BEYOND THE GLOBAL SUMMITS: REFLECTING ON THE ENVIRONMENTAL PRINCIPLES OF SUSTAINABLE DEVELOPMENT

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Beyond the global summits: reflecting on the environmental principles of sustainable development

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I - INTRODUCTION

In addition to challenges we face in the context of specific environmental problems there is the greater challenge of creating legal rules for achieving sustainable development which will in time play a central role in international and domestic environmental law and policy. It is advocated that to pave a sustainable future a new economic paradigm integrating traditional economics with ecological economics is necessary and as such the only viable option to secure a hopeful path for future generations of humans.¹ “Our goal must be to meet the economic needs of the present without compromising the ability of the planet to provide for the needs of future generations.”² The legal challenge for sustainable development is enormous: a legal framework is needed in which environmental and social considerations are integrated into developmental processes along with economic analyses so that decision-making

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¹ The World Bank forecasts that by 2020 nine out of the fifteen largest world economies will be developing States. As they develop they increasingly contribute to global environmental risks including climate change and the degradation of biological resources. Therefore the industrialized world must, through changes in production and consumption, reduce its environmental impact so as to leave space for developing States to meet their own needs and aspirations. Strong M, “Towards a Sustainable Civilization”, the Inaugural Jack Beale Lecture on the Global Environment, University of New South Wales, February 11, 1999, at 10.

reflects the ‘real’ values and services that nature provides. Despite incorporation of sustainable development into treaties, and domestic environmental and planning legislation, the concept largely remains one of rhetoric and policy without clear legal parameters: much discussion has occurred but little international law has emerged. “Sustainable development is notoriously difficult to pin down. It is subject to competing interpretations, and its application to any particular problem is often contentious.” From the outset the difficulties faced in implementing sustainable development have been clear and while legislation is needed more crucial is the need to achieve political commitment and ‘change’.

Much has been written on sustainable development, so why write another article on the area? The major task of this article is to reflect on the customary law status of sustainable development’s core environmental principles. In addition, the article evaluates the global summits on sustainable development by looking both backwards and forwards, and argues that despite much optimism a subsequent loss of political momentum and expectations have meant that the concept and its core environmental principles have not transcended into binding rules of international law; further political and legal commitment is needed. Due, to the breadth of sustainable development the article limits itself to discussing three central themes. Part II evaluates sustainable development’s environmental principles, reflects on why such lofty expectations were set and asks why there was a subsequent loss of optimism associated with espousal of rules implementing the principles. Part III examines how the current priorities of social development have broadened the concept into the three pillars of sustainable development. It also posits that other current international problems have negatively impacted on further implementing sustainable development’s environmental principles. Part IV looks beyond the global summits and assesses the customary law status of sustainable development’s core environmental principles and argues that despite State support it is not reflective of customary international law. The article concludes that as States are already doing much in terms of environmental integration they ought to formalize their conduct and adopt a framework of treaty rules integrating environmental considerations into developmental activities. Only through adoption of legally binding international rules can the environmental principles be uniformly implemented and thus help meet the environmental security needs of present and future generations thereby achieving sustainable development’s goals.

II - SUSTAINABLE DEVELOPMENT'S ENVIRONMENTAL PRINCIPLES

The international law of sustainable development is contained within a series of United Nations (UN) General Assembly (GA) facilitated global summits that have collectively produced a suite of declaratory instruments articulating broad aspirational principles of environmental and social justice to be incorporated into the traditional

5 Sustainable development has been the subject of abundant academic writing. Much of the academic work has focused on sectoral discussion of sustainable development in the context of areas including biodiversity, threatened species, fisheries, climate change, international trade, and transport policy. Regarding the principles of sustainable development discussion has tended to focus on the precautionary principle, intra and intergenerational equity, and the polluter pays principle.
developmental framework. As sustainable development’s principles are expressed within declaratory instruments and not as treaty rules they are soft law provisions that do not reflect an intention to create binding rules international law.

A. The conceptualization of sustainable development

The 1972 United Nations Conference on the Human Environment (UNCHE) commenced ‘a new journey of hope’ broadening the concept of environment from merely a domestic and sectoral plane. Until 1972 multilateral environmental agreements (MEAs) had focussed on first generation environmental problems including: regulation of valuable economic resources; protection of species; pollution from hazardous and ultra-hazardous activities; and underdevelopment.⁶ The UNCHE allowed the concerns of developing States for environmental impacts of poverty and underdevelopment, as well as the intrinsic linkages between environment and development, to be included within a new international framework. At the UNCHE States adopted the Stockholm Declaration, a statement of 26 principles calling upon governments and peoples to exert common efforts for the preservation and improvement of the human environment.⁷ “The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.”⁸ The Stockholm principles elaborate broadly on matters including the rights of future generations’ and the duty to prevent transboundary environmental harm.⁹ Since the Stockholm Declaration States have demonstrated a more diligent approach to global environmental regulation.

By the early 1980s, however, environmental deterioration was accelerating due to expanding population and economic growth, and second generation of environmental problems had emerged: acid rain; ozone depletion; climate change; deforestation; desertification; biodiversity conservation; trade in hazardous wastes; and protection of the environment in times of armed conflict.¹⁰ Despite the established link between environment and development too little progress had been made in integrating environmental dimensions into developmental policy.¹¹ In response, a 1983 GA

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⁶ By 1972 much environmental normative standard-setting had occurred on narrow subject matter as evidenced by adoption of multilateral environmental agreements (MEAs) on: wild animals, birds and fish in Africa; birds useful to agriculture; seals in the North Pacific Ocean; migratory birds in the United States (US) and Canada; whaling; fauna and flora in their natural state; nature and wild-life preservation in the western hemisphere; North-west Atlantic fisheries; birds; pollution of the sea by oil; fishing and conservation of living resources of the high seas; North-east Atlantic fisheries; the Antarctic; third party liability in nuclear energy; liability of operators of nuclear ships; high seas intervention in cases of oil pollution damage; wetlands; and world heritage.

⁷ Declaration of the United Nations Conference on the Human Environment (Stockholm), UN Doc.A/CONF./48/14/REV.1, reprinted in 11 ILM 1416-7 (UNCHE). The UNCHE also produced an Action Plan implementing the Stockholm principles, one of the measures provided for the establishment of a new international environmental organisation. Thus in December 1972 the United Nations (UN) General Assembly (GA) established the United Nations Environment Program (UNEP), responsible for implementing the Stockholm Declaration.

⁸ Stockholm Declaration, ibid, Preamble, para 2.

⁹ Stockholm Declaration, ibid, Principle 2.

¹⁰ Stockholm Declaration, ibid, Principle 21.


¹² Adede, 4-5.
resolution established the World Commission on Environment and Development (WCED) to investigate the state of the global environment. The outcome of the Commission’s work was its 1987 seminal report, ‘Our Common Future’. The Report identified dramatically increasing world population and powerful technological advances facilitating over-exploitation of global resources as the two major causes of environmental degradation. Pursuant to the Report “[s]ustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.” The adoption of ‘Our Common Future’ and its popularization of sustainable development revitalised the momentum that had commenced with the Stockholm Conference.

After completion of the Brundtland Commission’s work many States expressed continuing concern over second generation environmental problems. In particular, the climate change debate was gathering momentum especially in the context of threat to low-lying small-island developing States such as those in the South Pacific. Despite these concerns the period post-Brundtland was particularly optimistic. During the 1980s and early 1990s environmental issues were populist and often at the top of the political agenda. Treaty-making was prolific and standard setting through the adoption of a plethora of international instruments was common-place. Extensive regulation occurred through adoption of tens of MEAs on a wide range of areas. It appeared that any problem could be solved through treaty adoption. For most sectoral treaties there is evidence of early success as reflected by widespread political cooperation and diligent adoption of UN-set standards. However, the more difficult issues surrounding enforcement regimes, including liability and compensation regimes often eluded. Irrespective, the period evidenced several environmental successes including: the significant reduction of vessel-source marine pollution; the international regulation of the trade in hazardous waste; and the successful avoidance of the narrowly-averted disaster of irreversible ozone depletion. There was also evidence of a significant ‘greening’ of the European Union (EU) treaty system and its lobbying in major international environmental fora that created an atmosphere of

13 GA Resolution A/38/161 of 1983.
15 Our Common Future, ibid, 27.
16 So many treaties were created that the term ‘treaty congestion problem’ was coined- Weiss EB, “International Environmental Law: Contemporary Issues and the Emergence of a New World Order” (1993) 81 Georgetown Law Journal 675-710, at 697-702. Apart from the logistics in administering these treaties issues of coordination and integration, or at least the lack thereof, also arose. In this regard there exist special possibilities for international organizations, especially UNEP.
17 Environmental standard-setting was common place as evidenced by adoption of sectoral MEAs on areas including: marine pollution by dumping from ships and aircraft; cultural and natural heritage; international trade in endangered species of wild fauna and flora; pollution by ships; polar bears; long-range transboundary air pollution; Antarctic marine living resources; oceans and seas; ozone depletion; notification and assistance in cases of nuclear accident or radiological emergency; Antarctic mineral resource activities; and transboundary movement and disposal of hazardous wastes.
19 With the adoption of the Maastricht Treaty sustainable development was incorporated as one of the Community’s core aims, Article 2 of the Treaty on European Union, article 2 of the EC Treaty.
optimism extending from the Stockholm Declaration and reaching into the Rio Summit. The result of all the optimism was the convening of the Rio mega-conference on the environment and development.

B. The espousal of Rio’s ‘green’ principles

In 1989 the GA resolved to convene the 1992 United Nations Conference on Environment and Development (UNCED or Earth Summit). The UNCED addressed the imperative of developing policies and mechanisms for sustainable development in a world that continues a path of environmental destruction and exploitation of natural resources at unprecedented levels. At the Conference States adopted the Rio Declaration on Environment and Development (Rio Declaration) and the associated Agenda 21. Both instruments promote transition to a new global partnership requiring new dimensions of cooperation amongst States and peoples and in particular a new basis for relationship between wealthy industrialized States and less developed States in which the benefits and risks brought on by development are equitably shared by all.

The Rio Declaration is similar in style and ambition to the Stockholm Declaration and aspirationally expresses 27 principles to guide the international community on a path of sustainable development. Sustainable development is achieved by implementing the concept’s constituent principles that include: the environmental needs of future generations; environmental protection to be an integral part of development; common but differentiated responsibilities; reduction of unsustainable patterns of production and consumption; enactment of effective environmental laws;
recognition of the precautionary principle;\textsuperscript{30} internalization of environmental costs
and the use of economic instruments.\textsuperscript{31} Agenda 21 is a comprehensive action plan
implementing the Rio Declaration into the 21\textsuperscript{st} century. The instrument covers sectors
including the oceans, mining, and forestry, but also complex inter-sectoral issues
including: adoption of environmentally sound technology; provision of financial
resources to developing States; development of planning and monitoring database
information systems; progressive new institutional and legal arrangements; and
creation of a new international organisation to oversee implementation.\textsuperscript{32}

C. Evaluating the Rio outcomes

A new sense of optimism prevailed over the Earth Summit as virtually all States came
together for the biggest-of-its-time environmental forum. The UNCED represented
the most successful and comprehensive program reached by governments for shaping
the environmental needs of our human future. Most significantly, the UNCED’s
outcomes gave international environmental law (IEL) a distinct conceptual framework
for its operation and governance that “has assisted in supporting the view that
international environmental law has emerged as a discrete discipline of international
law with its own distinctive structures and principles.”\textsuperscript{33} “In other words, a system of
international environmental law has emerged, rather than simply more international
rules about the environment.”\textsuperscript{34}

Perhaps the most significant way in which the Rio process may have contributed to the
development of international environmental law is through the crystallisation of legal
principles. It can be argued that the emergence of a new discipline can be demonstrated by its
development of discrete ‘discipline specific’ principles.\textsuperscript{35}

Both the Rio Declaration and Agenda 21 are soft law instruments providing no legal
framework for implementing sustainable development. Rather, they show goodwill
and symbolic commitment to a new, popular global concern.\textsuperscript{36} There are three major
difficulties flowing from these soft law outcomes: first, implementation ultimately
rests on political good will of States to give effect to non-legally binding rules;
second, their customary law status is not clear; and third, they are difficult to
implement or to discern any kind of international standard from. Reliance on these
soft law rules, whose content is unclear, ultimately means that IEL is less effective.

Even though there had been no adoption of an MEA on sustainable development, the
sense of optimism leading to the UNCED still prevailed in the immediate post-summit

\textsuperscript{29} Rio Declaration, principle 11.
\textsuperscript{30} Rio Declaration, principle 15.
\textsuperscript{31} Rio Declaration, principle 16.
\textsuperscript{32} The 21 nation inter-governmental Commission on Sustainable Development (CSD) was established
to oversee implementation of Agenda 21.
\textsuperscript{33} Freestone D, “The Road from Rio: International Environmental Law After the Earth Summit” (1994)
\textsuperscript{34} Freestone, ibid, 218.
\textsuperscript{35} Freestone, ibid, 209.
\textsuperscript{36} One of the UNCED’s shortcomings was the inability to adopt the ‘Earth Charter’ defining a set of
moral and ethical principles for the conduct of people and States to each other and the earth as a basis
for achieving environmental sustainability.
period as evidenced by continued treaty proliferation.\textsuperscript{37} In this way the post-Rio era continued the momentum created by UNCED.\textsuperscript{38} This was, however, quickly succeeded by a period of fragmentation and unravelling of the law as evidenced by pessimism associated with a loss of political momentum and the inability to meet the lofty expectations of attaining sustainable development. Correlating with this loss of optimism was an increased emphasis on globalization and trade liberalization.

In the post-UNCED period MEAs, often framework in nature, continued being adopted with apparent ease, however, implementation was often poor\textsuperscript{39} and early political ‘commitment’ to treaties proved shallow with subsequent failure to implement basic provisions. While overall there was neither great success with enforcement or with the adoption of liability and compensation instruments. Further, the sheer number of instruments in existence by the mid-1990s, often based at a regional level, contributed to the increasing fragmentation of the body of regulation of IEL.\textsuperscript{40} The high number of treaties adopted led to the treaty-congestion problem whereby as different standards were set the unity that made Rio possible began to disintegrate. Further, despite the establishment of a new institution, the CSD is charged with the impossible task of monitoring the implementation of Agenda 21 and it has accomplished very little.\textsuperscript{41} By the mid-1990s the magnitude of the UNCED ambition was clearer and it was appearing doubtful whether its high and far-reaching aims were achievable. As poverty and pollution continued to rise, so did disenchantment of attainment in turn leading to an incremental loss of political momentum. At the time of its creation the international community did not fully understand the enormous challenges that widespread implementation of even the Rio Declaration’s most fundamental tenets such as the precautionary principle and its institutionalization of caution would pose.\textsuperscript{42}

Despite huge attendance at the UNCED by State delegations and non-governmental organisations (NGOs) the US under the administration of President George H. Bush was a reluctant participant in the conference.

In international environmental law’s hour of need, the United States largely abandoned its tradition of leading international environmental efforts. It opposed a firm agreement to stabilizing greenhouse gas emissions, paving the way for a weak framework agreement that allowed emissions to rise through the 1990s. And it opposed key provisions of the biodiversity agreement on behalf of special interests primarily concerned with intellectual property rights in biota.\textsuperscript{43}

\textsuperscript{37} Treaties were adopted in the following areas: Antarctic environmental protection; climate change; biodiversity; desertification in states experiencing serious drought and/or desertification, particularly in Africa; hazardous and noxious substances; nuclear tests ban; bio-safety; persistent organic pollutants; prior informed consent; and straddling fish stocks.


\textsuperscript{40} Driesen, ibid, 356.

\textsuperscript{41} Victor DG, “Recovering Sustainable Development” (2006) 85 \textit{Foreign Affairs} 9, 94.

\textsuperscript{42} While there was an overall recognition that human pollution of the environment is inevitable, the precautionary principle forced debate about the acceptable types and quantities of human-induced environmental harm thus becoming one of the most controversial principles of IEL during the 1990s. See also pages 16-17.

\textsuperscript{43} Driesen, note 39, 359-60.
In contrast to its position at the 1972 Stockholm Conference, the US was at best ambivalent about the 1992 Summit. Even though the UNCED process had initially secured the support and cooperation of the US Environment Protection Agency:

[n]o vision was ever articulated on what the U.S. wanted out of the Conference and where it wanted to take it. The U.S. position was largely negative and more defined in terms of what it did not want as compared to what it wanted. Basically, it seemed the U.S. wanted the status quo and nothing that would require it to do anything new. It gave short shrift to preparation of the national report and refused to commit the attendance of President Bush until it ensured that the climate change treaty would meet the U.S. bottom line. It refused to address legitimate developing country concerns. All in all U.S. leadership was missing at this time.

But it was not till after the Summit that the shift in US policy was more obvious.

Since the Rio Conference the US seems to have become increasingly wary of international mega-conference diplomacy, multilateral environmental treaty regimes, and efforts to develop customary international law...US enthusiasm for international environmental law appears to have diminished since the Rio Summit.

Since the Earth Summit, for example, the US has persistently objected to the inclusion of both the precautionary principle and common but differentiated responsibilities into customary international law. The shifting attitude towards sustainable development can be seen as a microcosm of a wider shift in thinking. The US has failed to ratify the Convention on Biological Diversity (CBD), the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the UNFCCC while its ratification of other MEAs has been sluggish. The US symbolically abandoned its position as global environmental pioneer, or if not that, chief enforcer, with the repudiation of the Kyoto Protocol in March 2001 by President George W. Bush. The window of opportunity in which the world had a chance to make a start on reversing climate change closed as governmental focus returned to the economy. In the lead-up to the Johannesburg Summit Worldwatch Institute released statistics showing the 1990s to be the warmest decade since recordings began in the 19th century and that global carbon dioxide emissions had risen by over nine percent.

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44 Even the US, that has in recent times resisted environmental multilateralism, played a leading role at Stockholm, “it had a clear sense of purpose for the Conference, putting environmental protection on the international agenda and contributing a substantial amount of intellectual and other resources.” Hajost SA, “The Role of the United States”, 16-17, in Campiglio L, Pineschi L, Siniscalo D, and Treves T (eds), note 11.
45 Hajost, ibid, 17.
46 Hajost, ibid, 17.
48 Bruneé, ibid, 629.
49 CBD, note 23.
50 UNFCCC, note 23.
51 Kyoto Protocol to the UNFCCC, FCCC/CP/1997/C.7/Add1, 37 ILM 22.
52 Although this is the official date of repudiation scholars suggest that abandonment occurred long before. Despite former President Bill Clinton having signed the agreement it was not ratified, leaving the Bush administration with room to declare that compliance cost was simply ‘too much’, Schmid, 58.
III - THE THREE PILLARS OF SUSTAINABLE DEVELOPMENT

The 2002 Johannesburg World Summit on Sustainable Development (WSSD or World Summit) is the most recent of the GA sponsored sustainable development initiatives. The WSSD focussed on a variety of urgent developmental problems as well as the further implementation of the Rio Declaration and Agenda 21. By and large, however, the focus of the Summit was not on the further elaboration of the ‘green’ Rio principles but rather a focus on social justice in particular the fight against poverty thereby broadening the concept of sustainable development.

A. The World Summit outcomes

States did not approach the WSSD with the level of enthusiasm as the UNCED that was characterized by strong optimism surrounding future international cooperation on environment, resources and development. At the World Summit the international community struggled to maintain the status quo. States were not able to create further legal rules addressing either urgent environmental problems or a legal framework for implementing sustainable development. At the same time the US resisted and obstructed adoption of negotiated global treaties, principles, targets and timetables.

The US delegation’s position at Johannesburg was negative and reactionary on virtually every issue, from renewable energy, safe drinking water, sanitation, trade, foreign aid to women’s reproductive health, agricultural subsidies and human rights. But it was not alone.

The agenda for the WSSD was broad and ambitious including the adoption of measures: combating world poverty; addressing water shortages; and increasing available renewable energy sources. Three instruments were adopted: the Johannesburg Declaration on Sustainable Development (Johannesburg Declaration); the Plan of Implementation of the World Summit on Sustainable Development (Plan of Implementation); and the Statement Regarding the Use of Renewable Energy Sources (Statement on Renewable Energy).

Like the Stockholm and Rio Declarations the Johannesburg Declaration is aspirational reaffirming previous commitment to sustainable development and emphasizing “the need to produce a practical and visible plan that should bring about poverty eradication and human development.” The Declaration attempts to pave “a common

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54 In 1997 States met in New York for the follow-up conference to the Earth Summit (Earth Summit II or ‘Rio +5’). The conference was unfortunate as it demonstrated a backlash from the ambitious agenda of five years previous, and did not result in adoption of further initiatives. See: Osborn D and Bigg T, Earth Summit II: Outcomes & Analysis (Earthscan Publications, London, 1998).
56 Pring, ibid, 416.
59 Johannesburg Declaration, note 57, article 1.
60 Johannesburg Declaration, article 8.
path, towards a world that respects and implements the vision of sustainable development” while recognizing that particular priority is needed for:

[T]he fight against the worldwide conditions that pose severe threats to the sustainable development of our people. Among these conditions are: chronic hunger; malnutrition; foreign occupation; armed conflicts; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis.

The Declaration speaks generally about poverty eradication and sustainable development, ensuring women’s empowerment, the particular needs of small island States whose existence is precarious, developing States, and of “the vital role of indigenous peoples in sustainable development.” Overall, however, the Declaration is disappointing because of its lack of commitment to further espousal of environmental principles and treaty commitment.

The Plan is a negotiated document implementing the provisions of the Rio Declaration, Agenda 21, and the Johannesburg Declaration. It recognizes and reaffirms the fundamental principles of sustainable development, as provided for at the Earth Summit and in the Millennium Declaration. The Plan deals with: poverty eradication; unsustainable patterns of consumption and production; protecting and managing the natural resource base of economic and social development; sustainable development in a globalising world; health and sustainable development; sustainable development of small island developing States; regional initiatives for sustainable development for Africa, Latin America and the Caribbean, Asia and the Pacific, West Asia, and the Economic Commission for Europe; means of implementation; and institutional framework for sustainable development.

The Statement on Renewable Energy was the most controversial aspect of the WSSD. Negotiation surrounded the achievement of targets for the use of renewable energy including the adoption by 2015 of a treaty on the use of renewable energy sources. The EU lobbied States to follow its lead by urging for the adoption of a global timetable for increasing the use of renewable energy. However, because of the resistance by the US and the Organisation of Petroleum Exporting Countries (OPEC)
States, there was not enough political will to facilitate treaty adoption. The US was joined by Australia, Canada, Japan, and Saudi Arabia in opposing deadlines for a ten to fifteen percent conversion from fossil fuels to solar, wind and other renewables. Rather than adopting a treaty on the use of renewable energy sources the promotion of ‘clean’ fossil fuels was attained through a non-legally binding energy plan calling for States to develop cleaner fossil fuels and green energy.

**B. Evaluating the World Summit outcomes**

The WSSD “provided a new opportunity to address systemic obstacles to progress on the environment in especially difficult areas, including the eradication of poverty.” Even though the WSSD outcomes were disappointing, when noting the absence of espousal of rules implementing Rio’s environmental principles, it was reassuring to see the Plan’s commitment to full implementation of Agenda 21. However, progress was made on the alleviation of world poverty and the elaboration of social development as the third pillar of sustainable development. Further, ‘partnerships’ between governments and with business were a major theme of the WSSD and were recognized as a major vehicle for the achievement of sustainable development. Thus despite inability to adopt a legal framework implementing sustainable development’s environmental principles the WSSD outcomes can be viewed positively.

It must be stressed that the WSSD was held in a significantly more desperate political climate than the UNCED. The world’s failing interest in environmental issues was accelerated by the events of September 11, 2001 that changed the global panorama: security against terrorism became paramount. In the US not only did environmental protection have to compete with an administration positioned against environmental multilateralism and participation in global climate change regulation, it was forced to stand alongside the threat of a new type of audacious terrorism, a culture of fear, the creation of a snowballing, unstoppable focus on national security. Evidence of this...

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70 Pring, note 55, 414.
71 The World Summit was also significant for the regulation of greenhouse gas emissions. There was an important development at the conference wherein China and Russia announced their ratification of the Kyoto Protocol, while Canada and India announced intention to also ratify. The practical effect of these ratifications is that they allowed the Protocol to commence operation in 2004. The US and Australia, however, continued to object to the Protocol. After Canada and Australia’s ratifications the US is now the only developed state not to have ratified the Kyoto Protocol.
73 Plan of Implementation, note 58, article 1.
76 George examines an obvious problem arising out of increased global focus on national security. His concern is not only the decreased political focus on environmental issues but the environmental degradation occurring through weapons building, stockpiling, disposal, and use. Weapons-producing States are yet to produce viable techniques for disposing of chemical and nuclear waste associated with production. George discusses seabed disposal advocated by some States, whereby capsules of nuclear waste are injected into the earth’s core. George EB, “Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government be Held Liable for not Attaining this Goal?” (2002-3) 27 William & Mary Envtl Law & Pol’y Rev 651. George quotes Rippon, writing in 1997: “It is well-established from various international scientific studies that the best long-term...
has never been more available: The first sentence of the Department of State’s website, entitled *Advance Sustainable Development and Global Interests*, provides that “Protecting our country and our allies from the dangers of terrorism, weapons of mass destruction, international crime, and regional instability is necessary but not sufficient for national security.” This escalating concern on terror and security was further exacerbated and ‘internationalized’ by the Bali, Madrid, London and Mumbai terrorist bombings. Thus the inability to meet the lofty expectations of implementing legal rules on sustainable development was sidestepped by a new global panorama focussed on fighting the new ‘demons’ of terrorism and national security.

At the opening of the GA on November 10, 2001, the then UN Secretary-General Kofi Annan gave the astute reminder that: “Let us remember that none of the issues that faced us on 10 September has become less urgent…The factors that cause the desert to advance, biodiversity to be lost, and the Earth’s atmosphere to warm have not decreased.” Adding to the new panorama have been the global refugee and people trafficking crisis, the SARS virus, bird and swine flu, and the recent global financial crisis. Further, in the 2008 US elections the environment was greatly overlooked as both Democratic and Republican policies focussed on global anti-terror, the wars in Iraq and Afghanistan, and the maintenance of trade, healthy economies and global financial security.

**IV - BEYOND THE GLOBAL SUMMITS**

Despite absence of a global treaty on sustainable development a certain level of State-acceptance of its environmental principles already exists. Since adoption of the Rio Declaration and Agenda 21 several of Rio’s environmental principles have been positively reiterated in treaties. Furthermore, commitment of States to sustainable development is reflected by ongoing work in diverse areas. While in the 2008 Report of the Secretary-General the GA recommended that governments, UN organizations and major groups deepen their commitment to sustainable development by redoubling their efforts in implementing Agenda 21 and the Johannesburg Plan of Implementation. At the same time many States have incorporated sustainable development’s environmental principles into domestic planning and environmental legislation. Are these international and domestic initiatives sufficient to reflect State-acceptance and a rule of customary international law whereby States must abide by sustainable development’s environmental principles or is more needed to transform isolation of radioactive waste could be achieved by disposal in deep ocean sediments. This ultimately is where everything will finish up, as mountains and other land formations are slowly eroded away and washed down into the deepest ocean trenches. How elegant to short circuit this multi-billion year natural waste disposal route by shooting vertical torpedoes of concentrated nuclear waste into these infinitely stable resting places.” George, 690-1.


79 See notes 109-16 and 121-3.

80 For example, States continue to create marine environmental protection rules under the LOSC in the areas of sustainable fisheries and shipping. More recently US Secretary of State Hillary Clinton has hinted possible US ratification of the LOSC [http://www.foxnews.com/politics/2009/03/12/lost-found-senate-moves-ratification-un-treaty/](http://www.foxnews.com/politics/2009/03/12/lost-found-senate-moves-ratification-un-treaty/).

the environmental principles into legally binding rules? Custom which is based on the practice and conviction of States is difficult to establish and requires either an explicit recognition by States or a declaration of its existence through subsidiary means identified in article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute). Custom which is based on the practice and conviction of States is difficult to establish and requires either an explicit recognition by States or a declaration of its existence through subsidiary means identified in article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute). Assessing the customary status of sustainable development’s environmental principles is therefore a particularly difficult task requiring a clarification of meaning as well as an examination of State practice.

A. Clarifying meaning

The most widely accepted definition of sustainable development is that of the WCED. However, this definition is ambiguous, inadequately understood and inappropriately applied thus often undermining the concept’s effective implementation. Thus, despite widespread use of the WCED definition a more precise definition of sustainable development eludes. Even if States were to agree on a definition for sustainable development, “widespread agreement on a principle does not translate into agreement on the principle’s normative content.” Despite its beginnings as a powerful concept it is suggested that sustainable development has become meaningless over the last two decades.

The ideal of sustainable development simply cannot serve as a beacon indicating the direction legal development should take because profound differences of opinion exist with regard not only to the means by which these goals are to be reached, but also the exact meaning of the goals themselves.

It is also unclear what is meant by ‘principles’ of sustainable development. “It is important to know what the exact meaning of those principles is and to know if internationally-accepted principles have to be considered as principles of law or

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82 Custom is recognized as a source of international law under article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute). “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. judicial decisions and the teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law.” Article 38(1) of the Statute of the ICJ, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

83 It is not clear what sustainable development means: does it mean development that is economically sustainable or is this a contradiction in terms as nothing physical can grow indefinitely or indeed that ‘development’ can never be ‘sustained’? What about sustainable use of renewable resources at rates within the capacity for renewal? What about non-renewable resources?


86 Victor, note 41, 103.

principles of policy, and whether of specific or general application." Are the environmental principles ‘principles of law’ and thus a source of legal obligation under article 38(1)(c) of the ICJ Statute? The environmental principles are not legally binding ‘principles’ as it was not the intention of the drafters to create legally binding international rules. They are instead ‘soft law’ or ‘principles of policy’, although it is argued that principles go beyond mere policy:

Principles go beyond concrete rules or policy goals; instead, they say something about a group of rules or policies, they denote what a collection of rules has in common, or what the common goals is of a collection of rules (for instance a statute). Principles usually contain a high moral and/or legal value.

The article advocates Brundtland’s approach of addressing the two critical and inter-related problems of continued environmental degradation and the developmental needs of the poorest States. Reliance is then placed on Johannesburg’s three pillar approach advocating integrating environmental, economic and social considerations within the developmental process. Sustainable development is thus the integration of environmental, economic and social considerations within developmental process so as to cure continued environmental degradation and the developmental needs of the poorest States. Sustainable development is an ideal representing an outcome to be attained through its implementing principles. As for principles: “principles are a necessary medium for ideals to find their way into concrete rules.” Furthermore, several principles can be viewed as forming sustainable development’s core: “while the concept is still subject to some uncertainty in meaning, it is possible to identify intra and intergenerational equity, sustainable use, and the principle of integration among the core elements of sustainable development.”

B. State practice

Does the State practice evidence a customary rule to include environmental factors in decision-making? This is a difficult question as the State practice implementing sustainable development’s core environmental principles of integration and sustainable use is selective and diverse. It demonstrates varying levels of State-acceptance of the separate but linked principles of: integration; prevention; precaution; and environmental impact assessment (EIA). These principles in some way all identify the environmental risk involved in developmental activities each possessing a unique linkage with policy and approval processes. It should be noted, however, that sustainable development cannot be a catchphrase for environmental protection.

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89 Verschuuren, note 87, 4.
90 Regardless of more specific contextual needs the definition of sustainable development must remain broad because of its widespread use. More specific contextual definitions can sit alongside the traditional Brundtland definition thus providing sectoral application of the concept and its principles.
91 Verschuuren, note 87, 13.
93 Lee M, note 3, 43.
1. The integration principle

Of sustainable development’s core principles environmental integration is pivotal in meeting the environmental security needs of present and future generations and thus key to achieving the concept’s goals.

To operationalize sustainable development we need to recognize that one principle-integrated decision-making-holds the other principles together...Of all principles contained in the sustainable development framework, integrated decisionmaking is perhaps the principle most easily translated into law and policy tools.

Effective environmental integration requires law and policy, including developmental decision-making, to reflect the sustainable utilization of natural resources and social equity. The importance of environmental integration is recognized in Principle 4 of the Rio Declaration that provides: “[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.” Environmental integration is also recognized in the EU’s new Sustainable Development Strategy (SDS) that identifies the main challenge as being to gradually change current unsustainable consumption and production patterns and the non-integrated approach to policy-making. A key objective of the SDS is to break the link between economic growth and environmental degradation.

Environmental integration provides a framework of integration of environmental policy into all facets of policy making (policy integration) as well as procedural legal obligations pertaining to decision-makers integrating environmental considerations into their decisions (procedural integration).

In practice...procedural integration has more often been articulated in terms of environmental protection and/or socio-economic development. It generally requires that states set up institutions and decision-making processes which ensure that social, human rights and environmental concerns are taken into account when development decisions are made, and/or that institutions and decision-making processes be set up so that development, social and human rights concerns are taken into account when decisions regarding environmental protection are made.

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95 Pursuant to article 6 of the EC Treaty environmental protection is to be integrated into the definition and implementation of the Community’s policies thus promoting sustainable development. The importance of integration is reaffirmed in the Sixth Environment Action Program which stipulates that “integration of environmental concerns into other policies must be deepened” in order to move towards sustainable development http://ec.europa.eu/environment/integration/integration.htm. Further, on 9 June 2006 the European Council approved the renewed EU Sustainable Development Strategy (SDS). It addresses seven main challenges: climate change and clean energy; sustainable transport; sustainable consumption and production; conservation and management of natural resources; public health; social inclusion, demography and migration; and global poverty. Particular priority is to be given to climate change and clean energy (IP/07/1576).
2. Prevention of transboundary environmental harm

States have under customary international law a duty to prevent transboundary environmental harm. The duty is recognized in Principles 21 and 2 of the Stockholm and Rio Declarations respectively, and is a cornerstone rule of IEL reflecting a composite duty based on a standard of due diligence geared towards foreseeable risk.

While the environmental jurisprudence is not extensive, it nevertheless affirms the existence of a legal obligation to prevent, reduce and control transboundary environmental harm, to cooperate in the management of environmental risks, to utilize shared natural resources equitably and sustainably, and albeit less certainly, to carry out environmental impact assessment and monitoring.

The duty to prevent is the subject of the Articles on the Prevention of Transboundary Harm from Hazardous Activities (Prevention Articles). The “articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.” The articles elaborate on the Rio Declaration and demonstrate that States are fully aware of the risks between environment, human rights and uncontrolled development. Their adoption by the International Law Commission (ILC) in 2001 evidences State support as does their favourable GA discussion and judicial consideration. The articles emphasize appropriate risk analysis as a precursor to any kind of preventive approach.

Despite the apparent acceptance by States of the duty to prevent transboundary environmental harm States will support liability flowing from a violation of the duty only in circumstances of significant environmental harm, and in particular where the risk has not been appropriately managed as required under the Prevention Articles.

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99 The duty to prevent transboundary environmental harm originates in the Trail Smelter Arbitration (US v Canada) 33 AJIL (1939) 182 and 35 AJIL (1941) 684 where it was found that Canada had to refrain from emitting fumes affecting the US. The duty was further elaborated on by the ICJ in the Corfu Channel case where it was found that every State has a duty “not to allow knowingly its territory to be used for acts contrary to the interests of other States” Corfu Channel (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 362. The duty was subsequently codified in Principle 21 of the Stockholm Declaration: “States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.” Principle 21 has been reiterated in numerous initiatives and judicial pronouncements.

100 The duty to prevent transboundary environmental harm includes the more specific duties of prevention, reduction, control, mitigation, cooperation and notification.


102 Prevention of Transboundary Harm from Hazardous Activities, ILC Report (2001) GAOR A/56/10,366 (Prevention Articles). Transboundary harm is defined as “harm caused in the territory of or in other places under the jurisdiction or control of a state other than the state of origin, whether or not the states concerned share a common border” (art 2(c)).

103 Prevention Articles, ibid, art 1.

104 Rio Declaration, note 22, principles 2, 10, 11, 17, 18, and 19.

105 MOX Plant Arbitration 2003 (PCA) and the Pulp Mills case (2006) ICJ Reports.

106 Prevention Articles, note 102, art 7.
3. The precautionary principle

Precaution “ensures that substances or activities posing environmental threat are prevented from adversely affecting the environment even if no conclusive scientific proof links the particular substance or activity to the environmental damage.”

Principle 15 of the Rio Declaration requires States to take a precautionary approach.

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Precaution requires States to commence acting now as action to protect the environment cannot be delayed until all scientific facts are known. Enough is already known including that repairing environmental damage costs more than prevention. Precaution thus encourages decision-makers to consider the potential environmental impacts of development so that if they err in developmental decision-making let that be on the side of caution.

Precautions are based on the premise that we must avoid in the future the reproduction of past wrongs and injustices... This principle enables us to provide concrete content for policies by looking at past injustice, and determining our responsibility towards the future based on the need to avoid the reproduction of historic wrongs to nations, individuals, and the environment.

There is significant debate as to whether precaution is a principle overarching all policy and decision-making or whether it is merely an approach to be utilized in cases of hazardous or ultra-hazardous activities. This distinction is significant in explaining the varying versions of precaution that have been adopted in many global and regional treaties including the: Vienna Convention for the Protection of the Ozone Layer, Montreal Protocol on Substances that Deplete the Ozone Layer, CBD, UNFCCC, Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Kyoto Protocol, Cartagena Biosafety Protocol, and Persistent Organic Pollutants Treaty. However, the diverse versions are also problematic as they reflect a lack of uniformity in meaning and State practice thus hindering the determining of any kind of customary rule.

Despite positive international treatment it is precaution’s domestic application that is the key to achieving real long term ‘change’ and the requisite State practice for

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108 Mayeda, note 84, 66.
109 Vienna Convention for the Protection of the Ozone Layer, Preamble, 26 ILM 1516.
110 Montreal Protocol on Substances that Deplete the Ozone Layer, Preamble, 26 ILM 1541.
111 CBD, note 23.
112 UNFCCC, note 23.
114 Kyoto Protocol, note 51, arts 2 and 3(3).
116 Persistent Organic Pollutants Treaty http://chm.pops.int/ Preamble; arts 1, 8.9; and annexes A, B and C.
crystallizing a rule of customary international law. Many States have provided for sustainable development in their domestic law by incorporating the precautionary principle into planning and environmental legislation where it is included in objects clauses playing primarily an interpretive role. “For objects clauses to be a useful interpretive device, they should be drafted in a way that facilitates the incorporation of environmental values into decision-making while still providing sufficient flexibility in the exercise of administrative discretion.”117 Statements of legislative objects then weave into more substantive obligation through directing administrative decision-makers to take the precautionary principle into consideration, along with other factors, in determining development proposals. Furthermore, the principle’s judicial consideration is usually limited to cases of review challenging aspects of administrative action and in particular the failure to take the precautionary principle into account in decision-making. This plays a crucial role in ensuring that decision-makers take all relevant environmental factors into consideration when assessing a proposed development. “It follows that the use of objects clauses in legislation which refer to principles of sustainable development may have some influence on decision-makers by requiring them to at least consider those principles in reaching a determination.”118

The most crucial aspect of the precautionary principle, however, is the identification of triggering conditions for its use. The triggering conditions and the legal process attached to the application of the precautionary principle, under domestic and international law, are varied and unsettled. Their identification is pivotal in ensuring the precautionary principle’s effective implementation.

4. EIA

Recognized as a key tool of environmental management EIA identifies the adverse environmental effects of proposed developments as well as any mitigating measures.119 It is provided for in many legal systems and plays a central role in safeguarding the inclusion of environmental considerations into decision-making processes. Principle 17 of the Rio Declaration requires that EIA be conducted for proposed activities likely to have a significant adverse environmental impact: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

The sheer volume of States worldwide with domestic legislative EIA procedures suggests the existence of a customary normative duty. However, despite many States having adopted EIA procedures the duty to conduct transboundary EIA enjoys less State support. The duty to conduct transboundary EIA is recognized in Article 7 of the Prevention Articles requiring States to consider EIA in assessing transboundary harm.120 However, the duty also exists regionally in the Convention on Environmental

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118 Barton, 891.
120 Prevention Articles, note 102, art 7 (assessment of risk), art 9 (consultation on preventative measures).
Impact Assessment in a Transboundary Context (Espoo Convention). Further, the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context requires strategic environmental assessment (SEA) to be undertaken much earlier in the decision-making process than project EIA and is thus seen as a key tool for sustainable development.

C. Case law of international courts and tribunals

The most important evidence of customary acceptance of sustainable development’s environmental principles is their judicial consideration by the ICJ and other international courts and tribunals. Judicial decisions are a subsidiary means for the determination of rules of law and key in determining whether customary international law obligates States to abide by sustainable development’s environmental principles. The case law engages with the conflict between environment and development and the role of sustainable development in resolving the disputes. Overall, however, the judicial consideration is disappointing as it does not explicitly apply the environmental principles to the disputes nor does it adequately elaborate on their or legitimacy. Further, the judgments are far from clear on the relationship between sustainable development’s environmental principles. Despite absence of application or declaratory statement as to legitimacy or interrelatedness certain individual judgments support the view that customary international law has crystallized around some of these newly-emerged principles of IEL.

In the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) (Nuclear Test case) New Zealand requested the ICJ review earlier proceedings against France alleging that the French tests contravened its rights under international law and/or that it was unlawful for France to carry out nuclear tests without first carrying out EIA based on accepted international standards. Despite the Court dismissing New Zealand’s request because of France’s alternative mode of testing the three dissenting judgments pronounced on recent developments in IEL. According to Judge Weeramantry the French nuclear tests would contravene the intergenerational equity principle, the precautionary principle and the requirement to carry out EIA, and found that EIA was prima facie applicable in the current state of IEL. Even though Judge Weeramantry cited the precautionary principle with approval he did not declare it to be customary international law. For Judge ad hoc Palmer, however, “the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the

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123 The Protocol also provides for extensive public participation in government decision-making in numerous development sectors.
124 Article 38(1)(d) ICJ Statute, note 82.
126 Nuclear Test case, [5-6].
127 Nuclear Test case, Dissenting Opinion of Judge Weeramantry, 341-5.
128 Nuclear Test case, Dissenting Opinion of Judge Weeramantry, 345.
environment.” Further, Judges Weeramantry and Koroma relied on Principle 21 of the Stockholm Declaration and the duty to prevent transboundary harm, with Judge Weeramantry confirming its customary law status.

In the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Merits) (Gabčíkovo-Nagymaros case) the ICJ had to resolve a dispute regarding the construction of a series of locks and dams. Even though this was a conflict between the rights to environmental protection and development the Court relied on existing treaty law between the parties rather than on emerging sustainable development principles. Despite not applying the environmental principles the Court was mindful that ‘vigilance and prevention’ are required on account of the often irreversible character of damage to the environment.

Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

In a separate opinion Vice-President Weeramantry found sustainable development’s primary purpose was to reconcile differences between the rights to environmental protection and to development. Further, sustainable development was “more than a mere concept, but as a principle with normative value.” Despite not explicitly declaring that it was reflective of customary international law the Vice-President stated that “[t]he principle of sustainable development is thus part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.” He also confirmed “EIA, being a specific application of the larger principle of caution, embodies the obligation of continuing watchfulness and anticipation.” The obligation thus requires at minimum that an assessment be undertaken prior to project commencement.

The International Tribunal for the Law of the Sea (ITLOS) has also considered sustainable development and the precautionary principle. In Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan; Australia and New Zealand v Japan) (Southern Bluefin Tuna cases) Australia and New Zealand claimed that Japan was in violation of its duty to protect and preserve an optimal level of exploitation of southern bluefin tuna thus failing to satisfy a precautionary obligation under the LOSC. Despite the ITLOS declining to take a stance on the customary international

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129 Nuclear Test case, Dissenting Opinion of Judge ad hoc Palmer, [91].
130 Nuclear Test case, Dissenting Opinion of Judge Weeramantry, 347.
131 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (merits) [1997] ICJ Rep 7 (Gabčíkovo-Nagymaros case).
132 Gabčíkovo-Nagymaros case, [140].
133 Gabčíkovo-Nagymaros case, Separate Opinion of Vice-President Weeramantry, 88.
134 Gabčíkovo-Nagymaros case, Separate Opinion of Vice-President Weeramantry, 95.
135 Gabčíkovo-Nagymaros case, Separate Opinion of Vice-President Weeramantry, 113.
law status of the precautionary principle “its decision reflected a classic ‘precautionary approach’”. In separate opinions, however, Judge Treves indicated that a precautionary approach seems inherent in the very notion of provisional measures while Judge ad hoc Shearer found that measures ordered by the Tribunal were rightly based on a consideration of a precautionary approach.

In MOX Plant (Ireland v United Kingdom), Provisional Measures (MOX Plant case) the ITLOS considered protection of the Irish Sea from radioactive pollution from a proposed power plant on the English coast. Ireland claimed that the activities of the power plant required proper assessment of environmental effects of the plant’s operations in accordance with the precautionary principle as espoused by the Rio Declaration. The ITLOS denied Ireland’s request for provisional measures as it did not agree there was any urgency in the matter and implicitly rejected Ireland’s claim that the precautionary principle was applicable to the dispute. The case suggests that the precautionary principle, even though a legal principle, is not incorporated into Part XII of the LOSC as it had not yet crystallized into customary international law. In a separate opinion Judge Wolfrum held that “it is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law.”

The most dramatic judicial consideration of sustainable development and its environmental principle has occurred within the World Trade Organization (WTO). In EC Measures Concerning Meat and Meat Products (Hormones) the Appellate Body ruled that it did not need to declare on the precautionary principle’s customary international law status. It determined that an EC ban on the import of US beef treated with artificial growth hormones could not be justified by application of the precautionary principle. The particular risk in question could not be established with sufficient specificity as it was not clearly scientifically proven: there was not a “rational relationship between the trade measure and the risk assessment.” In United States - Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle I) the US imposed a prohibition on the importation of shrimp that utilized harvesting methods involving a high incidental mortality of turtle.

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138 Southern Bluefin Tuna cases, Separate Opinion of Judge Treves [9].
139 Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan) (Order of 27 August, 1999) 38 ILM 1624, Separate Opinion of Judge ad hoc Shearer [4].
142 Controversy surrounded the different approaches adopted by the EU and US with respect to the precautionary principle. The EU maintained that the precautionary principle has customary international law status while the US position is that the precautionary principle has no legal status, but is merely an ‘approach’ to be used in certain narrow circumstances. A middle ground was taken by Canada viewing the precautionary principle as an emerging general principle of international law and should be viewed as subservient to more specific rules, for example the rules of the WTO.
144 Beef Hormones case, 123.
145 Beef Hormones case, 193.
The Panel and Appellate Body found that the ban was inconsistent with WTO rules. Despite the finding the case is important in that it identified a two stage test for determining the legality of trade restrictions that included consideration of sustainable development.\textsuperscript{147}

D. Is there a rule of custom?

Alongside the decisions of international courts and tribunals academic writings are a subsidiary means for the determination of rules of law.\textsuperscript{148} The case law of sustainable development and its environmental principles has been the subject of some worthy discussion by the commentators. It has been argued that the \textit{Gabčíkovo-Nagymaros} case endorsed sustainable development as having a role in reconciling the competing interests of development and environmental protection.\textsuperscript{149} The judgment “suggests that we are dealing with a legal principle, however confined, rather than a mere policy or moral invocation…requiring states to evaluate and assess environmental impacts and apply new environmental norms and standards becomes part of the process for giving effect to the objectives of sustainable development.”\textsuperscript{150} Other commentators, however, do not see the case law as establishing any customary obligation. Indeed, it is argued that the examples cited by Judge Weeramantry in the \textit{Gabčíkovo-Nagymaros} case can be distinguished as they “do not include any instances of the actual application of the principle of sustainable development in order to reach a binding determination that states have acted unlawfully. There is no instance of reliance upon the concept itself as a rule of law binding upon states and constraining their conduct.”\textsuperscript{151}

By in large, however, the academic writing on sustainable development is often \textit{ad hoc} and based on analysis of a select principle or on a sectoral or national treatment of a principle. The customary status of the precautionary principle, for example, has been the subject of much academic writing\textsuperscript{152} some suggesting that it is a rule of customary international law.\textsuperscript{153}

\begin{footnotesize}
\begin{enumerate}
\item[147] \textit{Shrimp-Turtle I} Appellate Body Report, 130.
\item[148] Article 38(1) ICJ Statute, note 82.
\item[153] By in large, however, the academic writing on sustainable development is often \textit{ad hoc} and based on analysis of a select principle or on a sectoral or national treatment of a principle. The customary status of the precautionary principle, for example, has been the subject of much academic writing some suggesting that it is a rule of customary international law.
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Opinion remains divided as to whether the precautionary principle may have crystallized into a binding norm of international law. However, the prevalence of the principle in recent environmental treaties, declarations and resolutions as well as its inclusion in the Rio Declaration and the UNCED treaties suggests that it may have indeed attained this status...[The] level of academic support coupled with recent State practice and ICJ commentary, would appear to conclusively endorse the principle’s status as a norm of customary international law.154

It is difficult from the academic writing to gauge any kind of customary incorporation of sustainable development’s environmental principles. Overall, the commentators suggest existence of significant difficulties in sustainable development being declared a norm of international law.155 Others, however, are more optimistic viewing the legality of sustainable development as not an absolute notion: “[t]here are degrees in the legal capacity through which the concept can be applied. It might have failed the test of ‘obligation’, but not of ‘responsibility’ for environmental damage.”156

Whether or not sustainable development is a legal obligation, and as we have seen this seems unlikely, it does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the practice of states and international organizations, and may lead to significant changes and developments in the existing law. In that very important sense, international law does appear to require states and international bodies to take account of the objective of sustainable development, and to employ appropriate processes for doing so.157

The State practice of sustainable development’s environmental principles although abundant lacks the requisite uniformity for customary incorporation. Inclusion of the environmental principles with differing levels of commitment does not demonstrate consistent and uniform enough State practice to generate a customary international obligation. “Mere repetition of soft law principles, by itself, does not result in the realization of those principles.”158 As to the requisite State practice:

State practice including that of the States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.159

The initiatives also do not demonstrate the requisite opinio juris for the creation of a customary rule. Despite absence of the requisite State practice and opinio juris these initiatives are, however, demonstrating ‘some’ sense of obligation for States to act in a manner consistent with sustainable development’s environmental principles. Thus

Principle” in Caron DD & Scheiber HN (eds), Bringing New Law to Ocean Waters, The Hague, Koninkijke Brill NV, 357-79.
155 Schwarz, note 84, 138-9.
156 Schwarz, ibid, 139.
157 Birnie, Boyle & Redgwell, note 101, 127.
the State practice and sense of obligation, albeit limited, is arguably demonstrating an emerging rule of customary international law from which, however, it is difficult to gauge the precise scope and content of any customary incorporation.

E. The way forward

The fact that environmental protection and sustainable use of natural resources are not yet integrated into developmental policy evidences that past unsustainable practices are continuing. Thus, as environmental sustainability is not yet attainable it is an important time to reflect on the past. The 1980s and early 1990s were a period of comparative prosperity and optimism much of it surrounding lapse of the cold war and the push towards globalization. In particular, treaty making continued prolifically, it was a time of relative western stability, and ‘green’ issues were populist: this was a perfect climate for the espousal of Rio’s environmental principles. However, “the emergence of globalization as the predominant economic trend in the 1990s set up an inevitable potential conflict with the goals of sustainable development proclaimed at Rio.” 160 Furthermore, we are now in a global panorama distinctly different from that prevailing at the UNCED and one in which the international community has not demonstrated the stamina required to keep the environmental principles ‘alive’. The WSSD was convened in this new panorama where the challenge of implementing sustainable development is greater, given that: world population, poverty and underdevelopment are increasing; natural resources continue being used at alarming rates; and urgent environmental problems, including the greenhouse challenge, continue to perplex. Despite controversy surrounding achievement targets for the use of renewable energy the WSSD can be seen as not forgetting these concerns, thereby continuing Rio’s momentum.

It is now posited that the only way to strengthen the international law of sustainable development is to return to Brundtland’s fundamentals. “Fixing the concept will require going back to its origins, and especially stressing the integration of economic and ecological systems while leaving it up to competent local institutions to decide how to set and pursue their own priorities.” 161 The central message of sustainable development is that we need to use natural resources at rates where the resources replenish themselves coupled with moral obligation to safeguard the environmental needs of current and future generations. “Far from requiring the cessation of economic growth, it recognizes that the problem of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits.” 162

We know that to achieve sustainable development significant legal reform is needed. “The concept of sustainable development reflects an international ideology, but an ideology requires a legal framework by which it may be put into practice.” 163 Thus a new political commitment is necessary to transform the environmental principles into an IEL paradigm with legally binding rules: commitment to a new treaty is needed, despite critics who may question the value of adopting yet another MEA. “It is time to

160 Hunter, Salzman and Zaelke, note 38, 206.
161 Victor, note 41, 103.
162 Our Common Future, note 14, 27.
reaffirm the principles and duties of these widely supported soft law statements and distil them into a clear treaty."\(^{164}\) The adoption of soft law first followed by subsequent treaty-adoptions is a well-established approach in international human rights law.\(^{165}\) In this way the soft-law Rio Declaration and Agenda 21 can be viewed as a precursor of a UN global treaty.\(^{166}\) Although, in making this nexus between soft and hard law instruments the Rio Declaration can be distinguished from the Universal Declaration on Human Rights, the precursor to the twin-covenants on human rights.\(^{167}\)

Through treaty-incorporation sustainable development’s environmental principles can elevate to ‘hard’ law thereby providing mandatory obligations on States to abide by the principles. Furthermore, under international law a violation of those rules would entail state responsibility.\(^{168}\) Despite the apparent difficulty of adopting a global treaty on sustainable development’s environmental principles there is already in existence significant, albeit diverse and non-uniform, State practice allowing for integration of ecological considerations into developmental decision-making. There is in addition the model treaty created by the International Union for the Conservation of Nature and Natural Resources (IUCN). The IUCN’s Draft International Covenant on Environment and Development\(^{169}\) (Draft Covenant) is a valuable model for a treaty on sustainable development’s environmental principles. The Draft Covenant contains 72 articles organized into 11 parts. Part II of the Draft Covenant provides for fundamental principles that will assist the parties in achieving the Covenant’s objective\(^{170}\) and includes the duties to prevent\(^{171}\) and to act with precaution,\(^{172}\) as well as a duty to undertake EIA,\(^{173}\) including transboundary EIA.\(^{174}\)

The article recommends the adoption of a framework treaty supplemented by specific protocols. The framework and protocol approach is a successful model that has been extensively utilized in IEL. The framework treaty would be adopted first; it would define and reconcile the various environmental principles, as well as provide obligations on States to strengthen their national laws and policy implementing the environmental principles. The framework would then be supplemented by specific

\(^{164}\) Robinson, note 158, 142.

\(^{165}\) In 1948 States adopted the non-legally binding *Universal Declaration of Human Rights*, GA Resolution 217A (III), UNGAOR, 3rd Sess., 183rd plen mtg, UN Doc A/RES/217A(III) (10 December 1948) (‘UDHR’). It was not until 1966, however, that the terms of the UDHR were provided for in treaty: *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’); and *International Covenant on Economic, Social and Cultural Rights*, 999 UNTS 171 (entered into force 23 March 1976) (‘ICESCR’).

\(^{166}\) Author unknown, “New Treaty in the Making” [http://sovereignty.net/p/sd/covenant.htm].


\(^{169}\) Draft International Covenant on Environment and Development (Draft Covenant) [http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf].

\(^{170}\) “The objective of this Covenant is to achieve environmental conservation and sustainable development by establishing integrated rights and obligations.” Draft Covenant, article 1.

\(^{171}\) Draft Covenant, article 6.

\(^{172}\) Draft Covenant, article 7.

\(^{173}\) Draft Covenant, article 37.

\(^{174}\) Draft Covenant, article 33(a).
protocols on each of the environmental principles. Such a treaty regime would be similar to the EU’s initiatives in promoting environmental integration, the precautionary principle, and EIA. The treaty’s EIA provisions, for example, would operate in the same way that the EIA Directive has become a cornerstone principle of EU developmental law. Finally, in the *Gabčíkovo-Nagymaros* case it was noted that a treaty is not static, but may be clarified and adapted by emerging norms of environmental law.\(^{175}\) In this way an initial obligation to conduct EIA would require a continuous monitoring of the effects a project may have, including significant transboundary impact.\(^{176}\)

V - CONCLUSION

During the last two decades States have adopted treaty rules on a wide range of environmental concerns but have struggled to create rules implementing sustainable development, largely due to the concept’s broad effects, uncertain meaning, and interdisciplinary impacts. The article discussed the evolution of sustainable development and reflected on the optimism associated with espousal of its environmental principles and the subsequent loss of expectation in adopting implementing rules. Twenty two years since ‘Our Common Future’ and numerous global summits later States are still to adopt an international legal framework implementing sustainable development’s environmental principles into an integrated developmental policy. Furthermore, implementation of sustainable development’s environmental principles has today been overshadowed by the new ‘demons’ of maintaining security against terrorism, protecting trade and healthy economies, and avoiding global financial recession. Fighting the new ‘demons’ has delayed creating a legal framework integrating the environmental principles of sustainable development.

The article also assessed the complex question of customary incorporation of sustainable development and its environmental principles. The principles have in varying degrees been included in domestic legislation where policy has driven their inclusion into legislative objects. The principles have also been included in many regional and global treaties. However, the case law and academic writings suggest that measuring any customary status from these initiatives is difficult. Despite the environmental principles often being positively reiterated they do not reflect the requisite uniformity of State practice and *opinio juris* to be reflective of customary international law. Furthermore, global environmental problems are more appropriately dealt with through creating specific treaty rules rather than through loose and general customary rules. Thus, given the problems in measuring levels of customary obligation sustainable development’s environmental principles need to be formally incorporated into an MEA reflecting a set of binding international rules; they cannot be destined simply as aspirational. Such a treaty would both obligate States to implement sustainable development’s environmental principles, as well as reconcile the principles of integration, prevention, precaution and EIA all of which seek to identify potential environmental effects alongside economic and social values. Despite ambiguities over meaning and legal content, and if backed by political commitment and incorporated into treaty, sustainable development and its constituent environmental principles will in time emerge as strong legal rules of IEL.

\(^{175}\) *Gabčíkovo-Nagymaros* case, 112.
\(^{176}\) *Gabčíkovo-Nagymaros* case, 112.