Address by
Justice Zainool Hosein
Chairman of the Environmental Commission
of Trinidad and Tobago
on the occasion of the Symposium on
"Sustainable Development: A Legal Perspective"
07 May 2003
held at Hilton & Conference Centre, Trinidad W.I.

While an undergraduate in the early sixties at the University of Sheffield, Environmental Law was not to be found as a subject of study that did not mean that there was no law relating to the Environment. There were statutory provisions of an anti-polluting nature dealing with public health matters and safety in mines, and there was, of course, a reference to the law of torts, local Government Law, and International Law. Some thirty to forty years later, most American and Canadian, as well as some British Universities offer courses in environmental management and environmental law. Societies have changed and the environment now assumes an importance it has never before achieved, so much so, that some international and world-funding agencies impose environmental conditionalities in their provisions for funding.

What has brought about this environmental consciousness and transformation? Unquestionably, environmental deterioration is wide spread at the national, regional and international levels as witnessed by resource depletion, ravaging of forested and other green areas, by "slash and burn", by all forms of harmful pollution, and the decline or in some cases, the extinction of species. The world has been forced to take heed: a small change in a far away place may have major consequences on the amount of our rainfall or the severity of storms and hurricanes. Destruction of Brazilian rain forests, deforestation in Thailand, air pollution in Mexico, all have world wide consequences: global warming, a hole in the ozone layer and the destruction of bio-diversity. The focus of contemporary western environmentalists' concern was not only the degradation of the environment in the West, but has now shifted to degradation and pollution in poor countries. This clearly reflected a realization that life, life styles and comfort of the people in the wealthy industrialized countries are increasingly affected by environmental degradation and the state of the environment in poor countries.

Another reason for increasing concern with environmental destruction in poor countries, is the heightened recognition that the earth's natural resources are finite, and that the continuing existence of industrialized societies depends on the continuing availability of these resources. The earth's resources and the earth's ability to absorb pollution are already strained, and therefore its ability to sustain unacceptably high materially rich life styles is in serious jeopardy.

Another reason for increased attention to environmental conditions in poor countries, is that serious damage to the environment through exploitation of resources, has already

taken place in industrially developed countries. And so, it is felt by some, that it is cheaper to prevent or reduce environmental degradation in poorer countries, than to undertake the impossible task of reversing degradation in the industrialized countries. Some say this is reflected in increasing interest in debt for nature swaps.

These and other environmental concerns date from the early nineteenth century, but, at that time, attention was centered on exploitation of natural resources. As a result of growing industrialization, a number of treaties were signed relating to fishing stocks, but pollution and ecological issues were not addressed.

The international response, however, soon recognized that co-operation between States was necessary. In 1945, the creation of a global organisation (the United Nations) after the destruction caused by World War II, provided an international framework within which, to develop an International Law on the Environment.

By 1972 a significant body of environmental obligations had been established – international concern was no longer focused only on the conservation of flora and fauna, but was addressing issues such as oil pollution, and the effect on the atmosphere of nuclear tests.

The first International Conference on the Environment, The United Nations Conference on the Human Environment, was held in Stockholm. It was attended by one hundred and fourteen (114) States, and marked the turning point in the development of International Environmental Law. The Conference produced a declaration of principles (regarded by some as the foundation of modern International Environmental Law), the most significant provisions of which, include the requirement for international co-operation to effectively control, prevent, reduce and eliminate adverse environmental effect resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interest of all States. It also provides, that States are responsible for ensuring that activities within their jurisdiction and control do not cause damage in other states, or in geographical areas beyond national jurisdiction.

The 1972 Conference also created the United Nations Environmental Programme (UNEP) as a body to guide the future development of International Environmental Law, and established the United Nations Environmental Fund, to which signatory States make voluntary contributions. By acting as a co-coordinating body, UNEP has greatly stimulated the development of Environmental Law. In just over twenty-five (25) years, the environment has become one of the central objectives of the international environmental focus, as well as one of the most dynamic areas of the international legal regime.

Between 1972 and 1992, several hundred bilateral and multilateral environmental agreements were concluded between nations. But the degradation and pollution has not stopped. In 1986 the Chernobyl explosion deposited fifty (50) tons of nuclear fuel into the atmosphere and a northwesterly wind carried radio-active particles across the Baltic States and to much of Western Europe, leading to pollution of land, air and water and

carrying an increased risk of cancer in humans. In the same year, a fire in a warehouse in Switzerland, caused agricultural chemicals solvents and mercury to flow into the Rhine, killing millions of fish, and threatening the safety of drinking water for the federal republic of Germany and in the Netherlands. Because of land degradation in Africa along the Sahels, the displacement of ten (10) million refugees was caused by barren soil. Forest cutting in Nepal has increased flooding in India and Bangladesh, and rain carried by the water cycle may destroy crops thousands of miles away. These catastrophes illustrate the impossibilities of controlling pollution within a country's borders but national degradation and pollution abound: air pollution in our cities, traffic congestion, the loss of open space, the lack of potable water, sanitary waste disposal and treatment; the diminishing biological diversity and the decline in fish stocks and other renewable resources needed for food, the rise in the sea level, the continuing deterioration of the protective ozone layer, just to name a few. I need not dwell further on these unsustainable trends. We all know them.

In 1987, the Brundtland Report noted that during the 1980's, there had been a marked increase in the incidence of environmental crises of a global nature, such as the drought in Africa, which triggered an environmental and developmental crisis, and putting some thirty-five (35) million people at risk and killing about one million. It was this report which concluded, that if resources continued to be used at the current rate, if the plight of the poor was ignored, and if pollution and wasting of resources continued, a decline was to be expected in the quality of life of the world's population. It called upon wealthy nations to make changes in their life style, by re-cycling waste, conserving energy and land, and by rehabilitating damaged landscapes. There was, in consequence, an escalation of pressure for international action on the environment, as well as pressures nationally and regionally. This led to the United Nations Conference on the Environment and Development in Rio de Janeiro, Brazil in 1992.

That Conference under the auspices of the United Nations was attended by approximately ten thousand (10,000) delegates from one hundred and seventy-six (176) states, including Trinidad and Tobago. Its effect has been described as starting an environmental revolution, which, if it succeeds, will rank with the agricultural and industrial revolutions as one of the great economic and social transformations in human history. Clearly, the Conference stimulated an acute awareness on the environment and development, and the declaration of its principles sought to underpin the basic fundamentals of sustainable development.

These principles were not empty articles of levity and so their impact not only echoed throughout the world, but called for national, regional and international application. I am happy to state that Trinidad and Tobago responded positively by reflecting broadly most of the principles of the Rio Declaration, not only in our National Environmental Policy but in the Environmental Management Act 2000 (the Act), (to which reference will be made), and the promulgation of subsidiary legislation.

The Act itself in its preamble sets out that our Government is committed to sustainable development and describes it as the balance of economic growth with environmentally

sound practices, in order to enhance the quality of life and meet the needs of present and future generations; it goes on to recite that management and conservation of the environment, and the impact of environmental conditions on human health constitutes a shared responsibility and benefit for everyone in the society requiring co-operation and it stresses the importance of co-ordination of public and private sector activities. It also recognises that public authorities and other institutions have been performing various environmental functions and services under existing laws, and emphasizes the need for a co-ordinated approach, to ensure that the application of those laws is consistent with the Government's commitment, as well as the use of economic and non-economic incentives to encourage sustainable development.

The recitals in the preamble to the Act are by themselves matters of intent, but in the body of the Act were given teeth, by being embodied in the statutory provisions that follow. Thus, for example, Section 4 of the Act sets out the objectives of the Act being, inter alia, the development and implementation of laws and policies and other programmes for, and in relation to, conservation and wise use of the environment and sustainable development as defined.

And so, in furtherance too, of Government's commitment to sustainable development, the Environmental Management Authority (the Authority) was established by and under the Act, to, inter alia, co-ordinate, facilitate and oversee execution of the National Environmental Strategy and programmes, to promote environmental awareness of environmental concerns, and to establish an effective, regulatory regime which will protect, enhance and conserve the environment.

Where an administrative and executive Authority is charged with the responsibility of carrying out the provisions of an Act, it is normal to provide for a system whereby its decisions and actions may be challenged on appeal or by original proceedings. Thus in October 2000, the Environmental Commission (the Commission) was established, pursuant to Section 81 of the Act. It was designated a Superior Court of Record with inherent powers, as well as the power to enforce its own Orders and Judgements, and the same power to punish contempts as the High Court of Justice. Its jurisdiction as set out in Section 81 consists of hearing and determining:-

a) Appeals from decision or actions of the Authority, and specifically authorised under the Act.

b) Applications for deferment of decisions relating to emergency responses, or designations relating to environmental sensitive areas or species;

c) Applications for the enforcement of consent agreements and administrative orders;

d) Administrative civil assessments;

e) Appeals from the designation of environmentally sensitive areas or environmentally sensitive species;

f) Appeals from a decision by the Authority refusing to issue a Certificate of Environmental Clearance or against the grant of one with conditions;

g) Appeals from any determination by the Authority to disclose information or materials claimed as a trade secret, or confidential business information;

h) Direct private party actions under Section 69; and

i) Such other matters as may be prescribed by the Act or any other written Law, where jurisdiction in the Commission is specifically provided.

In relation to carrying out its jurisdiction, the Commission, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property and other matters necessary, or proper for the due exercise of its jurisdiction, shall have all such powers, rights and privileges, as are vested in the High Court of Justice on the occasion of an action.

It is clear, therefore, that in pursuance of its commitment to sustainable development, there have been created in Trinidad and Tobago, both the administrative authority to carry out the administrative responsibilities prescribed for it, under the Act, and the Commission (a Superior Court of Record) to which persons aggrieved by the decisions and actions of the Authority may turn for redress as provided for.

The Commission has been described by the Regional Director of the United Nations Environmental Programme as one of the first Environmental Courts in the region, and one of the few in the World, for that matter. Clearly, ours is a growing jurisdiction which will take the Commission into uncharted waters. Because this is a developing area of law, legal practitioners will find themselves having greater recourse to citations from outside of the jurisdiction. And because the development of this area of Law is now of global significance, the Judgements and decisions of the Commission will (we hope), have an effect on the development of Environmental Law in other common-law jurisdictions. The fact that many of the principles of Environmental Law are yet to be properly honed and elucidated will necessitate the Commission taking a broader, robust perspective of the Law, putting it in a national, socio-economic context as well as an international context, the key to which being the concept of sustainable development.

As may be gained from the Brundtland Report, the Rio-Declaration and Agenda 21, the concept of sustainable development has both a national and international flavour, and Trinidad and Tobago’ commitment to the concept is evident from the incorporation in the Act of most of the principles enunciated in the Rio Declaration.

Under Principle 1 (human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life, in harmony with nature).

Ample evidence is to be found both in the preamble of the Act, as well as in Section 4 thereof.

If human beings are so entitled in International Law, then to be effective nationally, such a right has to be prescribed for in our Domestic Law. A question is bound to arise as to whether this should be introduced and protected as a fundamental right, (as has been done in some countries), in addition to those set out in Section 4 of the Constitution.

By Principle 3, the right to develop must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Section 4(d)(1) of the Act adopts this principle and further provides for it by conservation and wise use of the environment.

Principle 4 asserts that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. The Act in its preamble, Section 4, as well as Sections 35-40, dealing with the issuance of a Certificate of Environmental Clearance, clearly embody this principle.

Principle 8 postulates that in order to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies. The Act in its preamble Section 4(d) (i)(ii) and Section 16(h) identify with this principle.

Principle 10 of the Rio Declaration enumerates that environmental issues are best handled with participation of all concerned citizens at the relevant level. At the National level, each individual shall have appropriate access to information concerning the environment that is held by Public Authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. It postulates that States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided. These aspects of the Declaration are well provided for in the Act: (See sections 4(a)(b) and (c); 16(1)(e); 17; 18(c); 28 to 30; 35(3); 42; 49; and 69. See also the Noise Pollution Control Rules 200l, Rules 3, 10(1)(d), 2(b), 16(4), 24, 25. Also see the Certificate of Environmental Clearance Rules 2001, Rules 3(2)(b), 5(2), 8, and 9.

Principle 11, States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. It recognises that standards applied by some countries may be inappropriate and of unwarranted economic and social costs to other countries, in particular developing countries. The general import of the Act itself and the subsidiary legislation, which have been passed, are conscious of the principles in this statement.

Sections 66, 67, 81(5)(d), dealing with administrative civil assessments give effect to the approach that States shall develop a national law regarding liability and compensation for the victims of pollution and other environmental damage, and provides an expeditious and more determined manner to develop further international environmental law, regarding liability and compensation for adverse effect of environmental damage caused by activities within their jurisdiction or control, to areas beyond their jurisdiction. These provisions embody also, the approach that the polluter should, in principle, bear the costs of pollution stated in Principle 16 of the Declaration. The Act also provides in Section 35(5) as well as in the Certificate of Environmental Clearance Rules, (Rules 4(1)(b), 5 and 10) for an Environmental Impact Assessment as an instrument to be undertaken for proposed activities that are likely to have a significant adverse impact on the environment.

Achieving sustainable development implies changes in many of the cultural patterns that now influence societies' relationship with the environment. This change cannot be expected to take place merely through a coercive system of legal sanctions regardless of how meticulous and extensive it may be, it is impossible for a policeman to follow every citizen. The lack of environmental awareness is sometimes linked to anti-social individual economic benefits in the short-term, but it is often the result of not being aware of the consequences of certain types of relationships with the environment.

Thus, education and public information, especially through the mass media, are basic tools for achieving a change in people's habits and behaviour. Sustainable development implies human development, and an expression of this is the degree of education. When the behaviour of most people is conscientious and responsible in relation to the environment, the enforcement of legal sanctions will only be pertinent for small groups.

I would therefore respectfully submit, that the commitment to sustainable development has been reasonably well translated into statutory provisions in Trinidad and Tobago. This concept of sustainable development is not a twentieth century novelty. Indeed, John Stewart Mill, in "Principles of Political Economy" in 1848 had asked, "…………is there nothing recognised as property except what has been produced? Is there not the earth itself, its forests and waters, and all other natural riches above and below the surface? These are the inheritance of the human race, and there must be regulations for the common enjoyment of it. What rights, and under what conditions a person shall be allowed to exercise over any portion of this common inheritance cannot be left undecided. No function of Government is less optional than the regulation of these things, or more completely involved in the idea of a civilised society".

Sustainability itself at the individual level, is a long established concern of planning law, and appears to be a way of translating the generalised notions of concern for the temporal and spatial dimensions of human activity into criteria for assessing the environmental probity of actions of landowners but there are, of course, wider conceptual issues relevant to the term.

Some of these notions found their way into the Environmental Policy set out in the United Kingdom's White Paper 1990 entitled "This Common Inheritance", Paragraph 1.14 of which states:

> "Mankind has always been capable of great good and great evil, that is certainly true of our role as custodians of our planet. The Government's approach begins with the recognition that it is mankind's duty to look after our world prudently, and conscientiously. We do not hold a freehold on our world, but only a full repairing lease. We have a moral duty to look after our planet and to hand it on in good order to future generations. That is what experts mean when they talk of sustainable development: not sacrificing tomorrow's prospect for a largely illusory gain today. We must put a proper value on the natural world: it would be odd to cherish a Constable but not the landscape he depicted".

In conclusion, the members of the judiciary across the globe assembled at the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg in South Africa, hosted by the Chief Justice of South Africa and sponsored by the United Nations Environmental Programme from August 18th to 20th 2002, affirmed, inter alia, that an independent judiciary and judicial process is vital for the implementation, development and enforcement of Environmental Law and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels are crucial partners for promoting compliance with, and the implementation and enforcement of national and international environmental law.

By the passing of the Act which incorporates and has given legal effect to most of the principles in the Rio Declaration, and by the creation of the Commission, entrusted with the power to give effect to those principles, we in Trinidad and Tobago have not only given a similar commitment to sustainable development, and the Commission for its part, as the Judicial segment of the system, is determined to exercise its jurisdiction fairly and efficiently, always conscious of the balance of sustainable development which underscores addressing the matters falling within its jurisdiction.