wayne Morrison, ed., *Blackstone's Commentaries on the Laws of England* (London: Cavendish, 2001) vol. 1 at 232). This is also the principle of neighbourhood and liability for damage under customary international law (now largely codified), which was clearly enunciated in the famous case of the *Trail Smelter Arbitration.* The dispute arose between the United States and Canada over the emission of sulphur fumes from a smelter in Canada which caused environmental damages, including damages to orchards, in the neighbouring US state of Washington. In the arbitral award, the Tribunal held that, under international law, "...no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . ." (1931-1941), 3 R.I.A.A. 1905 at 1965 [*Trail Smelter*].

33 Cordonier Segger & Khalfan , *supra* note 26 at 110.

34 *Supra* note 1, art. 5.

35 *New Delhi Declaration, supra* note 31, principle 1.

plant genetic resources for food and agriculture. Numerous international treaties recognize plant genetic resources as natural, renewable resources.[36]

The ITPGRFA establishes different ways of achieving its objective of the "sustainable use" of PGRFA, including pursuing fair agricultural policies that promote diverse farming systems, promoting the expanded use of local crops, supporting the wider use of diversity of species and varieties, increasing the range of genetic diversity available to farmers.[37] These measures form part of a general setting of possible political and legal measures to promote the sustainable use of PGRFA.

The duty of States to ensure sustainable use of natural resources also implies that States have sovereignty over their natural resources. Within limits established by international law, States will act according to their own laws on natural resources within their territory.[38] In the ITPGRFA, Article 4 states that each Contracting Party is required to "ensure the conformity of its laws, regulations, and procedures with its obligations as provided in this *Treaty*." Article 7 requires the Contracting Parties to apply their commitments in their national policies and programs as well as through international cooperation. Article 10 recalls that the MLS is established by the Contracting Parties "in the exercise of their sovereign rights".[39] Therefore, the obligations deriving from the *Treaty*, especially the rights and obligations drawn from the MLS of Access to PGRFA and Benefit-Sharing arising out of PGRFA's use, constitute the expression of every Contracting party's sovereignty. The Parties have the duty to ensure that these obligations are translated into national policies and legislation in accordance with the public international law principle to fulfill obligations in good faith, a duty repeated in Article 21 of the *Treaty* which sets up compliance systems and mechanisms through the Governing Body.

The duty to ensure sustainable use of PGRFA is also expressed in Article 14 of the *Treaty*. Article 14 enjoins States to promote the effective implementation of the Global Plan of Action[40] through national actions and international cooperation. This Global

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36 I.e. IT, *supra* note 1, art. 2, s. 3 defines "*genetic material*" as "any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity"; art. 2, s. 2: "*PGRFA*" signifies "any genetic material of plant origin of actual or potential value for food and agriculture"; see also CBD, *supra* note 6. Art. 2, s. 2, defines "*biological resources*" as "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity." See also the *ILA New Delhi Declaration*, principle 1.3: "[t]he protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, *biological diversity and fauna and flora* of the Earth, are the common concern of humankind" *New Delhi Declaration, supra* note 31 at 213 [emphasis added]; and, the *African Convention on the Conservation of Nature and Natural Resources*, 15 Sept. 1968, 1001 U.N.T.S. 3 (entry into force: 16 June 1969). Art. III(a) defines "*Natural Resources*" as "renewable resources, that is soil, water, *flora and fauna*" [emphasis added]. This Convention has been revised and readopted by the Assembly of the African Union on July 11th, 2003 in Maputo. It is not into force yet. This new version defines in its Article V.1 "*Natural Resources*" as "renewable resources, tangible and non tangible, including soil, water, flora and fauna and non renewable resources." Accessible on <http://www.intfish.net/treaties/africa2003.htm> (visited 08/12/2006).

37 IT, *supra* note 1, art. 6.2.

38 Cordonier Segger & Khalfan , *supra* note 26 at 111.

39 This is also in conformity with Article 15 of the Convention on Biological Diversity, *supra* note 6, which reaffirms the sovereignty of states over natural resources within their jurisdiction.

40 Global Plan of Action, adopted by the International Technical Conference on Plant Genetic Resources Leipzig, Germany 17-23 June 1996, accessible on <ftp://ext-ftp.fao.org/ag/cgrfa/GS/gpaE.pdf> (visited 08/12/2005).

Plan of Action sets up means of conservation and sustainable use of PGRFA. It states that:

> [i]n reaffirming the sovereign rights of states over their biological resources, we highlight the fact that formulating an agreed Global Plan of Action addressing plant genetic resources for food and agriculture is an appropriate manifestation of the international community's concern and responsibility in this area.[41]

This Article eases access and use of Genetic Resources for farmers, local breeding companies, and researchers for a better management of "agricultural development in order to reduce crop vulnerability and genetic erosion, and promote increased world food production compatible with sustainable development.[42] The *Treaty* thus contributes to the duty of States to ensure sustainable use of natural resources by imposing obligations at the national level as well as encouraging States to act within their borders.

But the duty to ensure sustainable use of PGRFA has other ramifications. It also leads to the application of another important principle of sustainable development law: the principle of integration and interrelationship. As it has been well expressed by scholars:

> [t]he principle of sustainable use of natural resources demonstrates an integrative potential – it weaves together economic, environmental, and social concerns by mediating between resource use and environmental protection, bearing in mind a collective "concern", or "interest" for the management of resources that extend beyond the territory of single States, based on the obligation not to damage their interests.[43]

2.2 Integration and interrelationship

Sustainable development law represents the intersection of different fields of international law, namely economic development, environmental protection and social improvement. Some international agreements deal with issues situated at the intersection of these fields. The *Treaty* is one of these international accords, as its intrinsic purposes are the protection of the environment, as well as the economic and social development of the people concerned, in addition to incorporating the principles of equity and fairness. The *Treaty* is also part of a complex web of international agreements and negotiations that are taking place in a variety of human rights, economic and environmental fora. These include the World Trade Organization (WTO), the World Intellectual Property Organization, the *Convention on Biological Diversity* (CBD)[44] and the United Nations Conference on Trade and Development (UNCTAD).

The multi-lateral system puts into place facilitated access to PGRFA where access is used solely for the purpose of utilization and conservation for research, breeding, and training for food and agriculture.[45] However, the *Treaty* tackles issues closely related to

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41 *Ibid.* Introduction, s. 1.

42 *Supra* note 1, art. 6.2 (f).

43 Cordonier Segger & Khalfan , *supra* note 26 at 122

44 *Supra* note 6.

45 *Supra* note 1, art. 12.3(a). Purposes including chemical, pharmaceutical and/or other non food/feed industrial uses are expressly excluded from the MLS.

PGRFA, but originating from different fields such as human rights, economy and the environment.

The negotiating States combined environmental, social, and economic considerations when creating the *Treaty*. Article 5.1 explicitly provides for the "integrated approach" that should be promoted by States for the exploration, conservation, and sustainable use of PGRFA. The main duty is to conserve PGRFA and avoid, if possible, their genetic erosion. Article 5 then takes into account social aspects, such as the obligation to support farmers' and local communities' efforts to manage and conserve their on-farm PGRFA.[46] Article 6.2(c) also expresses this integrated approach when exhorting States to promote the development of "varieties particularly adapted to social, economic and ecological conditions".

The most explicit expression of human rights concerns in the ITPGRFA lies in Article 9 on "Farmers' Rights". Contracting Parties are encouraged to take measures to protect and promote Farmers' Rights but are allowed considerable flexibility in choosing what measures to take. Local farming communities are recognized as playing an important role in the development and conservation of PGRFA. This recognition creates the right to take part in the debate at a national level.[47] They are assured the right to receive part of the benefits from the utilization of genetic resources that they have contributed in developing. This is a major advancement in indigenous and local communities' rights.

An economic implication of the *Treaty*'s obligations can be found in Article 13 on Benefit-Sharing in the multi-lateral trading system. Benefits to be derived from these provisions include exchange of information, access to and transfer of technology, capacity building, and sharing of monetary and other benefits of commercialization. Most importantly, Benefit-Sharing allows everyone to have low-cost or free access to a large list of PGRFA. Therefore, if the benefit-sharing provisions of the multi-lateral trading system come to fruition, local economies could be strengthened through the introduction of new knowledge and technologies. Farmers might even receive pecuniary benefits from the International Funding Strategy in the distant future.

While it is beyond the scope of this article to discuss in any detail the integration and interrelationship of the *Treaty* with other international instruments such as the CBD and the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS),[48] it is worthwhile to highlight a couple of points of intersection as these further illustrate how the SDL principle of integration and interrelationship is embodied in the ITPGRFA. First, the provisions of the *Treaty* that create the Multilateral System overlap with the economic jurisdiction claimed by the TRIPS Agreement.[49] Article 27.1 of TRIPS requires Member States to make patents available for any invention in all fields of technol-

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46 *Supra* note 1, art. 5(c).

47 *Ibid.*, art. 9.2(c).

48 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 ILM 1197, being Annex 1C to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 ILM 1144 [TRIPs].

49 Some would argue that intellectual property rights also fall within the ambit of human rights, particularly Article 27(2) of the Universal Declaration of Human Rights, UNGA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13 at 71: "Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." But as the primary purpose of the WTO agreements is to promote free trade, the author will assume that the TRIPS Agreement can primarily be considered an economic instrument.

ogy. While Article 27.3(b) provides some limited exceptions to this requirement including patents for plants and animals, it also requires that some sort of intellectual property protection be available for plant varieties, "either by patents or by an effective *sui generis* system or by any combination thereof." Article 12.3(d) of the ITPGRFA, on the other hand, requires recipients of material from the MLS not to "claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System." Reconciling the obligations of the ITPGRFA and the TRIPS Agreement will be difficult, but the overlap between the two illustrates how economic considerations are integrated into the ITPGRFA.

Furthermore, at the Conference for the Adoption of the Agreed Text of the CBD held in Nairobi in May 1992, the Conference adopted not only the agreed text of the CBD (opened for signature the following month at the Earth Summit in Rio), but also a resolution on "The Interrelationship Between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture." This resolution forms part of the foundation that led to the negotiation of the ITPGRFA. The resolution notes, *inter alia*, a recommendation that the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture[50] be adjusted in line with the outcome of the negotiations of the CBD and "recognizes the need to seek solutions to outstanding matters concerning plant genetic resources within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture, in particular: (a) Access to *ex-situ* collections not acquired in accordance with this Convention; and (b) the question of farmers' rights." Thus from its very inception, the ITPGRFA was intended to be integrated with the environmental goals of the CBD.[51]

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50 The Global System was created by Article 7 of the International Undertaking on Plant Genetic Resources for Food and Agriculture.
The International Undertaking was the first comprehensive international agreement dealing with plant genetic resources for food and agriculture. It was adopted by the FAO Conference in 1983, (Resolution 8/83), as an instrument to promote international harmony in matters regarding access to plant genetic resources for food and agriculture. One hundred and thirteen countries have adhered to the International Undertaking, which seeks to "ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes." It is monitored by the Commission on Genetic Resources for Food and Agriculture (CGRFA). Further information is available at: The Commission on Genetic Resources for Food and Agriculture, accessible at <http://www.fao.org/ag/cgrfa/IU.htm >.

51 While the CBD is most closely associated with environmental protection describing it as an 'environmental treaty' is not necessarily accurate. It, too, can be understood as a treaty that integrates the environmental, social and economic components of sustainable development law, Garforth, *supra* note 27. Because the CBD is most closely associated with environmental protection, however, the author uses it as an example of how the environment is integrated into the IT. See for a more comprehensive analysis about the relationship between the TRIPS agreement and the CBD: Disclosure Requirements see online: *Ensuring Mutual Supportiveness Between the WTO TRIPS Agreement and the CBD, IUCN* <http://www.iucn.org/en/news/archive/2005/12/disclosure_requirements_publication.pdf>; See also Michael I. Jeffrey, "Intellectual Property Rights and Biodiversity Conservation; Reconciling the Incompatibilities of the TRIPS Agreement and the Convention on Biological Diversity" in Burton Ong, ed., *Intellectual Property and Biological Resources* (Singapore: Marshall Cavendish, 2004) and Tejera Valentina, "Tripping Over Property Rights: Is it Possible to Reconcile the Convention of on Biological Diversity With Article 27 of the TRIPS Agreement?" (1999) 33 New Eng. L. Rev. 967.

The interrelationship between the CBD and the ITPGRFA continues as the access and benefit-sharing provisions of the former are elaborated and implemented by the Parties to the Convention. In particular, the decision by the Parties to the Convention to launch negotiations on an international access and benefit-sharing regime includes the ITPGRFA as one element to be considered during the negotiations.[52] The relationship between the two agreements is only likely to deepen as States implement the obligations of the *Treaty* and the negotiations for the international regime begin in earnest.

Even though each Member State is juridically equal under the *Treaty*, it is obvious that differences exist between these States. For example, most of the PGRFA come from centres of diversity located in developing countries[53] whereas the major *ex situ* conservation centres are situated in developed countries. Other examples can be given regarding the different economic or social situations of the various Contracting Parties. This leads to the application of the principle of common but differentiated responsibilities.

2.3 Common but differentiated responsibilities

This principle recognizes the special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social, and developmental considerations. As pointed out by scholars,

> The principle of common but differentiated responsibility includes two fundamental elements. The first concerns the common responsibility of States for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take into account the different circumstances, particularly in relation to each State's contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat.[54]

These two elements are present in the *Treaty*. The preamble contains several references to the common responsibility of States. The Contracting Parties recognize that "PGRFA are a common concern of all countries"[55] and that they are "[a]ware of their responsibility to past and future generations to conserve the World's diversity of PGRFA."[56] This responsibility for the conservation and sustainable use of PGRFA applies at the national, regional, and international level. Article 4 creates a common responsibility for each Party to "ensure the conformity of its laws, regulations and procedures with its obligations as provided in this *Treaty*."

With respect to taking into account the differences between countries, numerous provisions in the ITPGRFA reserve special treatment for developing nations, transition economies, and least developed countries.[57] States have common responsibilities in pro-

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52 *Convention on Biological Diversity*, Global Taxonomy Initiative, COP7, Decision VII/19.

53 William B. Lacy, "The Global Plant Genetic Resources System: A Competition-Cooperation Paradox", Symposium on Global Implications of Germplasm Conservation and Utilization," (1995) 35 Crop Science 335.

54 Cordonier Segger & Khalfan , *supra* note 26 at 133.

55 *Supra* note 1, Preamble, s. 3.

56 *Ibid.*, s. 13.

57 For references to developing countries and countries with economies in transition see: *ibid.*, arts. 6.2(c), 7.2(a), 8, 13.2(b), 13.2(c), 13.2(d), 15.1(b)iii, 18.3, 18.4(b), and (c), 18.5.

tecting agricultural biodiversity and promoting the sustainable use of PGRFA. These goals, however, do take into account the differences of each participant's social, economic, and ecological character and, thus, require that countries achieve these goals by assuming their respective, but different roles.

Article 8 provides for technical assistance especially in favour of developing countries and States with economies in transition. Article 13 obliges the Contracting Parties to transfer technology for the conservation, characterization, evaluation, and use of PGRFA which are under the multi-lateral system. Art. 13.2(b)(iii) for example, provides and/or facilitates access to and transfer of technologies for the conservation, characterization, evaluation and use of PGRFA which are under the multi-lateral system "under fair and most favourable terms" for developing countries and economies in transition. Capacity building[58] and sharing of monetary and other benefits of commercialization[59] are also expressly and primarily devoted to developing countries. For example, Art. 18.3(b) states that

> The extent to which Contracting Parties that are developing countries and Contracting Parties with economies in transition will effectively implement their commitments under this Treaty will depend on the effective allocation, particularly by the developed country Parties, of the resources referred to in this Article. Contracting Parties that are developing countries and Contracting Parties with economies in transition will accord due priority in their own plans and programmes to building capacity in plant genetic resources for food and agriculture.

Regarding the funding strategy,[60] developing countries have to give priority to their own plans and programs for building capacity in PGRFA before mobilizing funding for other activities, plans, and programs. Moreover, in considering all plans and programs set up by the Governing Body enabled by the funding strategy, priority is to be given to agreed plans and programs for farmers in developing countries, especially in least developed countries that conserve and use in a sustainable manner the PGRFA.[61]

As such, the ITPGRFA recognizes the principle of common yet differentiated responsibilities. This recognition "strengthens the integrative potential of international law relating to sustainable development by addressing the balance between global environmental problems and economic development. It is therefore closely related to the principle of poverty eradication and equity."[62]

2.4 Equity and the eradication of poverty

The principle of equity and eradication of poverty is a deep-rooted principle of sustainable development law.[63] Equity derives from the fact that not all people and not all States

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58 *Ibid.*, art. 13.2(c).

59 *Ibid.*, art. 13.2(d).

60 *Ibid.*, art. 18.

61 *Ibid.*, art. 18.5.

62 Cordonier Segger & Khalfan, *supra* note 26 at 136-137. See also: S.R. Chowhury, "Common but Differentiated State Responsibility in International Environmental Law: From Stockholm (1972) to Rio (1992)" in K. Ginther et al., *Sustainable Development and Good Governance* (The Hague: Martinus Nijhoff, 1995) at 322, 321.

63 See e.g. Cordonier Segger & Khalfan, *ibid.* at 122-129.

enjoy equal levels of economic, social, or environmental development. Wealthy nations have an obligation to help less affluent nations to give every human being a chance to live above the poverty level: "All States which are in a position to do so have a further responsibility, as recognised by the Charter of the United Nations and the *Millennium Declaration of the United Nations*, to assist States in achieving this objective."[64]

Programs for eradication of hunger constitute a basic duty to diminish poverty. Indeed, food security is part of the general objectives of the *Treaty*,[65] as well as the Global Plan of Action.[66] Food security objectives are to be realized, amongst other means, through the multi-lateral system, which provides for:

> access to PGRFA and [the] sharing, *in a fair and equitable way*, [of] the benefits arising from the utilization of these resources[67] [emphasis added].

There are two key components to the principle of equity. The first is the concept of inter-generational equity, which is defined as "that principle of ordering of the community of mankind which will make it possible for every generation, by virtue of its own effort and responsibility, to secure a proportionate share in the common good of the human species."[68] The second component consists of intra-generational equity, which is defined as "the rights of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources."[69]

These two variants of the principle are present in the ITPGRFA. Concerning intra-generational equity, the *Treaty* clearly expresses the will of the Parties to ensure a just distribution of the benefits among people of the present generation. For example, under Article 13.3, the benefits arising from the use of plant genetic resources for food and agriculture that are shared under the Multilateral System should flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries and countries with economies in transition, which conserve and sustainably utilize plant genetic resources for food and agriculture. The exchange of information on scientific, technical, and environmental matters contribute to the sharing of benefits[70] and consequently to the intra-generational mutual aid. The funding strategy is another expression of intra-generational equity as it aims at providing financial resources to developing countries setting up programs and plans to help farmers to conserve and sustainably use PGRFA.[71]

Similarly, inter-generational equity lies in the inherent nature of genetic resources. According to José Esquinas-Alcazár, CPGR Secretary General:

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64 *Ibid.* at 100.

65 *Supra* note 1, ITPGRFA Preamble para. 9, art. 11.1.

66 *Global Plan of Action*, *supra* note 41, at ss. 7-9.

67 *Supra* note 1, art. 10.2 [emphasis added].

68 E. Agius, "Obligations of Justice Towards Future Generations: A Revolution on Social and Legal Thought" in E. Agius, ed., *Future Generations and International Law* (London: Earthscan Publications, 1998) at 10.

69 Cordonier Segger & Khalfan, *supra* note 26 at 99.

70 *Supra* note 1, art. 17.1.

71 *Ibid.*, art. 18.

> Agricultural biodiversity is a precious inheritance from previous generations, which we have the moral obligation to pass on intact to coming generations and allow them to face unforeseen needs and problems.[72]

The "past, present and future contributions of farmers" in the conservation process of PGRFA is recognized in the preamble[73] of the *Treaty* and in Article 9.[74] "Future needs" are also taken into account in the preamble,[75] as well as the responsibility of past and future generations to conserve the world's diversity of PGRFA.[76] Inter-generational equity can be seen in general throughout all the *Treaty* norms. The obligation to use PGRFA in a sustainable manner has no other goal than the conservation of PGRFA. Inter-generational equity consists in allowing people to produce enough food to satisfy current needs, while assuring that future food production needs are neither compromised nor jeopardized. Therefore, even though the ITPGRFA does not expressly mention inter-generational equity, the principle constitutes an inherent basis of the *Treaty*'s objectives.

The principle of equity and eradication of poverty is completed by the application of another important sustainable development law principle: public participation and access to information and justice. In fact, improving the state of inter- and intra-generational equity can also be achieved by increasing people's involvement in PGRFA issues. The principle of public participation and access to information and justice creates the means to attain this objective.

2.5 Public participation and access to information and justice

This principle occupies a prominent place in sustainable development law.[77] It can be broken down into three parts.

First, there is the right for people to participate in official socio-economic development decision-making processes and activities, when these affect their lives and well-being. Second, in order to participate fully, people should have access to the information relating to these decisions and activities. Finally, people whose rights are affected by State decisions should have a right of access to justice.

This principle is not expressly contained in the *Treaty* text. However, all three components of the principle are present in the *Treaty*. Participation of the people concerned by a decision relating to PGRFA is provided in Article 9. The Commission on Genetic Resources for Food and Agriculture (CGRFA) has continuously emphasized the impor-

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72 *Supra* note 12 at 234-235.

73 *Supra* note 1, Preamble s. 7.

74 *Ibid.*, Art. 9.1. "The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, *have made and will continue to make* for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world." [Emphasis added].

75 *Ibid.*, Preamble at para. 6.

76 *Ibid.*, s. 13.

77 See Principle 10, 1992 Rio Declaration on Environment and Development, online: United Nations Environmental Programme <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> see also the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (25 June 1998) (in force 30 Oct. 2001) online: United Nations Economic Commission for Europe <http://www.unece.org/env/pp/documents/cep43e.pdf>.

tance of participation in the promotion of sustainable development by specific groups of the public, such as indigenous people or local farmers in the present case. Article 9.2 of the *Treaty* which recognizes Farmers' Rights states that:

> The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:
>
> (c) *the right to participate in making decisions, at the national level, on matters related to conservation and sustainable use of plant genetic resources for food and agriculture*" [emphasis added].

The right of farmers to participate in the decision-making process is therefore acknowledged in the *Treaty*, but it is the responsibility of the Contracting Parties to provide for the application of this right "as appropriate" at the national level. The "discretion" given to Contracting Parties is not expected to result in disrespect or suppression of this right by governments. In fact, this text goes further than Article 8(j) of the CBD[78] in this respect.[79]

Article 6 also expresses this right. In particular, Article 6.2(c) entails Contracting Parties to promote the sustainable use of PGRFA:

> promoting, as appropriate, plant breeding efforts which, *with the participation of farmers,* particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas [emphasis added].

Regarding access to the necessary information, Article 5 and 6 in their national application provide for access to information related to PGRFA. For example, Article 5.1(e) requires States to promote the development of an efficient and sustainable system of *ex situ* conservation, by providing for the adequate documentation, characterization, regeneration, and evaluation. Article 6 obliges Member States to broaden the genetic base of crops and increase the range of genetic diversity to farmers,[80] as well as to promote the expanded use of local and locally adapted crops, varieties, and underutilized species.[81]

Another example of public access to information lies in the benefit-sharing system, which provides for transfer of technology[82] as well as exchange of information[83] related to PGRFA. Article 14 encourages Contracting Parties to promote the effective imple-

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78 CBD, *supra* note 6, art. 8(j) on *In-situ Conservation*. "Each Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

79 H. David Cooper, "The International Treaty on Plant Genetic Resources for Food and Agriculture" (2002) 11:1 RECIEL at 3-4.

80 *Supra* note 1, art. 6.2(d).

81 *Ibid.*, art. 6(e).

82 *Ibid.*, art. 13.2(b).

83 *Ibid.*, 13.2(a).

mentation of the *Treaty* by applying the Global Plan of Action to provide a coherent framework of exchange for information and technology transfer through national and international programs. Moreover, Article 16 calls for the development of an International Plant Genetic Resources Network (IPGRN) that asks Contracting Parties to encourage the participation of relevant institutions in an international network. These institutions may be governmental, private, or non-governmental. They may also include research centres, local breeding companies, etc. This participation in the IPGRN develops the exchange of information between the concerned persons as the network tends to include the participation of as many sources of genetic resources as possible. Article 17 provides for the development of a Global Information System on PGRFA. This Global Information System facilitates the exchange of information on scientific, technical, and environmental matters related to PGRFA, and the aim is to cooperate with the Convention on Biological Diversity's Clearing House Mechanism.[84]

Finally, concerning the right of access to justice, the *Treaty* requires that States ensure that an opportunity to seek recourse is available under their legal systems in cases of contractual disputes arising under Material Transfer Agreements (MTAs).[85] This is the only provision on access to justice in the *Treaty* that is available for individual members of the public. The arbitration procedure set up in Annex II applies to disputes arising between two or more Contracting Parties.

As a consequence, the principle of public participation and access to information and justice is implicitly and explicitly present in the *Treaty*, even if it could be developed in more detail. The same conclusion could apply to the principle of the precautionary approach to human health, natural resources, and ecosystems, as is discussed below.

2.6 Precautionary approach to human health, natural resources and ecosystems

The principle of precaution[86] applies to activities that might have consequences of significant, serious or irreversible harm. Under these circumstances, the person responsible for these activities has the obligation to take measures to prevent this damage – or even to stop the activities – even if there is a lack of full scientific certainty as to the existence and severity of the risk.

This principle is not explicitly present in the ITPGRFA. There is no obligation that requires a State to make sure that the people under its jurisdiction do not carry on activities that could harm the environment, in so far as such activities do not have adverse effects on other states or their constituents.[87] However, there is a general obligation attached to States to do all they can to encourage and facilitate the sustainable use of PGRFA. As has been demonstrated earlier, the use of PGRFA in such a manner is a means of preserving its the actual and future value. This obligation concurs with the precautionary approach for they both have in view the interest of safeguarding human health and the protection of the environment.

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84 *Ibid.*, art. 17.1.

85 *Ibid.*, art. 12.5.

86 According to certain scholars, "[i]n most areas, including where environmental law intersects with international economic or social development law, this concept appears to be *lex ferenda*, a principle in the process of becoming international customary law, with persistent objectors properly on record." In Cordonier Segger & Khalfan, *supra* note 26 at 155.

87 See Cordonier Segger & Khalfan, *ibid.* at 110; *Trail Smelter*, *supra* note 32.

The principle of the precautionary approach is implicit in the *Treaty* as it derives from the sustainable development approach to the conservation and use of PGRFA. Again, another principle that is not clearly expressed in the *Treaty* is that of good governance.

2.7 Good governance

The principle of good governance has been described as

> the exercise of economic, political and administrative authority to manage a country's affairs at all levels and on all issues. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.[88]

This principle is closely related to the norm of public participation and access to information and justice, especially because if a State does not create reliable institutions for coherent, effective decision-making, and respect for the rule of law, then the principle of public participation and access to information and justice cannot be applied.

The ITPGRFA does not expressly provide for national good governance obligations. Under Article 4, Member States are only required to "ensure the conformity of its laws, regulations and procedures with its obligations as provided in this Treaty." Even though the requirement for farmer participation in decision-making, or the requirement for the provision and sharing of information about relevant activities and measures could be interpreted as amounting to obligations for good governance, this would tend to have a moderating effect on governmental behavior, merely providing a basis for monitoring and assessing such activities or measures.

Rather, the *Treaty* requires Contracting Parties to respect the engagements they took by ratifying the *Treaty*. This effectively concurs with the requirement under public international law recalling that nations are to at all times govern themselves in *bona fide*.[89] Article 10.2 calls for:

> the Contracting Parties [to] agree to establish a multilateral system, *which is efficient, effective, and transparent,* both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis" [emphasis added].

Finally, Article 21 states that:

> The Governing Body shall, at its first meeting, consider and approve *cooperative and effective procedures and operational mechanisms to promote compliance with the provisions of this Treaty and to address issues of non-compliance.* These procedures and mechanisms shall include monitoring, and offering advice or assistance, includ-

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88 Cordonier Segger & Khalfan , *ibid.* at 166.

89 *Charter of the United Nations,* 26 June 1945, Can. T.S. 1945 No. 7, Art.2s.2; *Vienna Convention on the Law of the Treaties*, 23 May 1969, U.N.T.S. 1155 at 331, art. 26; see also *Nuclear Tests Case (New-Zealand v. France)* Order of 20 December, [1974] I.C.J. Rep. 74 at 268; and *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* Order of 26 November [1984] I.C.J. Rep. 84 at 418: 60.

> ing legal advice or legal assistance, when needed, in particular to developing countries and countries with economies in transition" [emphasis added].

Here, States' compliance with their international obligations deriving from the ITPGRFA is taken into account. Therefore, it can be said that the *Treaty* provides for the application of the principle of good governance as between nations at the international level, but, that at the national level, the principles guiding their governance remain at those of their discretion.

3. CONCLUSION

The preceding analysis demonstrates that the principles of sustainable development law have been integrated significantly into the *International Treaty on Plant Genetic Resources for Food and Agriculture*. The *Treaty*'s intrinsic objectives of protecting the environment, reaching food security as well as furthering Contracting Parties' economic and social development make it essential for these Parties to apply principles of sustainable development law.

Indeed, while certain principles are more clearly articulated in this *Treaty* and are as such *de facto* recognized, others, while of influence on States' governance, are only implicitly apparent. However, these norms, regardless of their textual exposure do form an integral part of the States' implementation of their *Treaty* obligations at the international and national level.