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## Equality for the Earth – The Role of Intergenerational Equity and Customary International Law

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# Equality for the Earth – The Role of Intergenerational Equity and Customary International Law

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## Introduction

We all want to have an earth that lasts forever. Yet often we hear our parents say things about how different the earth was in the past ‘things were different in my day – the tomatoes tasted better’, or ‘in my day it was never this hot. What is happening to the world?’ Whilst our parents might be right (and I only say might!), this raises an important question – how do we pass onto our children, and their children, an earth that is at least as good as the one we have today, and how do we keep the earth in a good state of repair? The answer lies in two important concepts: the principles of intergenerational equity (IGE) and intragenerational equity (INGE). These are principles relating to the use of the earth’s renewable and non-renewable resources in this generation as well as future generations, and the impact of that use on present and future generations.

Underpinning these equitable principles is sustainable development, a concept regarding the use of the earth’s resources for development in a manner that ensures that the needs of current and future generations are met. Whilst there is universal acceptance of the principles of IGE and INGE, the question remains whether these concepts are international law principles, or an emerging norm of Customary International Law. This paper looks at the concepts of IGE and INGE. It then considers whether these concepts are ‘soft law’ principles, or whether they have become Customary International Law.

## Intergenerational equity, intragenerational equity and sustainable development

### Intergenerational equity (IGE)

IGE is an equitable principle that all generations are partners, caring for and using the earth.<sup>1</sup> As such, each generation needs to pass the earth and its natural resources on in at least as good conditions as we received them.<sup>2</sup> The

principle arises from Rawls’ ‘veil of ignorance’, since from the ‘original position,’ every generation has a duty to preserve resources since those in the ‘original position’ would not know which generation they were going to be part of.<sup>3</sup>

The principle of IGE is based on the recognition that human life results from the earth’s natural resource base, and its very survival is dependent on that resources base, whilst recognizing that humans have the unique capacity to alter the environment upon which its existence depends.<sup>4</sup> This places the obligation on the present generation to conserve and maintain the present resources by minimizing long-term and irreversible damage to the environment through conservation, and the conservation of the past and present natural and cultural heritage for future generations.<sup>5</sup>

Solow defines IGE to mean equal consumption per person at some point in time.<sup>6</sup> It requires that development be managed so that the resource, and the benefits from that resource, are maintained or enhanced for future generations, and future generations are not disadvantaged by the exploitation of natural resources.<sup>7</sup>

Three principles underpin IGE. First, is the idea of conserving the diversity of the earth’s natural and cultural resource base, to ensure that the options of future generations are not unduly restricted.<sup>8</sup> Secondly, each generation should maintain the quality of the planet, ensuring that when it is passed to the next generation it is in no worse condition than that in which it was received, and the condition is comparable to that of previous generations.<sup>9</sup> Finally, each generation should provide all members with equitable rights of access to the legacy of past generations, as well as conserving access to the legacy for future generations.<sup>10</sup> Thus, the aim of IGE is to find a path, which is fair for future generations, but also enables us to use the resources for this generation.

### Intragenerational equity (INGE)

Intragenerational equity is concerned with equality between people of the same generation. This is separate from IGE, which is about equality between present and future generations. INGE includes considerations of fairness in the domestic and global utilisation of resources among human members of present generations.<sup>11</sup>

The principle of INGE places rights and obligations upon the living generation to use and care for the planet, allocating both renewable and non-renewable resources fairly between all members of a single generation.<sup>12</sup> This means that the fair use of resources between generations is intimately linked to the use and care of the planet by members of a single generation. In order to implement INGE, wealthier countries need to assist poor countries and communities to ensure equal access to, and use of, the natural environment. This includes assisting the poor communities to sustainably use the resources available and ensure that these communities gain access to the economic benefits of the planet.<sup>13</sup> It is only when all members of the present generation have equitable access to resources (INGE) can a generation hope to provide the future generations with the capacity to meet their needs.

### Sustainable development

‘Sustainable development’ is a principle first defined by *The World Commission on Environment and Development* (The Brundtland Commission) in its report to the United Nations General Assembly,<sup>14</sup> which defined it as ‘development which meets the needs of the present without compromising

the ability of the future generations to meet their own needs.’<sup>15</sup> Emphasising the notions of fairness and IGE, the Commission stated that sustainable development provides ‘successive generations [with] not only man-made wealth but also natural wealth...in adequate amounts to ensure continuing improvements in the quality of life.’<sup>16</sup> The concept of sustainable development was recommended as a guiding principle to governments and private enterprises, encouraging all countries to pursue policies aimed at sustainable and environmentally sound development.<sup>17</sup>

Although sustainable development was first applied to the environment, it has been expanded and reaffirmed by the United Nations to encompass three interdependent and mutually reinforcing pillars – economic development, social development and environmental protection.<sup>18</sup> This is affirmed by the United Nations Development Program (UNDP).<sup>19</sup> Today, the United Nations specifies that protecting and managing the natural resources base for economic and social development are overarching objectives of, and essential requirements for, sustainable development.

The fundamental notions underpinning sustainable development are intergenerational and intragenerational equity, where the development of resources by one generation provides economic sustainability for generations to come.<sup>20</sup> Competing views on intergenerational sustainability by eminent writers disagree on what need be sustained for the next generation, and what intergenerational obligations, if any, intergenerational sustainability imposes on the current generation.<sup>21</sup> Some argue that intergenerational sustainability requires that future generations be left no worse off than earlier ones,<sup>22</sup> whilst others argue that the needs and entitlements of contemporaries should be weighed against the obligations of sustainability for the future generations.<sup>23</sup> The World Commission notes that balance should be struck between the needs of the people of the present and those of the future, although what that balance is remains controversial.<sup>24</sup>

### **Do the principles of intergenerational equity, intragenerational equity and sustainable development represent Customary International Law?**

The concept of IGE and sustainable development originated as an ecological concept. Today it has matured to a legal debate, centring on the issue of whether the current generation has a legal obligation to protect the interests of future generations, through the sustainable development of the resources.<sup>25</sup>

The theory of IGE has roots in international law. The Preamble to the *Universal Declaration on Human Rights* begins with a recognition on the equal and unalienable rights of the human family as a foundation for freedom, justice and peace in the world. Weiss sees the reference to all members as being not just present generations but also future generations.<sup>26</sup> This concept has support in domestic law. The Supreme Court of the Philippines held in *Minors Oposa v Secretary of the Department of Environment and Natural Resources*<sup>27</sup> that the present generation has standing to represent future generations, since each generation has a responsibility to future generations to preserve nature’s rhythm and harmony for the full enjoyment of a balanced and healthy natural ecology.<sup>28</sup>

Since the Declaration of Human Rights, the

intragenerational and intergenerational protection of mankind has taken roots in the development of the concept of sustainable development. These concepts have primarily developed through soft law, and were initially articulated in Principle 2 of the *Stockholm Declaration on the Human Environment* (Stockholm Declaration), which articulates aspects of INGE, – ‘the protection and improvement of the human environment is a major issue affecting the well-being of peoples and economic development throughout the world’.<sup>29</sup> The concept of sustainable development is articulated in Principles 9, 10 and 11 of the Stockholm Declaration, emphasising a need for environmental protection and economic development as mutually reinforcing goals. Most importantly, Principle 11 of the Stockholm Declaration declares that:

...environmental policies of all states should enhance and not adversely affect the present or future development of developing countries, nor should they hamper the attainment of better living conditions for all...<sup>30</sup>

The principles of IGE and INGE and their development through sustainable development were restated in Principle 3 of the *Rio Declaration on the Environment and Development* (Rio Declaration): ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’.<sup>31</sup>

The subsequent *Agenda 21*<sup>32</sup> action plan for sustainable development that arose from the Rio Declaration provided the blueprint for how it is possible to achieve IGE and INGE through sustainable development. However, both the Declarations are international law principles (known as ‘soft law’) with no binding effect on States. Similarly, *Agenda 21* is a plan for action, rather than a binding document enforceable in international law.

Whilst there are numerous soft law sources (primarily international law principles) related to IGE, INGE and sustainable development, the question remains whether these principles have evolved into Customary International Law,<sup>33</sup> or whether they remain merely soft law and aspirational. The soft law nature of these principles are not toothless tigers, since they are capable of evolving into Customary International Law. The question is whether these principles have evolved into Customary International Law through state practice and *opinio juris*.

Phillipe Sands, an eminent writer on international environmental law, says that there can be little doubt that the concept of ‘sustainable development’ has entered the corpus of International Customary Law’. Furthermore, other writers see the inclusion of the concept of sustainable development into a number of Treaties as evidence of the translation from a legal principle into the binding status of Customary International Law.

The status of the concept of sustainable development as Customary International Law is strengthened by reference to the term ‘sustainable development’ in recent International Court of Justice (ICJ) decisions.

In the ICJ decision of *The Case Concerning the Gabèikovo-Nagymaros Project*, the court determined that the concepts of IGE and sustainable development were integral in the development of the waterway in question. It noted that:

owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future — of pursuit of such interventions [with nature]

at an unconsidered and unabated pace, new norms and standards have been developed, ...[a] need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

Sands notes that by invoking the concept of sustainable development in this judgment, the ICJ indicates its acceptance of these principles as part of international law.

The evolution of IGE and sustainable development as Customary International Law has been further demonstrated by ICJ Vice-President Weeramantry in the *Case Concerning the Gabèikovo-Nagymaros Project*. Weeramantry proclaimed that sustainable development was much more than a concept. Rather, it had achieved the status of a modern principle or norm of Customary International Law.

The ICJ again invoked the concept of sustainable development and intergenerational equity in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*. In this decision, the ICJ expressly considered the obligation of the parties to contribute to the optimum and rational utilisation of the Uruguay River, according to the principle of fair and equitable use, to ensure that all users have access to the river.

## Conclusion

The utilisation of the terms equitable use and sustainable development by the ICJ in recent judgments provide an indication that the principles of sustainable development and IGE/INGE are a part of Customary International Law. It would seem that the time for the 'equality for the earth' has come.

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- <sup>30</sup> *Declaration of the United Nations Conference on the Human Environment* (1972), Principle 11.
- <sup>31</sup> *Rio Declaration on Environment and Development* (1992) Principle 3.
- <sup>32</sup> United Nations Economic and Social Development Division for Sustainable Development, *Agenda 21* (1992)
- <sup>33</sup> Customary International Law is identified as a source of international law under Art. 38 (1) (b) of the Statute of the ICJ. It comprises state practice and *opinio juris* (opinion of the courts).