

# The Johannesburg Summit: Outcome and Overall Assessment

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## I. From Rio to Johannesburg

### 1. The Summit's Antecedents

The Stockholm Conference of 1972 was the first attempt to tackle human-induced environmental problems on a global level. It produced the first universal multilateral declaration recognizing the danger of human-related activities to the environment, with the objective of acting to counter them. By combining politics with concrete principles in a systematic whole, the Stockholm Declaration proved a milestone<sup>1</sup>. There were no major disagreements among the states voting on it as to the outcome of the conference. Twenty years later, the Rio Conference increased the amount of participation in international environmental law-making. It gave equal standing for developing countries to raise their concerns regarding the protection of the international environment<sup>2</sup>, and it included NGOs in the drafting process. Its achievements were: the Rio Declaration, in the format of its Stockholm predecessor, a long and detailed plan of action (Agenda 21), two multilateral agreements (the Framework Convention on Climate Change (FCCC), and the Convention on Biological Diversity), the legally non-binding Forest Principles, and the establishment of the Commission on Sustainable Development (CSD). The Rio Declaration introduced the new concept of sustainable development. In the post-Rio process, further multilateral environmental agreements (MEAs) on e.g. desertification (1994) and migrating fish stocks (1995) were concluded.

At its Special Session to Review and Appraise the Implementation of Agenda 21, in New York, on June 23-27, 1997 (Rio + 5), the General Assembly hoped to take stock of the implementation of Agenda 21, but came away with few new results<sup>3</sup>, apart from the conclusion that environmental degradation was continuing unabated. This prompted an initiative based on sustainable development by several single governments (e.g. Brazil), pushing for inclusion of protection of the environment as a goal in the UN Charter, a reform of UNEP, and the finalization of the Kyoto Protocol to the Framework Convention on Climate Change.

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<sup>1</sup> G. Palmer, *New Ways to Make International Environmental Law*, AJIL 86 (1992), 259, at 266.

<sup>2</sup> K. Bosselmann: *Rio + 10: Any Closer to Sustainable Development?*, NZJEL 6 (2002), 297, at 298.

<sup>3</sup> Compare *ibid.*, at 301.

In the Millennium Declaration of September 2000, the United Nations reaffirmed their commitment to sustainable development and urged the ratification and full implementation of major MEAs<sup>4</sup>.

The Doha Ministerial Declaration of the WTO<sup>5</sup> of autumn 2001 stressed the “mutually supportive” relationship of trade and the environment and the “integrity of WTO instruments” in face of multilateral environmental agreements. The Monterrey Consensus, negotiated by the International Conference on Financing for Development<sup>6</sup> in spring 2002 centered on raising development assistance (as a percentage of GDP), and mitigating the effects of globalization on developing countries.

## 2. The Summit's Preparatory Process

In order to set an agenda, it was agreed that preparations would begin at the national, sub-regional and regional levels, moving towards the global stage<sup>7</sup>.

### A. National level

Within a number of countries national preparatory committees were established<sup>8</sup> – usually including business, government agencies, academia and NGOs – to prepare national reports for the CSD, and national positions for the negotiations<sup>9</sup>.

Country profiles 2002, based on CSD reports of 1997, were published, very detailed and voluminous in size<sup>10</sup>, and ordered in chapters according to Agenda 21. The progress made which the reports intended to illustrate is, however, hard to measure.

Additionally, the countries themselves filed national assessment reports. These are much shorter than the country profiles, and not structured according to Agenda 21, even if they relate to its various subject areas. Interestingly, some very poor countries made a substantial effort in reporting<sup>11</sup>, while some industrial countries did not seem to bother with issuing a report at all<sup>12</sup>.

<sup>4</sup> United Nations Millennium Declaration, Part IV – Protecting our common environment <<http://www.un.org/millennium/declaration/ares552e.htm>> (visited 05/03/2003).

<sup>5</sup> Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, WTO Doc. WT/MIN(01)/DEC/1.

<sup>6</sup> Final Outcome of the International Conference on Financing for Development, UN Doc. A/CONF.198/3.

<sup>7</sup> WSSD – Preparatory Process, <[http://www.johannesburgsummit.org/html/prep\\_process/prep\\_process.html](http://www.johannesburgsummit.org/html/prep_process/prep_process.html)> (visited 05/03/2003).

<sup>8</sup> Fifty-seven countries.

<sup>9</sup> The infrastructure for this was largely already in place from the preparatory process of the Rio + 5 Summit in 1997.

<sup>10</sup> 150-200 pages each.

<sup>11</sup> As measured by the page length of their reports, e.g. Tonga, Swaziland, Bosnia.

<sup>12</sup> E.g. Austria, United States, Sweden, France, Italy.

Another initiative on national progression targets did not bear much fruit, as it was only taken up by twelve countries.

## B. Regional level

Sub-regional and regional preparatory sessions produced much shorter assessments on the key challenges, opportunities and constraints relating to sustainable development that each region had experienced over the past ten years, and the future priorities it saw itself confronted with<sup>13</sup>.

## C. Sessions of the Preparatory Committee for the WSSD

First Session, 31 April-2 May 2001, New York: This organizational meeting elected a bureau, considered the reports of the national and regional levels and set the agenda for identifying the main possible themes for the Summit<sup>14</sup>.

Second Session, 28 January-8 February 2002, New York: In a Chairman's Paper, the first main chapters and areas of the Plan of Implementation – which was later to be adopted at Johannesburg – were identified<sup>15</sup>.

Third Session, 25 March-5 April 2002, New York: Starting from the Chairman's Paper, gradually the structure and text of the Plan of Implementation, were developed, through informal discussions, in different working groups<sup>16</sup>. The division between type 1 and type 2 outcomes was mentioned for the first time. Criticism ensued forthwith from developing countries that this would detract from political commitments.

Sustainable Development Governance (SDG) was discussed at length on the basis of a paper prepared by the Vice-Chairs<sup>17</sup>. The paper stressed the overarching importance of establishing national capacity for integrating sustainable development in policy-making, in the form of national sustainable development councils and strategies, as soon as possible<sup>18</sup>.

<sup>13</sup> The regional groups were Africa, Asia and the Pacific, Europe and North America, Latin America and the Caribbean, and West Asia.

<sup>14</sup> WSSD Documents, Prepcoms, First Summit Preparatory Committee (PREPCOM 1). 30 April-2 May 2001, New York, <<http://www.johannesburgsummit.org/html/documents/prepcom1.html>> (visited 25/02/2003).

<sup>15</sup> Statement by the Chairman, 8 February 2002, <[http://www.johannesburgsummit.org/html/documents/prep2final\\_papers/chairman\\_statement.doc](http://www.johannesburgsummit.org/html/documents/prep2final_papers/chairman_statement.doc)> (visited 25/02/2003).

<sup>16</sup> Compare generally the documents on Prepcom3, <<http://www.johannesburgsummit.org/html/documents/prepcom3.html>> (visited 05/03/2003).

<sup>17</sup> Earth Negotiations Bulletin, Summary of the Third Session of the Preparatory Committee for the WSSD: 25 March-5 April 2002, <<http://www.iisd.ca/linkages/download/pdf/enb2229e.pdf>> (visited 05/03/2003), at 8.

<sup>18</sup> Discussion Paper Prepared by the Vice-Chairs Mr. Ositadinma Anaedu and Mr. Lars-Goran Engfeldt for consideration at Third Session of the Preparatory Committee for WSSD, <[http://www.johannesburgsummit.org/html/documents/prepcom3docs/governance\\_discussion\\_paper.doc](http://www.johannesburgsummit.org/html/documents/prepcom3docs/governance_discussion_paper.doc)> (visited 05/03/2003).

Fourth Session, 27 May-7 June 2002, Bali, Indonesia: This meeting stated the main issues for the Summit, as emphasizing the need for a global partnership to achieve the objectives of sustainable development, reconfirming the need for an integrated and strategically focused approach to the implementation of Agenda 21, and addressing the main challenges and opportunities faced by the international community in this regard<sup>19</sup>. Based on informal meetings before the main session, the Vice-Chairs circulated an explanatory note with guiding principles for partnerships for sustainable development<sup>20</sup>.

The repeated preoccupation with the preceding Doha Round of the WTO in the last preparatory meeting before the Johannesburg Summit left a disheartening impression on its participants and observers<sup>21</sup>, as it significantly turned down the expectations of what could be achieved there.

International Environmental Governance (IEG): This issue began to receive attention before the preparatory process had even started. In May 2000, the Global Ministerial Environment Forum (GMEF) convened in Malmö, Sweden, and declared that the ensuing WSSD "should review the requirements for international environmental governance, based on an assessment of future needs for an institutional architecture that has the capacity to effectively address wide-ranging environmental threats in a globalizing world"<sup>22</sup>. The UNEP Governing Council, at its 7<sup>th</sup> special session in Cartagena, accorded great importance to the report of its Open-Ended Intergovernmental Group of Ministers on the future needs and options for strengthened IEG<sup>23</sup>. The report concluded that in order to arrive at an effective system of IEG, UNEP should be strengthened, *inter alia* through the provision with predictable financing. The GMEF should become the "cornerstone" of an international institutional structure to this end<sup>24</sup>.

### 3. General Picture of the Johannesburg Summit

The WSSD lasted from August 26 to September 4, 2002 and gathered 21,340 participants, among them some 9,000 delegates from 191 governments, and additionally intergovernmental and non-governmental organizations, the private sector, ci-

<sup>19</sup> WSSD Documents, Prepcoms, Fourth Summit Preparatory Committee (PREPCOM 4), 27 May-7 June 2002, Bali, Indonesia, <<http://www.johannesburgsummit.org/html/documents/prepcom4.html>> (visited 05/03/2003).

<sup>20</sup> Vice-Chairs' Summary of the Informal Meetings on Partnerships for Sustainable Development, <[http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali\\_documents/prep4\\_summary\\_partnership.pdf](http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali_documents/prep4_summary_partnership.pdf)> (visited 12/02/2003).

<sup>21</sup> Miscellaneous – Consultation Papers, Environmental Law Review 4.4 (December 2002), at 258; Bosselmann, *supra* note 2, at 314.

<sup>22</sup> Governing Council of the United Nations Environment Programme, 6<sup>th</sup> Special Session, Malmö, Sweden, 29-31 May 2000 (Malmö Ministerial Declaration), para.24, <[http://www.unep.ch/natcom/assets/milestones/malmo\\_declaration.PDF](http://www.unep.ch/natcom/assets/milestones/malmo_declaration.PDF)> (visited 11/03/2003).

<sup>23</sup> UN Doc. UNEP/gcss.VII/6, Annex I, 5 March 2002, at 23.

<sup>24</sup> *Ibid.*, at 26.

vil society, academia and the scientific community. Although this number exceeded participation at Rio<sup>25</sup>, it contrasts sharply with the number of about 60,000 participants initially expected<sup>26</sup>. It involved seven thematic Partnership Plenaries, statements by non-State entities, addresses by heads of state and government and other senior officials, four high-level Round Tables on the theme “Making It Happen”, and a multi-stakeholder event, the closing plenary, chaired by WSSD President Thabo Mbeki<sup>27</sup>.

## II. Outcome of the WSSD

On 4 September 2002 the Summit unanimously adopted the 7-page “Johannesburg Declaration on Sustainable Development”<sup>28</sup>, as well as the 72-page “Plan of Implementation of the World Summit on Sustainable Development”<sup>29</sup>. These two documents, both standing for the so-called “type 1 outcome” of the Summit, have been added to by the so-called “type 2 Partnership Initiatives”<sup>30</sup>. As of 3 February 2003, the “Consolidated List of Partnerships for Sustainable Development” encompasses a total of 251 Partnership proposals<sup>31</sup>.

Both the Political Declaration and the Plan of Implementation only contain legally non-binding commitments, entered into by the States convened to Johannesburg. Thus it is beyond doubt that both instruments are not governed by international law, but are “soft law” in character. Conversely, the “Type 2 Partnership Initiatives” cannot even be classified as “soft law” because they lack any normativity. Legally speaking, the “Consolidated List of Partnership” is nothing else than a compilation of relevant Partnership proposals<sup>32</sup>.

<sup>25</sup> Roughly 17,000 persons participated at the Rio Summit, including representatives of 178 countries, among them over 100 heads of state and government (Earth Negotiations Bulletin, Summary of the World Summit on Sustainable Development: 26 August-4 September 2002, at 1, <<http://www.iisd.ca/linkages/download/pdf/enb2251e.pdf>> [visited 11/03/2003]).

<sup>26</sup> Compare Bosselmann, *supra* note 2, at 314; J. Maier, *Weder Durchbruch noch Rückschlag – Eine erste Bilanz des Weltgipfels für nachhaltige Entwicklung in Johannesburg*, Vereinte Nationen 5/2002, at 177.

<sup>27</sup> Earth Negotiations Bulletin, Summary of the WSSD, *supra* note 25, at 15.

<sup>28</sup> Text in: Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002, UN Doc. A/CONF.199/20, at 1 et seq.

<sup>29</sup> Text *ibid.*, at 6 et seq.

<sup>30</sup> Text in: UN Doc. A/CONF.199/CRP.5 of 28 August 2002.

<sup>31</sup> See the website of the Johannesburg Summit 2002: <[http://www.johannesburgsummit.org/html/sustainable\\_dev/partnership\\_initiatives.html](http://www.johannesburgsummit.org/html/sustainable_dev/partnership_initiatives.html)> (visited 11/03/2003).

<sup>32</sup> For more details see at p. 228 et seq. below.

## 1. "Type 1" Outcomes

### A. The Johannesburg Declaration on Sustainable Development

This document contains a number of political commitments of the States convened with regard to global sustainable development: These commitments are however so vaguely worded that they will hardly prove capable of influencing the ongoing process of shaping sustainable development. At best, only the States' resolve, "through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of the biodiversity"<sup>33</sup> is worth mentioning. Other statements, such as: "we urge developed countries that have not done so to make concrete efforts to reach the internationally agreed level of official development assistance"<sup>34</sup>, or: "(w)e undertake to strengthen and improve governance at all levels for the effective implementation of Agenda 21, the Millennium development goals and the Plan of Implementation of the Summit"<sup>35</sup> are so abstractly worded and remain so far behind the commitments expected and hoped for that their reading provokes nothing but disappointment.

### B. The Johannesburg Plan of Implementation

From the outset, the Plan is limited to developing a broad range of strategies for implementing existing instruments on environmental protection and sustainable development, may these instruments be legally binding, such as the conventions on climate change, biodiversity and combating desertification, or non-binding, such as Agenda 21 and the General Assembly's Millennium Declaration. Thus, the Plan is more concerned with making the existing instruments meaningful and workable in practice, than opening up new fields where law-making is needed.

As indicated by the Summit's preparatory process, the Plan reaffirms and "promotes the integration of the three components of sustainable development – economic development, social development and environmental development – as interdependent and mutually reinforcing pillars"<sup>36</sup>. It approves, even more so than the Rio Summit of 1992, sustainable development as the focus of the international agenda, thereby stressing the important links between poverty, environmental protection and the use of natural resources<sup>37</sup>.

The broad spectrum of issues covered by the Plan clearly reflects this acknowledgement. It encompasses: poverty eradication; water and sanitation; sustainable

<sup>33</sup> Political Declaration, para. 18.

<sup>34</sup> Ibid., para. 22.

<sup>35</sup> Ibid., para. 30.

<sup>36</sup> Plan of Implementation, para. 2.

<sup>37</sup> This particular relationship has been dealt with more closely by U. Beyerlin, *Sustainable Use of Natural Resources – a Key to Combating Poverty*, in this issue, 417 et seq.

production and consumption; protection and management of the natural resource base; health and sustainable development; energy; chemicals; sustainable development of small island developing States; sustainable development for Africa and other regions; means of implementation; and an institutional framework for sustainable development. With regard to all these issues the States convened entered into political commitments. However, it will be shown that among the Plan's 170 provisions, only a few promise to induce the States' governments to take meaningful action directed at reaching well-defined targets within fixed periods of time, while the majority of these stipulations are so weakly formulated that they can hardly be expected to produce any measurable effect.

#### a) Poverty eradication

Reaffirming the Millennium Development Goals, the Plan requires taking actions at all levels in order to halve, by the year 2015, the proportion of the world's people whose income is less than 1 dollar a day, who suffer from hunger, and who are without access to safe drinking water and do not have access to basic sanitation; to establish a world solidarity fund to eradicate poverty and to promote social and human development in the developing countries; and by 2010, to significantly improve the lives of at least 100 million slum dwellers<sup>38</sup>.

#### b) Changing unsustainable patterns of consumption and production

Referring to the principle of common but differentiated responsibilities, as set out in principle 7 of the Rio Declaration, the Plan induces governments, relevant international organizations, the private sector and all major groups to play an active role in changing such patterns. In this respect, a 10-year framework of programs in support of relevant regional and national initiatives should be developed<sup>39</sup>.

In this context, the Plan pays particular attention to recommendations of the Commission on Sustainable Development (CSD) concerning energy. It stresses the need of an increased use of renewable energy resources, as well as the acceleration of the development and dissemination of energy efficiency and energy conservation technologies<sup>40</sup>. Unfortunately, the Plan does not set any concrete targets or a timetable with regard to the achievement of an increased use of renewed energy resources, as proposed by the European Union and Brazil; this endeavor was finally blocked by the USA and OPEC<sup>41</sup>. It only stresses that improved access of the poor to reliable, socially acceptable and environmentally sound energy services and resources must be part of any effort to halve the proportion of people in poverty by 2015<sup>42</sup>. Notwithstanding this deficiency, the Summit's Plan might become the start-

<sup>38</sup> Plan of Implementation, paras. 7, 8 and 11.

<sup>39</sup> Ibid., paras. 14 and 15.

<sup>40</sup> Ibid., para. 20.

<sup>41</sup> See for more detailed information Maier, *supra* note 26, at 180.

ing point for a more definite policy of advancing the use of renewable energy as a means of sustainable development.

Furthermore, the Plan contains the commitment relating to the sound management of chemicals. It establishes the objective that, by 2020, chemicals are to be used and produced in ways that minimize any significant adverse effects on human health and the environment. It urges States to promote the ratification and implementation of relevant international instruments, including the Rotterdam Convention<sup>43</sup> and the Stockholm Convention<sup>44</sup>, so that both conventions can enter into force by 2003 and 2004 respectively. States are also urged to further develop a strategic approach to international chemicals management, based on the Bahia Declaration and Priorities for Action beyond 2000 of the Intergovernmental Forum on Chemical Safety<sup>45</sup>, by 2005. Finally, countries have to be encouraged to implement the new globally harmonized system for the classification and labeling of chemicals as soon as possible, with a view to having the system fully operational by 2008<sup>46</sup>.

### c) Protection and management of the natural resource base

The relevant section of the Plan begins by stressing that the management of the land, water and living resources base in a sustainable and integrated manner is essential for sustainable development. Furthermore, it subscribes to water pollution prevention, as well as promotion of sustainable water use and addressing water shortages. In this respect, it requires the development of integrated water resources management and water efficiency plans and programs, with support to developing countries, by 2005<sup>47</sup>.

With regard to oceans, seas, islands and coastal areas, the Plan encourages the application of the ecosystem approach, as featured in the Fifth Conference of the Parties to the Biodiversity Convention<sup>48</sup>, by 2010. With a view to achieving sustainable fisheries, the Plan underlines the need of restoring depleted stocks to levels that can produce the maximum sustainable yield on an urgent basis and where possible by 2015. It calls upon States to urgently develop and implement national and regional plans of action, as well as to put into effect relevant FAO action plans<sup>49</sup> by

<sup>42</sup> Plan of Implementation, para. 9 (a).

<sup>43</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, ILM 38 (1999), 1.

<sup>44</sup> Stockholm Convention on Persistent Organic Pollutants, ILM 40 (2001), 532.

<sup>45</sup> Both documents are available at the IFCS homepage, at <<http://www.who.int/icfs>> (visited 11/03/2003).

<sup>46</sup> All these commitments are laid down in para. 23 of the Plan of Implementation.

<sup>47</sup> Plan of Implementation, paras. 24-26.

<sup>48</sup> See the Decision V/6 of May 2000, UN Doc. UNEP/CBD/COP/5/23, Annex III. According to this Decision, A. 1., the ecosystem approach means "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".

<sup>49</sup> It expressly refers to the FAO Plan of Action for the Management of Fishing Capacity (1999) and the FAO Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001).



2004 and 2005 respectively. It also requires the development and facilitation of the use of diverse approaches and tools, the elimination of destructive fishing practices, and the establishment of protected marine areas, including representative networks by 2012. States are further required to advance implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities<sup>50</sup> and the related Montreal Declaration<sup>51</sup> by 2006. Finally, it calls for the establishment of a regular process under the United Nations for global reporting and assessment of the state of the marine environment by 2004<sup>52</sup>.

#### d) Climate change and ozone depletion

The Plan deals with these issues rather shabbily. As far as climate change is concerned, it does not go into subject matter, but restricts itself to strongly urging States that have not already done so to ratify the Kyoto Protocol in a timely manner<sup>53</sup>. While the Plan is almost silent on air pollution, it addresses ozone depletion by calling upon States to ensure adequate replenishment of the Montreal Protocol's fund by 2003/2005, as well as to improve access by developing countries to alternatives to ozone-depleting substances, and assist them in complying with the phase-out schedule under the Protocol by 2010<sup>54</sup>.

#### e) Food security, land and water use; desertification; biodiversity

Most of the provisions dealing with these issues are rather undefined in substance. However, a few of them deserve attention. Interestingly, with a view to combating hunger the Plan reminds those States parties to the 1966 UN Covenant on Economic, Social and Cultural Rights to meet their obligations under article 11<sup>55</sup>. It calls upon States to develop and implement integrated land management and water-use plans, taking into account indigenous and local, community-based

<sup>50</sup> UN Doc. A/51/116, Annex II.

<sup>51</sup> UN Doc. E/CN.17/2002/PC.2/15.

<sup>52</sup> See for this section the Plan of Implementation, paras. 30-36.

<sup>53</sup> Ibid., para. 38.

<sup>54</sup> Ibid., para. 39.

<sup>55</sup> Ibid., para. 40 (a). Article 11 of the Covenant reads as follows:

"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

approaches, as well as to adopt policies that guarantee well defined and enforceable land and water use rights<sup>56</sup>. While the Plan points to the need of implementing the Convention on Combating Desertification only in rather broad terms<sup>57</sup>, it deals with the Biodiversity Convention in more detail. Para. 44 characterizes the Convention as the key instrument for the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from use of genetic resources, and requires a more efficient and coherent implementation of the three objectives of the Convention and the achievement by 2010 of a significant reduction in the current rate of loss of biological diversity<sup>58</sup>. Further, it imposes the duty on States to negotiate within the framework of the Convention, bearing in mind the relevant Bonn Guidelines<sup>59</sup>, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources<sup>60</sup>. This clause is the only one in the Plan which requires States to undertake international norm-setting activities. Concerning the protection of forests, the Plan acknowledges the need of significantly reducing deforestation and halting the loss of forest biodiversity. It characterizes the achievement of sustainable forest management, nationally and globally, as an essential goal of sustainable development, but does not show any clear ways and means for arriving at this aim. It only asks countries and the Collaborative Partnership on Forests to accelerate implementation of the proposals of the Intergovernmental Forum on Forests and to intensify efforts on reporting to the Forum, with a view to contributing to an assessment of progress to be concluded in 2005<sup>61</sup>.

#### f) Sustainable development in a globalizing world

In rather broad and abstract terms, the Plan advocates the promotion of open, equitable, rules-based, predictable and non-discriminatory multilateral trading and financial systems that benefit all countries in the pursuit of sustainable development, as well as the implementation of the outcomes of the Doha Ministerial Conference by the members of the WTO, and in particular ensuring the effective and full participation of developing countries in multilateral trade negotiations. Moreover, the Plan advocates the active promotion of corporate responsibility and ac-

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(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

<sup>56</sup> Ibid., para. 40 (b)-(r).

<sup>57</sup> It is at least worth mentioning that the Plan puts emphasis on the potential synergies between the conventions on desertification, climate change and biodiversity, and is clearly in favor of making the Global Environment Facility a financial mechanism of the Convention; *ibid.*, para. 41 (f).

<sup>58</sup> Ibid., para. 44.

<sup>59</sup> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising out of their Utilization (Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Sixth Meeting, The Hague, 7-19 April 2002, UNEP/CBD/COP/6/20, pp. 262, Decision IV/24. Access and benefit sharing as related to genetic resources, A. (Annex).

<sup>60</sup> Plan of Implementation. para. 44 (o).

<sup>61</sup> Ibid., para. 45.

countability, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, without setting any timetable for taking action<sup>62</sup>.

#### g) Health and sustainable development

Regarding the health issue, the Plan is, compared with other sections, pretty forthright. It sets clear timetables for action directed to enhance health education with the objective of achieving improved health literacy on a global basis by 2010; to reduce, by 2015, mortality rates for infants and children under 5 by two thirds, and maternal mortality rates by three quarters, of the rate prevailing in 2000; and to reduce HIV prevalence among young men and women aged 15 to 24 by 25 percent in the most affected countries by 2005 and globally by 2010, as well as to combat malaria, tuberculosis and other diseases<sup>63</sup>.

#### h) Sustainable development of small island developing States

Once more, the Plan sets timetables for action, requiring (a) the undertaking of initiatives aimed at implementing the Global Programme of Action for the Protection of the Marine Environment by 2004; (b) the development of community-based initiatives on sustainable tourism by 2004; (c) the strengthening of ongoing, and the support for new, efforts on energy supply and services by 2004; and (d) the review of implementation of the Barbados Programme of Action for the Sustainable Development of Small Island Development States in 2004<sup>64</sup>.

#### i) Sustainable development for Africa

Stressing the need of reinvigorating the commitment of the international community to address the special challenges that Africa faces in its efforts to achieve sustainable development and giving effect to a new vision based on concrete actions for the implementation of Agenda 21 in Africa, the Plan acknowledges the importance of the New Partnership for Africa's Development (NEPAD). Among the broad range of strategies the Plan promotes for supporting Africa's efforts to achieve sustainable development, only few are concrete enough to warrant mentioning here. Thus, the Plan requires (a) the backing of Africa's efforts to implement NEPAD objectives on energy that seek to secure access for at least 35 percent of the African population within 20 years, especially in rural areas; (b) the improvement of sustainable agricultural productivity and food security with the aim of halving the proportion of people who suffer from hunger by 2015; and (c) giving

<sup>62</sup> Ibid., paras. 47-49.

<sup>63</sup> Ibid., paras. 54 (e), (f), and 55.

<sup>64</sup> Ibid., paras. 58 (e), (g), 59 (a), 61.

support to African countries in developing and implementing food security strategies by 2005<sup>65</sup>.

j) Means of implementation

Under this indeterminate heading the Plan contains a number of statements which are quite diverse in nature.

The Plan urges the developed countries that have not done so to make concrete efforts towards the target of 0,7 percent of gross national product as official development assistance (ODA) to developing countries and effectively implement their commitment on such assistance to the least developed countries as contained in paragraph 83 of the Programme of Action for the Least Developed Countries for the Decade 2001-2010<sup>66</sup>. It further pleads for actions for reducing unsustainable debt burden, encouraging the search for innovative mechanisms to comprehensively address the debt problems of developing countries. This includes debt-for-sustainable-development swaps, as well as requiring donor countries to ensure that resources provided for debt relief do not detract from ODA resources<sup>67</sup>.

Recognizing the major role which trade can play in achieving sustainable development and in eradicating poverty, the Plan, *inter alia*, instructs WTO members to implement substantial trade-related technical assistance and capacity-building measures, and to support the Doha Development Agenda Global Trust Fund<sup>68</sup>. It encourages efforts to promote cooperation on trade, environment and development issues, including in the field of providing technical assistance to developing countries, between the secretariats of WTO, UNCTAD, UNDP, UNEP, and other relevant international environmental and developmental and regional organizations<sup>69</sup>. Regarding the relationship between the multilateral trading system and multilateral environmental agreements, the Plan stresses the mutual supportiveness of both sets of instruments, consistent with sustainable development goals, while recognizing the importance of maintaining their integrity<sup>70</sup>. This statement may disappoint all those who expected the Johannesburg Summit to reach an agreement on how to determine the relationship between trade and the environment. In fact, however, a coalition of States in Johannesburg, including the European Union, the USA and the G77 group, at times pressed for the supremacy of the multilateral trading system over the multilateral environmental agreements<sup>71</sup>. It did not succeed. Thus, en-

<sup>65</sup> Ibid., paras. 62 (j), (i), and 67 (a).

<sup>66</sup> Ibid., para. 85 (a). The Programme was adopted in Brussels on 20 May 2001; see UN Doc. A/CONF.191/11.

<sup>67</sup> Plan of Implementation, para. 89 (e) and (f).

<sup>68</sup> Ibid., para. 90 (c).

<sup>69</sup> Ibid., para. 97 (c).

<sup>70</sup> Ibid., para. 98; compare the Doha Ministerial Declaration, at p.1.

<sup>71</sup> Maier *supra* note 26, at 179 et seq.; International Environment Reporter, Vol. 25, No. 19, at 850.

vironmentalists may be satisfied to find that, in the end, the multilateral environmental agreements have kept parity with the WTO rules<sup>72</sup>.

According to another paragraph of the Plan, trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. It further stresses that unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided, while environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus<sup>73</sup>.

#### k) Institutional framework for sustainable development

In its Malmö Ministerial Declaration of May 2000 the Global Ministerial Environment Forum (GMEF) stated that the forthcoming Johannesburg Summit should review the requirements for a greatly strengthened institutional structure for international environmental governance, based on an assessment of future needs for an institutional architecture that has the capacity to address the complex and wide-ranging environmental problems faced today. In this context, the debates during the preparatory process of the Summit focused on working out ways and means for strengthening UNEP as the principal United Nations body in the field of the environment. Compared with the impetus that originated from these debates, the Summit's real outcome is rather poor.

The relevant section of the Plan starts by making very broad reference to a number of objectives, such as limiting overlap and duplication of activities of international organizations, enhancing participation and effective involvement of civil society and other relevant stakeholders in the implementation of Agenda 21, and strengthening international cooperation aimed at reinforcing the implementation of Agenda 21 and the outcomes of the Summit<sup>74</sup>.

With regard to strengthening the institutional framework for sustainable development at the international level, the Plan states, *inter alia*, that the international community should fully implement the outcomes of the decision on international environmental governance adopted by the UNEP Governing Council at its 7<sup>th</sup> special session in Cartagena<sup>75</sup>, and should invite the General Assembly at its 57<sup>th</sup> session to consider the important but complex issue of establishing universal membership for the Governing Council/Global Ministerial Environment Forum. If one considers that the said decision of the Governing Council only makes reference to some tentative recommendations contained in the report of the Open-ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance at its 22<sup>nd</sup> session<sup>76</sup>, this statement hardly makes any mea-

<sup>72</sup> In this sense K. Töpfer, UNEP Press Releases September 2002/62.

<sup>73</sup> Plan of Implementation, para. 101.

<sup>74</sup> Ibid., para. 139 (f), (g), (i).

<sup>75</sup> UN Doc. UNEP/GC.SS.VII/6, Annex I, 5 March 2002, at 23.

surable progress towards more effective international governance for sustainable development<sup>77</sup>. Finally, with regard to the Commission on Sustainable Development, the Plan stresses that this body needs to be strengthened. It recommends that the Commission should focus on actions related to the implementation of Agenda 21, constrain its sessions to every two years, limit the number of issues addressed in each session, and serve as a focal point for the discussion of partnerships that promote sustainable development<sup>78</sup>.

## 2. "Type 2" Outcomes: the "Public-Private Partnership" Initiatives

### A. Background

There are several social factors in the international system which brought about the rise of public-private partnerships in sustainable development at the Johannesburg Summit. All of them are, broadly speaking, symptomatic of the post-Cold War world: the rise of non-state actors – such as NGOs and private businesses – as participants in international relations, rising grassroots participation, and globalization.

NGOs, due to their specialized expertise and knowledge, are seen as useful agents in the realms of environmental protection and social development, including their international dimension. At the political level, NGOs nowadays often participate in official delegations for international conferences. Business, for its part, increasingly provides the funding crucial to projects, filling gaps left by lack of government support. In addition to profit considerations, "social responsibility" is often forwarded as motive for an investment decision by some international corporations. Despite facing possible disadvantages as first movers<sup>79</sup>, those corporations stand to acquire future markets in the long term. Some see both NGOs and business, owing to their nature as private entities, as able to perform better in development than governments or international organizations<sup>80</sup>. Their connections reach across social strata. Thus they are better able to overcome cultural barriers, especially when meeting resistance from states fearing loss of sovereignty<sup>81</sup>. "By

<sup>76</sup> Ibid., pp. 26 et seq.

<sup>77</sup> Plan of Implementation, para. 140 (d).

<sup>78</sup> Ibid., paras. 147 (d) and (e), 148 (b).

<sup>79</sup> F. Calder, *The Potential for Using the Multistakeholder Network Model to Develop and Deliver Partnerships for Implementation ("Type Two Outcomes") for the World Summit on Sustainable Development* (The Royal Institute of International Affairs Sustainable Development Programme, Discussion Paper), February 2002, at p.7 <<http://www.riia.org/index.php?id=135>> (visited 17/6/2003).

<sup>80</sup> Compare on the role of non-state actors in sustainable development, the article by J. Gupta, *The Role of Non-State Actors in International Environmental Affairs*, in this issue.

<sup>81</sup> W.H. Reinicke, *Deepening the Atlantic: Toward A New Transatlantic Marketplace?* (1996), quoted in: W.H. Reinicke/J.M. Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords*, in: D. Shelton (ed.), *Commitment and Compliance* (2000), 75, at 96-97.

participating in the policy making process [they] can contribute to and influence global regulatory policy such as the setting of norms and standards, reducing transaction costs and simplifying the system itself for all involved”<sup>82</sup>.

“Grassroots” participation by civil society elements, as a counterpart to the community of states<sup>83</sup>, is also on the rise since the end of the Cold War<sup>84</sup>. Community-based self-help groups and a broad range of NGOs all now serve to achieve sustainable development<sup>85</sup>. This grassroots approach reflects governments’ role in creating a legally secured “enabling environment”<sup>86</sup>.

Lastly, globalization is driven again primarily by private actors, and among those mostly corporate ones<sup>87</sup>. The “neoliberal model” is supposed to give primacy to market dynamics, and to have extended through the political sphere, emphasizing democracy and flexibility<sup>88</sup>. The increased importance of business in public life<sup>89</sup> has repercussions of a wider social dimension. Globalization is said to create a “global consciousness”<sup>90</sup>. Although there are many valid arguments why economic globalization is detrimental to sustainable development<sup>91</sup>, it may have its good effects too.

The three factors above led to innovative solutions other than binding agreements. These are primarily outside of the “hard law” sphere altogether. Among them is the increasing practice of public-private partnerships for sustainable development (“type 2” outcomes).

<sup>82</sup> Ibid., at 92.

<sup>83</sup> U. Beyerlin, Strengthening International Governance for Sustainable Development: Expectations from the 2002 Johannesburg World Summit, Potchefstroom Electronic Law Journal, 2002, Vol.1, at 8 <<http://www.puk.ac.za/law/per/documents/abyerlin.doc>> (visited 18/06/03).

<sup>84</sup> This has also been termed a “second wave of self-determination” (K. Ginther, Development Partnerships and Development Research: from Advocacy to Action/Reflections on Method, in: F. Weiss *et al.* (eds.), International Economic Law with a Human Face (1998), 133, at 145, and is often attributed to the aftermath of decolonization. Others describe it as “democratisation” (F. Fukuyama, Second Thoughts: The Last Man in a Bottle, National Interest, 56 [Summer 1999], cited in: C.A. Kupchan, The End of the American Era (2002), at 47).

<sup>85</sup> Compare Ginther, *supra* note 84, at 139. For the region of Africa, this approach was emphasized as early as in 1990 in the African Charter for Popular Participation in Development and Transformation, published as an ECA (Economic Commission for Africa) document: E/1990/42-E/ECA/CM. 16/41 and adopted by the ECOSOC Conference of Ministers (267<sup>th</sup> meeting, 19 May 1990, Res.691(XXV)). This Charter spells out a prototype for development (Ginther, *ibid.*, at 148).

<sup>86</sup> Ginther, *ibid.*, at 151.

<sup>87</sup> Reinicke/Witte *supra* note 81, at 21.

<sup>88</sup> M.H. Ivanova, Partnerships, International Organisations, and Global Environmental Governance, in: J.M. Witte *et al.* (eds.), Progress or Peril? Partnerships and Networks in Global Environmental Governance – The Post-Johannesburg Agenda (2003), at 15; compare Bosselmann, *supra* note 2, at 303, who points out that a marked free-trade strain was already woven into Agenda 21 in 1992.

<sup>89</sup> Ivanova *supra* note 88, at 17.

<sup>90</sup> M.E. O’Connell, The Role of Soft Law in a Global Order, in: D. Shelton (ed.), Commitment and Compliance (2000), at 108.

<sup>91</sup> Compare Bosselmann, *supra* note 2, at 301.

## B. The origin of public-private partnerships (PPPs)

In the context of sustainable development, the term of PPPs came to be used within UN institutions from the late 1990s onwards. The globalizing international environment certainly paved some conceptual ground for exploring fresh avenues in implementation. During the Second Session of the Preparatory Conference for the WSSD it was decided to add an innovation to the traditional conference outcomes of the Rio type<sup>92</sup>. At Johannesburg, J.M. Witte reported that there was “the vision of a new and innovative type of environmental governance”<sup>93</sup>, a less formal, more collaborative and integrated way than the hitherto practiced formal, legalistic approach dominated by the public sector<sup>94</sup>. J. Lash, President of the World Resources Institute, described this new element as “(...) the first stirrings of a new way of governing the global commons – the beginnings of a shift from the stiff formal waltz of traditional diplomacy to the jazzier dance of improvisational solution-oriented partnerships that may include non-governmental organizations, willing governments and stakeholders.”<sup>95</sup>

## C. PPPs as “type 2” outcomes of the WSSD

On a textual basis of the type 1 outcomes (see Part 1. above), PPPs do not feature very prominently. Throughout the different chapters covered by the Plan of Implementation they are mentioned only a few times<sup>96</sup>. As part of the Consolidated List of Partnerships for Sustainable Development<sup>97</sup>, they do not amount to more than a mere compilation, without any normative effect.

### a) The partners

The “Guiding Principles for Partnerships for Sustainable Development”, first circulated by the co-chairs of the Fourth Session of the Preparatory Committee, 27 May-7 June 2002, in Bali, Indonesia<sup>98</sup>, identify a number of different stakeholders

<sup>92</sup> Second Summit Preparatory Committee (PREPCOM 2), 28 January-8 February 2002 (New York), Statement by the Chairman, February 8, 2002, <[http://www.johannesburgsummit.org/html/documents/prep2final\\_papers/chairman\\_statement.doc](http://www.johannesburgsummit.org/html/documents/prep2final_papers/chairman_statement.doc)> (visited 23/02/2003); compare Maier *supra* note 26, at 177.

<sup>93</sup> J.M. Witte/C. Streck, Introduction to Witte *et al.*, *supra* note 88, at 2.

<sup>94</sup> J.M. Witte *et al.*, The Road from Johannesburg: What Future for Partnerships in Global Environmental Governance?, in: Witte *et al.* *supra* note 88, at 61.

<sup>95</sup> Quoted in *ibid.*

<sup>96</sup> E.g. in paras.7 (Poverty eradication), 20 (Changing unsustainable patterns of consumption and production), 26 (Protecting and managing the natural resource base of economic and social development), 56 (health and sustainable development) and 96 (Means of implementation).

<sup>97</sup> Consolidated List of Partnerships for Sustainable Development as of 3 February 2003, <[http://www.johannesburgsummit.org/html/sustainable\\_dev/consolidated\\_list\\_091202.pdf](http://www.johannesburgsummit.org/html/sustainable_dev/consolidated_list_091202.pdf)> (visited 07/03/2003).

<sup>98</sup> Guiding Principles for Partnerships for Sustainable Development (“type 2 outcomes”) to be Elaborated by Interested Parties in the Context of the World Summit on Sustainable Development



who may combine to form PPPs: governments, regional groups, local authorities, non-governmental actors, international institutions and private sector partners.

Out of 500 applications received by the CSD, 251 partnerships have been posted on the WSSD<sup>99</sup>. Combined committed funding numbers about US\$ 253m. so far, a substantial amount considering the rather short timeframe<sup>100</sup>. The partnerships were initiated by governments, international organizations and NGOs, each group accounting for roughly one third of the total. Geographically, most of them are to be found in Africa, Asia and the Small Island Developing States (SIDS)<sup>101</sup>. Participation by the private sector seems to have been more the exception than the rule so far<sup>102</sup>, or else symbolic in nature<sup>103</sup>.

#### b) Function of PPPs

PPPs are a special, action-oriented form of implementation. According to the Guiding Principles, they should "contribute to and reinforce the implementation of the outcomes of the intergovernmental negotiations of the WSSD"<sup>104</sup>. Consequently, they do not set binding norms, and thus do not alleviate the continued need for state commitments in the form of international agreements. Particular care was taken in the text of the Guiding Principles to stress their complementary nature<sup>105</sup>. Witte *et al.* see them as "a promising medium through which states and their international organizations can achieve their mission"<sup>106</sup>.

#### c) Guiding Principles

The Guiding Principles<sup>107</sup> set out the main entry requirements for PPPs for registering under the WSSD process<sup>108</sup>. Firstly, these consist of behavioral direc-

(WSSD), <[http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali\\_documents/annex\\_partnership.pdf](http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali_documents/annex_partnership.pdf)> (visited 12/02/2003), see also: Vice-Chairs' Summary of the Informal Meetings on Partnerships for Sustainable Development, <[http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali\\_documents/prep4\\_summary\\_partnership.pdf](http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali_documents/prep4_summary_partnership.pdf)> (visited 12/02/2003).

<sup>99</sup> See: Consolidated List of Partnerships for Sustainable Development as of 3 February 2003, <[http://www.johannesburgsummit.org/html/sustainable\\_dev/consolidated\\_list\\_091202.pdf](http://www.johannesburgsummit.org/html/sustainable_dev/consolidated_list_091202.pdf)> (visited 08/02/2003).

<sup>100</sup> A prominent example (though outside the formal WSSD process) is the Global Alliance on Vaccines for Immunization (GAVI), which was set up by an initial grant of US\$750m. from the Bill and Melinda Gates Foundation (Calder, *supra* note 79, at 21).

<sup>101</sup> Compare Partnerships for Sustainable Development, <[http://www.johannesburgsummit.org/html/sustainable\\_dev/partnership\\_background.html](http://www.johannesburgsummit.org/html/sustainable_dev/partnership_background.html)> (visited 11/02/2003).

<sup>102</sup> Compare e.g. the Business Action for Sustainable Development (BASD), <<http://www.basd-action.net/initiatives/index.php>> (visited 08/02/2003).

<sup>103</sup> Maier, *supra* note 26, at 180.

<sup>104</sup> Guiding Principles *supra* note 98, at 1.

<sup>105</sup> Ibid., at 2; see also: Partnerships for Sustainable Development (WSSD homepage), <[http://www.johannesburgsummit.org/html/sustainable\\_dev/type2\\_part.html](http://www.johannesburgsummit.org/html/sustainable_dev/type2_part.html)> (visited 12/02/2003). This did not stop many in the preparatory process as advancing them as the main outcome of the Summit, even before it started, see e.g. Calder, *supra* note 79, at 1.

<sup>106</sup> Witte *et al.*, *supra* note 94, at 82.

tives<sup>109</sup> for all partners taking part in PPPs under the WSSD process. They must show mutual respect for each other and share the responsibility for the partnership initiative<sup>110</sup>, be accountable for their behavior<sup>111</sup>, participate on a voluntary basis<sup>112</sup>, and operate in good faith<sup>113</sup>.

In addition, there are certain material requirements which must be fulfilled by each partnership undertaking, such as explicit commitment to the stated objectives of the partnership, a combination of different partners (governments, regional groups, local authorities, NGOs, international organizations and the private sector)<sup>114</sup>, an integrative approach to sustainable development, international reach, the addition of something "new" to the WSSD process (as opposed to continuing partnerships which existed before), and the formal objective of contributing to the global WSSD targets.

#### d) Controlling and catalyzing PPPs

Registration of the partnerships is made by the Commission on Sustainable Development (CSD)<sup>115</sup> (which took over that task from the WSSD Preparatory Committee<sup>116</sup>) in an informal process continuing on after the Summit<sup>117</sup>. By virtue of this role as nerve center of the emerging PPPs system, the CSD may exercise a certain degree of control over all PPPs. Moreover, beyond mere registering, the CSD seems to have assumed a catalyzing function. In due time, this process and the Guiding Principles may pave the ground for establishing a proper legal framework<sup>118</sup>.

<sup>107</sup> Guiding Principles, *supra* note 98.

<sup>108</sup> Compare in general Gupta, *supra* note 80.

<sup>109</sup> In this sense the Guiding Principles do have normative character.

<sup>110</sup> Guiding Principles, *supra* note 98, at 2.

<sup>111</sup> Based on principles such as self-reporting, professional "codes of conduct" (Witte *et al. supra* note 94, at 75) and "naming and shaming" (*ibid.*, at 87).

<sup>112</sup> Guiding Principles, *supra* note 98, at 2.

<sup>113</sup> *Ibid.*, at 2.

<sup>114</sup> Compare *ibid.*, at 2.

<sup>115</sup> Partnerships for Sustainable Development (WSSD homepage), <[http://www.johannesburgsummit.org/html/sustainable\\_dev/partnership\\_background.html](http://www.johannesburgsummit.org/html/sustainable_dev/partnership_background.html)> (visited 08/02/2003). This role was earmarked for the CSD in the preparatory process to the WSSD already, see e.g.: Discussion Paper Prepared by the Vice-Chairs Mr. Ositadinma Anaedu and Mr. Lars-Goran Engfeldt for consideration at Third Session of the Preparatory Committee for WSSD, <[http://www.johannesburgsummit.org/html/documents/prepcom3docs/governance\\_discussion\\_paper.doc](http://www.johannesburgsummit.org/html/documents/prepcom3docs/governance_discussion_paper.doc)> (visited 05/03/2003).

<sup>116</sup> Compare Calder, *supra* note 79, at 3.

<sup>117</sup> Compare Guiding Principles, *supra* note 98, at 3.

<sup>118</sup> Compare below at p. 236; Müller-Kraenner also argues in this sense for the possibility of such a framework (S. Müller-Kraenner, Partnerships as an Instrument to Implement the Johannesburg Policy Targets, in: Witte *et al.*, *supra* note 88, at 57). Witte *et al.* argue that the rules framework already exists, although in non-binding form, *supra* note 88, at 78.

## e) Assessment

The WSSD raised the existing PPP concept to a more formal level<sup>119</sup>, while fully retaining the decentralized and non-binding character of the PPPs that is the essence of their strength<sup>120</sup>.

Despite the Guiding Principles, the partnerships remain an elusive and highly contested phenomenon, as there is no common understanding of what clearly constitutes them, nor how they relate to type 1 outcomes of the WSSD, or to earlier intergovernmental agreements<sup>121</sup>. This is rightly identified as a serious shortcoming of the WSSD debate<sup>122</sup>. None of the Guiding Principles are, at this point, binding on the partners in any sense of the word<sup>123</sup>. But, as argued above<sup>124</sup>, they may yet become so.

Many NGOs at the WSSD saw the type 2 partnerships as a move by industrial countries to escape their responsibility for development and the international environment, substituting firm commitments for a loose, decentralized and largely unverifiable process<sup>125</sup>. This concern is addressed by the complementarity requirement in the Guiding Principles<sup>126</sup>.

Mention must be made of the fact that the PPPs registered under the WSSD are only a fraction of the whole of public-private partnerships for sustainable development currently in existence. PPPs operate outside the formal WSSD framework as often as inside it. In fact, some PPPs which are not on the WSSD list contain major industrial corporations as the driving partners<sup>127</sup>.

The PPP listing system remains open-ended and expandable, as submissions for partnerships are also considered in the follow-up process to the WSSD.

## D. The WSSD PPPs in practice

Partners engaging in PPPs generally agree that some practical requirements should be met for a partnership to work: specific measurable targets and time-frames, identified sources of funding, long-term sustainability without outside

<sup>119</sup> Compare *Ivanova supra* note 88, at 23.

<sup>120</sup> For that reason, Witte *et al.* argue that a harder, binding, and centralized mechanism "is neither politically realistic nor practically desirable", as this would have suffocating effects (Witte *et al., supra* note 94, at 73-74 and 86).

<sup>121</sup> Compare *ibid.*, at 78, calling for such a definition.

<sup>122</sup> *Ibid.*, at 61.

<sup>123</sup> Compare *ibid.*, at 80, calling for mandatory monitoring and evaluation for partnerships.

<sup>124</sup> At p. 230.

<sup>125</sup> See e.g. R. Parmentier (Greenpeace International): Type 1 versus Type 2 Outcomes: Explaining the Jargon, Exposing the Trap, <<http://archive.greenpeace.org/earthsummit/docs/jargon.pdf>> (visited 07/03/2003).

<sup>126</sup> See at note 98 above.

<sup>127</sup> See e.g. the list of case studies by members of the World Business Council for Sustainable Development (WBCSD), <<http://www.wbcd.ch/casestud/index-list.htm>> (visited 04/03/2003). Despite showing a heavier emphasis on business interest, many of WBCSD's "selection criteria" closely mirror the "Guiding Principles" of the WSSD, *supra* note 98.

help, participation of local communities, a sense of ownership, generation of economic income, and the involvement of the private sector<sup>128</sup> of developing countries<sup>129</sup>. Moreover, there is a need for in-built checks and balances to counter inherent power asymmetries between the partners<sup>130</sup>.

Information about how the PPPs work in practice is at this stage hard to come by, as most of them were launched at the WSSD, or shortly before that date. However, the official information supplied by their partners, as documented in the Sustainable Development Partnership (type 2) Summary<sup>131</sup>, already allows some estimate of their expected scope and performance in the future. The following two examples selected from the list of 251 PPPs<sup>132</sup> may give an idea of the essentials required for such a partnership.

#### a) Tanzania: Renewable energy through local private enterprise

SUDERETA, a network of NGOs in Tanzania, has joined with North South Initiative e.V. in Germany (a non-profit association) in a partnership fostering growth of small enterprises in Tanzania in the sector of renewable energy (RE) hardware<sup>133</sup>. German companies provide the start-up RE technology. These "Enterprises of Trust" (EoT) are financed by a Revolving Savings and Credit Fund (SUDERETA provides some venture capital, but its company vote share never exceeds 49%). Such financial devices are intended to initiate local economic cycles. EoTs are scheduled to become financially self-sufficient after 6 years. The scenario as planned considers a total of 500 enterprises and requires a budget of 24.87m. over a period of 20 years, a fifth of which will have to be met by external funding.

The global objective is to "enable poor people in rural areas to improve their living conditions by themselves"<sup>134</sup>. Renewable energies such as photovoltaic systems have many advantages over central-grid energy: They are decentralized, relieve women and children from their daily work of collecting firewood, and safeguard the natural environment from being stripped empty for fossil fuels. All these partner-

<sup>128</sup> This is based on the important recognition that market participants in those countries have, in principle, the capacity to pay for services, however limited it may be in the starting phase.

<sup>129</sup> These requirements for PPPs were identified by various panelists at Third Meeting of the Global Forum on Sustainable Energy (GFSE-3), Public-Private Partnerships for Rural Energy Development, Graz, Nov. 27-29, 2002; official meeting summary at <<http://www.gfse.at/papers/sdvol78num1.pdf>> (visited 11/03/2003). As they constitute best practice, it seems safe to assume that they work for PPPs in all fields.

<sup>130</sup> Compare Witte *et al.*, *supra* note 94, at 75-76.

<sup>131</sup> At <[http://www.johannesburgsummit.org/html/sustainable\\_dev/summary\\_partnerships.pdf](http://www.johannesburgsummit.org/html/sustainable_dev/summary_partnerships.pdf)> (visited 07/03/2003).

<sup>132</sup> See *supra* note 97.

<sup>133</sup> Enterprise of Trust – Economic Welfare in Rural Areas through the use of Renewable Energies (Partnership Initiatives Information Sheet), <[http://www.johannesburgsummit.org/html/sustainable\\_dev/p2\\_managing\\_resources/2008\\_enterprise\\_trust\\_suderata.pdf](http://www.johannesburgsummit.org/html/sustainable_dev/p2_managing_resources/2008_enterprise_trust_suderata.pdf)> (visited 12/02/2003).

<sup>134</sup> Ibid.

ship-specific goals are connected to type 1 outcomes of the WSSD, including awareness education.

#### b) Sustainable Mountain management in the Himalaya region

The Italian Foreign Ministry (DGCS) has launched a partnership with the governments of countries bordering the Hindu Kush – Karakorum – Himalaya mountain complex<sup>135</sup>, together with several scientific specialist organizations, with the objective of preventing further degradation of the region's fragile ecosystems, and raising the living standards of its inhabitants<sup>136</sup>. Targets include the creation of databases on natural resources, on climate change and how to counter its effects, on biodiversity, and on economy. Additionally, training will be given in technologies such as remote sensing and GIS for data collection on land cover and environmental conditions, especially for monitoring degradation. Implementation will be effected through the use of pre-identified governance methods. Emphasis is laid on the participation of local actors. The timeframe for all those targets is three years. It is not clear, however, how results will be measured. Funding information is so far only available on the DGCS contribution (3.9m). Regular monitoring will be developed on the basis of self-reporting to the public via email, and by involving "reference institutions" such as UNET, FAO and the World Conservation Union "according to accepted international project criteria". The Partnership Initiatives Information Sheet<sup>137</sup> refers extensively to relevant type 1 outcomes of the WSSD, the Rio Summit, and Agenda 21.

### III. Overall Assessment of the Summit's Outcome

#### 1. Shift from Law-Making to Law-Implementation?

It was clear from the outset that the States participating in the Johannesburg Summit would not agree upon new legally binding commitments. They focused instead on enhancing the implementation of existing ones<sup>138</sup>. In principle, they cannot be blamed for this stance because the current weakness of international environmental protection results from the shortcomings in the multi-level processes of

<sup>135</sup> Afghanistan, Bangladesh, Bhutan, China, India, Nepal, Myanmar, Pakistan (all member countries of the International Centre for Integrated Mountain Development, ICIMOD).

<sup>136</sup> Institutional consolidation for systemic planning and management towards poverty alleviation and environmental conservation in the framework of the regional sustainable development in the Hindu Kush – Karakorum – Himalaya mountain complex (Partnership Initiatives Information Sheet), <[http://www.johannesburgsummit.org/html/sustainable\\_dev/p2\\_managing\\_resources/1408\\_inst\\_consolidation\\_italy.pdf](http://www.johannesburgsummit.org/html/sustainable_dev/p2_managing_resources/1408_inst_consolidation_italy.pdf)> (visited 12/02/2003).

<sup>137</sup> See *ibid.*

<sup>138</sup> As shown above, II. 1. B. e), para. 44 of the Plan of Implementation is the only provision that calls upon States to undertake international law-making activities.

relevant law implementation, rather than from remaining lacunas in international law-making<sup>139</sup>. Fortunately, with the Plan of Implementation, the Johannesburg Summit has made an attempt to fill the existing implementation gaps by inducing those States which had not done so to comply with their obligations under international treaties, as well as non-binding instruments. The commitments made in the Plan, albeit soft law in nature, can be expected to give impetus to the acceleration and effectuation of the decentralized post-Rio implementation processes that were seriously delayed or even stagnated for years.

However, it cannot be ignored that most of the commitments the Johannesburg Plan contains are, compared with those laid down in Agenda 21, less elaborate and rather vague in substance. Even those Johannesburg commitments which have to be fulfilled within a fixed time limit are handicapped by the lack of clarity in determining the kind and scope of measures to be taken for achieving the prescribed target. This deplorable shortcoming may have been the price to pay for the overly ambitious attempt to adopt an all-encompassing program of action for sustainable development.

While primarily concerned with enhancing the implementation of existing legally binding or non-binding obligations of States, the Plan also includes a few paragraphs which are designed to lay the ground for undertaking activities, such as changing unsustainable patterns of consumption and production<sup>140</sup>, or advancing the use of renewable energy<sup>141</sup>, whose impacts on sustainable development were undervalued as yet. Although very vague in substance, the commitments made in these paragraphs of the Plan might prove a catalyst for developing innovative strategies towards sustainable consumption and production, as well as using environmentally sound renewable energy.

## 2. Shift from “Hard Law” to “Soft Law”?

In the post-Rio process, a series of international soft law instruments were established extending from Agenda 21, the UN General Assembly’s Millennium Declaration, the Monterrey Consensus and the Doha Ministerial Declaration of the WTO to the most recent Johannesburg Summit’s Plan of Implementation. At first glance, this long raft of documents, only binding politically on States, seems to give evidence for a shift from hard law to soft law in international environmental and developmental relations. However, a closer look at the post-Rio process reveals

<sup>139</sup> There is for instance urgent need for establishing an international instrument for halting the ongoing process of world-wide degradation of forests and related biodiversity, either through a relevant protocol to the Biodiversity Convention or through a separate international treaty on forest protection. Unfortunately, the Plan of Implementation has done nothing to promote this discussion; see above, under II. 1. B. e). See for a more detailed discussion B. Schulte zu Sodingen, Sustainable Forest Management – Progresses since Rio and Challenges for the Future, in this issue, 397 et seq.

<sup>140</sup> Plan of Implementation, paras. 14 and 15.

<sup>141</sup> Ibid., para. 20.

that this is not true. It is beyond doubt that international agreements, particularly multilateral ones, such as the Rotterdam Convention, the Stockholm Convention, the Biosafety Protocol and the Kyoto Protocol, continue to function as pillars supporting the global normative system of environmental protection and sustainable development. In this respect, soft law instruments may provide for transitional solutions or serve as catalysts for international law-making at a later stage, but they can never fully substitute international agreements. With regard to implementation, the situation is different. It is in this realm that soft law, particularly when combined with hard law, becomes increasingly important in practice. Although lacking legally binding force, it can direct States' conduct in the process of law implementation, provided that it contains rules clear and concrete enough to produce meaningful steering effects on the behavior of States. Unfortunately, the Johannesburg Plan can hardly be expected to gain considerable efficacy as a tool of implementation, as its provisions in large parts are lacking sufficient normative strength.

### 3. Shift from Intergovernmental Action to Private-Public Partnership?

The ever-increasing presence of NGOs in today's international environmental and developmental relations<sup>142</sup> gives evidence of an emerging international civil society that is going to become a counterpart to the community of States which for decades clearly dominated the international arena. For years, NGOs have been actively participating in relevant international treaty-making and treaty-implementation processes<sup>143</sup>. By making all these processes more transparent and subject to control, NGOs fulfil a valuable "watchdog" function for the public of the world. Furthermore, they are trying to use the national and international judicial processes to advocate protecting the environment.

With regard to non-State actors as partners in achieving sustainable development, the Johannesburg Summit's Type 2 Partnership Initiative is an innovative attempt to induce government, civil society, business and industry to become actively involved in joint undertakings which are strictly project-oriented. As indicated in the Guiding Principles, the public-private partnerships (PPPs) cannot serve as surrogates for intergovernmental action, but are meant to play a complementary role in the implementation of type 1 instruments. PPPs are voluntary and self-regulatory in nature. In case of their failure, it is not the States having supported them who can be held accountable, but only the partners involved. Registering PPPs with the United Nations and monitoring their activities, as indicated in the relevant Guiding Principles of the Summit, may provide for certain international control

<sup>142</sup> See for a more recent assessment of this phenomenon the study prepared by Ecologic and Field titled "Participation of Non-Governmental Organisations in International Environmental Cooperation", published in: Reports of the German Umweltbundesamt 11/02 (2002).

<sup>143</sup> Compare above at p. 226 et seq.

over them, but only the establishment of legal framework for ensuring corporate accountability and sound decision-making<sup>144</sup> will provide them with any kind of legitimacy. Whether PPPs will have the effect of greening the economy in the future, highly depends on their constituency. In order to prevent PPPs from resulting in unsuitable "privatization of sustainable development"<sup>145</sup>, it must be ensured that in each partnership the private stakeholders and the government involved have an equal share in the relevant decision-making.

#### 4. Shift from "Sustainability" to "Development"?

Commenting on the Johannesburg Summit, K. Bosselmann stated: "... while Rio aimed for sustainability to guide economic and social progress, Johannesburg aimed for economic and social progress to guide sustainability"<sup>146</sup>. If one shares his view that "there is a qualitative difference between the environmental dimension and the social-economic dimension of sustainable development" in the sense that "the former is the prerequisite for the latter"<sup>147</sup>, he is certainly right. However, the wide-spread understanding in doctrine and State practice is that the concept of sustainable development reflects the idea of integrating environmental protection and social-economic development in such a way that both interests must be brought in line with each other. Taking into account Article 4 of the Rio Declaration which stresses that "(i)n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it", it cannot be held that environmental protection is predominant over development in absolute terms<sup>148</sup>. Thus, Bosselmann's argument that "the natural sphere is paramount and cannot be compromised"<sup>149</sup> mirrors a position that to date only a minority of international environmentalists have taken. Therefore, the Johannesburg Summit cannot be blamed for being concerned with both dimensions of sustainable development by addressing environmental and social-economic interests, thereby pursuing an anthropocentric approach which is typical for the agenda of sustainable development<sup>150</sup>.

<sup>144</sup> This has been rightly stressed by Gupta, *supra* note 80.

<sup>145</sup> Compare again Gupta, *ibid*.

<sup>146</sup> Bosselmann, *supra* note 2, at 314.

<sup>147</sup> *Ibid.*, at 301-302.

<sup>148</sup> See for a more detailed discussion on the meaning of sustainable development e.g. U. Beyerlin, *The Concept of Sustainable Developments*, in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996), 95, at 101 et seq., and A. Boyle/D. Freestone, *Introduction*, in: A. Boyle/D. Freestone (eds.), *International Law and Sustainable Development* (1999), 1, at pp.10 et seq. Compare also P. Sands, *Principles of International Environmental Law*, Vol. I (1995), 199 et seq.

<sup>149</sup> See again Bosselmann *supra* note 2, 302.

<sup>150</sup> Looking for commitments which seem to be reflecting an ecocentric approach, only para. 44 of the Plan (requiring the achievement of a significant reduction in the current rate of loss of biological diversity by 2010) comes to mind.



Whether the Plan of Implementation in its entirety strikes a sound balance between environmental protection and development, is indeed another matter. The Summit should not be blamed for having cared about some crucial social needs of humankind, such as health<sup>151</sup> and education<sup>152</sup>, which in essence altogether lack any considerable environmental dimension. It can, however, be criticized for having included in its Plan of Implementation quite a number of commitments referring to issues which, while clearly espousing both dimensions of sustainable development, unfortunately prove one-sided in the way they go about addressing these issues. To this category of commitments belong particularly those referring to sustainable development in a globalizing world<sup>153</sup> and trade<sup>154</sup> which in large parts appear to be pursuing a policy approach that gives economics clear preponderance over the environment. With regard to the trade issue, the Plan admittedly does not fully ignore pertinent ecological aspects<sup>155</sup>, but it is far from promoting a policy of "greening" the GATT/WTO. Fortunately, the Plan also includes a considerable number of provisions which clearly evidence the acknowledgement of the convening States, that in many areas there is a close nexus between development and the environment. This is particularly true regarding the crucial issue of poverty alleviation. The Plan is certainly right in stressing the need for combining social-economic efforts with those towards integrated protection and management of land, water and living resources, as well as in enhancing the access of poor people to these resources<sup>156</sup>. It is fair to say that at least in this regard the Johannesburg Summit has shown more sensitivity and responsiveness to that end than the Rio Summit.

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<sup>151</sup> Plan, Chapter IV, paras. 53-57.

<sup>152</sup> Ibid., paras. 116-124.

<sup>153</sup> Plan, chapter V, paras. 47-55.

<sup>154</sup> Ibid., paras. 90-99.

<sup>155</sup> As already mentioned, the Plan acknowledges the "mutual supportiveness between the multilateral trading system and the multilateral environmental agreement"; *ibid.*, para. 98.

<sup>156</sup> Compare in particular chapters II and IV of the Plan.

