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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. In order to pave the way to a sustainable future, a new economic paradigm is necessary, which integrates traditional economics with ecological economics. A new economic paradigm is the only viable option to secure the path for future generations.[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 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."[3] 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."[4]

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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." Maurice Strong, Chairman, Earth Council, Inaugural Annual Jack Beale Lecture on the Global Environment: Towards a Sustainable Civilization (Feb. 11, 1999), *available at* http://www.ies.unsw.edu.au/events/jb1.pdf.

2. KOFI A. ANNAN, WE, THE PEOPLES, THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 55 (2000).

3. Maria Lee, *Sustainable Development in the EU: The Renewed Sustainable Development Strategy 2006*, 9 ENVT. L. REV. 41, 41 (2007).

4. Ben Boer, *Implementing Sustainability*, 14 DELHI L. REV. 1, 4 (1992).

Much has been written on sustainable development,[5] 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 it 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 the further implementation of 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' General Assembly ("GA") facilitated global summits that have collectively produced a suite of declaratory

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.

instruments articulating broad aspirational principles of environmental and social justice to be incorporated into the traditional developmental framework. Because 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 under 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: (1) regulation of valuable economic resources; (2) protection of species; (3) pollution from hazardous and ultra-hazardous activities; and (4) underdevelopment.[6] The UNCHE included the concerns of developing states for environmental impacts of poverty and underdevelopment, as well as the intrinsic linkages between environment and development, within a new international framework. At the UNCHE, states adopted the Stockholm Declaration, a statement of twenty-six 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

6. By 1972, much environmental normative standard-setting had occurred on narrow subject matter as evidenced by adoption of 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 and Canada; whaling; fauna and flora in their natural state; nature and wildlife preservation in the western hemisphere; Northwest Atlantic fisheries; birds; pollution of the sea by oil; fishing and conservation of living resources of the high seas; Northeast 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. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF./48/14/REV.1 (June 16, 1972), *available at* 11 *ILM* 1416–69. The UNCHE also produced an Action Plan implementing the Stockholm principles, one of the measures provided for the establishment of a new international environmental organization. Thus, in December 1972, the GA established the United Nations Environment Program ("UNEP"), responsible for implementing the Stockholm Declaration.

8. *Id.* at 1416.

on matters including the rights of future generations[9] and the duty to prevent transboundary environmental harm.[10] 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 environmental problems, including: acid rain; ozone depletion; climate change; deforestation; desertification; biodiversity conservation; trade in hazardous wastes; and lack of protection of the environment in times of armed conflict.[11] Despite the established link between environment and development, too little progress had been made in integrating environmental dimensions into developmental policy.[12] In response, a 1983 GA resolution established the World Commission on Environment and Development ("WCED") to investigate the state of the global environment.[13] The outcome of the Commission's work was its 1987 seminal report, "Our Common Future."[14] The Report identified dramatically increasing world population and powerful technological advances that facilitate 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."[15] The adoption of "Our Common Future" and its popularization of sustainable development revitalized 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 post-Brundtland period was particularly optimistic. During

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9. *Id.* at 1417.

10. *Id.* at 1420.

11. A.O. Adede, *The Road to Rio: The Development of Negotiations*, *in* THE ENVIRONMENT AFTER RIO: INTERNATIONAL LAW AND ECONOMICS 4 (Luigi Campiglio et al. eds. 1994).

12. *Id.* at 4–5.

13. G.A. Res. 38/161, U.N. Doc. A/38/161 (Dec. 19, 1983) *available at* http://www.un-documents.net/a38r161.htm.

14. World Commission on Environment and Development [WCED], *World Commission on Environment and Development*, U.N. Doc. A/42/427 (Mar 20, 1987). The Report was adopted by UNEP and presented to the GA at its 42nd Session.

15. *Id.* ¶ 49.

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 commonplace.[16] Extensive regulation occurred through adoption of tens of MEAs in a wide range of areas.[17] 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.[18] However, the more difficult issues surrounding enforcement regimes, including liability and compensation regimes, were often eluded. Irrespective, the period evidenced several environmental successes including: (1) the significant reduction of vessel-source marine pollution; (2) the international regulation of the trade in hazardous waste; and (3) 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[19] and its lobbying in major international environmental fora that created an atmosphere of optimism extending from the Stockholm Declaration and reaching into the Rio Summit.[20] The result of all the optimism was the convening of the Rio mega-conference on the environment and development.

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16. So many treaties were created that the term 'treaty congestion problem' was coined. Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 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.

18. A particular treaty regime that stood out is the United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf 62/122 (Dec. 10, 1982), *available at* http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_122_CONVENTION.pdf [hereinafter LOSC]. LOSC came into force November 16, 1994. The LOSC sets out a concrete legal scheme codifying customary international law and creating new legal obligations. It is impressive because of its far-reaching nature and careful balance of competing interests of maritime, coastal, developed, and developing states.

19. With the adoption of the Maastricht Treaty, sustainable development was incorporated as one of the Community's core aims. Treaty on European Union art. 3, Feb 7, 1992, 1992 O.J. (C 191); Treaty Establishing the European Community art. 2, Nov 10, 1997, 1997 O.J. (C 340).

20. Further, during the period, the world was in a relative peace, and the collapse of

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").[21] 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")[22] and the associated Agenda 21.[23] 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.[24]

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communist and socialist regimes in Central and Eastern Europe and the former Soviet Union generated further optimism. Coupled with this there were relatively few pockets of breaches to international peace and security such as the ethnic struggles and human rights abuses in Cambodia, East Timor, Middle-East, Rwanda, Sierra Leone, and the former Yugoslavia. *See* The conflicts in the former Yugoslavia, S.C. Res. 808, U.N. Doc. S/RES/808 (1993), *available at* http://www.nato.int/ifor/un/u930222a.htm; The International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (1994), *available at* http://www.un.org/ictr/english/Resolutions/955e.htm.

21. G.A. Res. 44/228, U.N. Doc. A/44/49 (Dec. 22, 1989), *available at* http://www.un.org/documents/ga/res/44/ares44-228.htm. In 1992, the United Nations Conference on Environment and Development ("UNCED" or "Earth Summit") was held in Rio de Janeiro. The conference was attended by delegates from over 170 governments and resulted in the adoption of several binding and non-legally binding instruments.

22. U.N. Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

23. Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151.26 (1992) *available at* http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm. The Summit also adopted the United Nations Framework Convention on Climate Change. FCCC/Informal/84, U.N. Doc. GE.05-62220 (May 9, 1992), *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf [hereinafter UNFCC]; International Convention on Biological Diversity, U.N. Doc. UNEP/Bio.Div/CONF/L.2 (May 22, 1992) [hereinafter CBD]; and Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, U.N. Doc. A/CONF.151/26 Vol. III, *available at* http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm. In addition, the Earth Summit launched the process that led to the 1994 adoption of the International Convention Combating the Effects of Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, U.N. Doc. A/AC.241.27 (Sept. 12, 1994), *available at* http://www.unccd.int/convention/text/pdf/conv-eng.pdf.

24. Strong, *supra* note 1, at 39.

The Rio Declaration is similar in style and ambition to the Stockholm Declaration and aspirationally expresses twenty-seven 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,[25] environmental protection to be an integral part of development,[26] common but differentiated responsibilities,[27] reduction of unsustainable patterns of production and consumption,[28] enactment of effective environmental laws,[29] recognition of the precautionary principle,[30] internalization of environmental costs, and the use of economic instruments.[31] Agenda 21 is a comprehensive action plan implementing the Rio Declaration into the twenty-first century. The instrument covers sectors including the oceans, mining, and forestry, but also complex inter-sectoral issues including the adoption of environmentally sound technology, the provision of financial resources to developing states, the development of planning and monitoring database information systems, the progressive new institutional and legal arrangements, and the creation of a new international organization to oversee implementation.[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."[33] "In other words, a system of

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25. *Rio Declaration*, *supra* note 22, at princ. 3.

26. *Id.* at princ. 4.

27. *Id.* at princ. 7.

28. *Id.* at princ. 8.

29. *Id.* at princ. 11.

30. *Id.* at princ. 15.

31. *Id.* at princ. 16.

32. The twenty-one nation inter-governmental Commission on Sustainable Development ("CSD") was established to oversee implementation of Agenda 21.

33. David Freestone, *The Road from Rio: International Environmental Law After the Earth Summit*, 6 J. ENVTL. L. 193, 195 (1994).

international environmental law has emerged, rather than simply more international rules about the environment."[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.[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.[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 period, as evidenced by continued treaty proliferation.[37] In this way the post-Rio era continued the momentum created by UNCED.[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, but implementation was often poor,[39] and early political 'commitment' to treaties proved shallow

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34. *Id.* at 218.

35. *Id.* at 209.

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.

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.

38. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 197 (3rd ed. 2007).

39. David M. Driesen, *Thirty Years of International Environmental Law: A*

with subsequent failure to implement basic provisions. Overall, there was neither great success with enforcement nor 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.[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.[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, which led 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.[42]

Despite huge attendance at the UNCED by state delegations and non-governmental organisations ("NGOs"), the United States, 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 throughout the 1990s. And it opposed key provisions of the biodiversity agreement on behalf of special interests primarily concerned with intellectual property rights in biota.[43]

Retrospective and Plea for Reinvigoration, 30 SYRACUSE J. INT'L L. & COM. 353, 358 (2003).

40. *Id.* at 356.

41. David G. Victor, *Recovering Sustainable Development*, FOREIGN AFFAIRS, Jan.-Feb. 2006, at 91, 94.

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* Precautionary Principle, *infra* Section IV(B)(3).

43. Driesen, *supra* note 39, at 359–60.

In contrast to its position at the 1972 Stockholm Conference,[44] the United States was, at best, ambivalent about the 1992 Summit.[45] Even though the UNCED process had initially secured the support and cooperation of the U.S. 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 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.[46]

But it was not until after the Summit that the shift in U.S. policy was more obvious.

> Since the Rio Conference the United States seems to have become increasingly wary of international mega-conference diplomacy, multilateral environmental treaty regimes, and efforts to develop customary international environmental law .... US enthusiasm for international environmental law appears to have diminished since the Rio Summit.[47]

Since the Earth Summit, for example, the United States has persistently objected to the inclusion of both the precautionary principle and common but differentiated responsibilities into customary international law.[48] The shifting attitude towards sustainable development can be seen as a microcosm of a wider shift in thinking. The United States has failed to ratify the Convention on Biological Diversity ("CBD")[49] and the Kyoto Protocol to the UN Framework Convention on Climate Change,[50] while its ratification of other MEAs

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44. Even the US, that has in recent times resisted environmental multilateralism, played a leading role at Stockholm; "[i]t 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." Scott A. Hajost, *The Role of the United States*, *in* THE ENVIRONMENT AFTER RIO 15, 16–17 (Luigi Campiglio et al. eds. 1994).

45. *Id.* at 17.

46. *Id.*

47. Jutta Brunneé, *The United States and International Environmental Law: Living With an Elephant*, 14 EURO. J. INT'L L. 617, 620, 622 (2004).

48. *Id.* at 629.

49. CBD, *supra* note 23.

50. Kyoto Protocol to the UNFCCC, Mar. 25, 1998, U.N. Doc.

has been sluggish. The United States 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.[51] 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 nineteenth century and that global carbon dioxide emissions had risen by over nine percent.[52]

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 focused 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 that they did the UNCED, which 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.[53] At the

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FCCC/CP/1997/C.7/Add.1 [hereinafter Kyoto Protocol].

51. 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.'

52. Lisa Mastny, *Melting of Earth's Ice Cover Reaches New High,* WORLDWATCH INST. (Mar. 6, 2000), http://www.internetpirate.com/meltingice.htm.

53. 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* DEREK OSBORN & TOM BIGG, EARTH SUMMIT

same time, the United States resisted and obstructed adoption of negotiated global treaties, principles, targets, and timetables.[54]

> 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.[55]

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: (1) the Johannesburg Declaration on Sustainable Development ("Johannesburg Declaration" or "Declaration"),[56] (2) the Plan of Implementation of the World Summit on Sustainable Development ("Plan of Implementation" or "Plan"),[57] and (3) 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[58] and emphasizing "the need to produce a practical and visible plan that should bring about poverty eradication and human development."[59] The Declaration attempts to pave "a common path, towards a world that respects and implements the vision of sustainable development"[60] while recognizing that particular priority is needed for

> the fight against the worldwide conditions that pose severe threats to the sustainable development of our people. Among these conditions

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II: OUTCOMES & ANALYSIS (1998).

54. George Pring, *The 2002 Johannesburg World Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'burg into 'Joke'burg'*, 30 DENV. J. INT'L L. & POL'Y 410, 413–14 (2002).

55. *Id.* at 416.

56. World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26–Sept. 4, 2002, *Draft Political Declaration Submitted By the President of the Summit*, U.N. Doc. A/CONF.199/L.6/Rev.2/Corr.1 (Sept. 4, 2002) [hereinafter *Johannesburg Declaration*], *available at* http://www.un.org/jsummit/html/documents/summit_docs.html.

57. World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26–Sept. 4, 2002, *Draft Plan of Implementation of the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/L.1 (June 26, 2002) [hereinafter *Plan of Implementation*], *available at* http://www.un.org/jsummit/html/documents/summit_docs.html.

58. *Johannesburg Declaration*, *supra* note 56, at arts. 1, 8.

59. *Id.* at art. 7.

60. *Id.* at art. 10.

> 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.[61]

The Declaration speaks generally about poverty eradication and sustainable development,[62] ensuring women's empowerment,[63] the particular needs of small island states whose existence is precarious, developing states,[64] and of "the vital role of indigenous peoples in sustainable development."[65] 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.[66] 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 globalizing world; health and sustainable development; sustainable development of small island states; regional initiatives for sustainable development for Africa, Latin America, the Caribbean, Asia, the Pacific, West Asia, and the Economic Commission for Europe; means of implementation; and institutional framework for sustainable development.[67]

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

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61. *Id.* at art. 17.

62. *Id.* at art. 19.

63. *Id.* at art. 18.

64. *Id.* at art. 22.

65. *Id.* at art. 25.

66. *Plan of Implementation*, *supra* note 57, at art. 1.

67. Institutional initiatives include: objectives, strengthening the institutional framework for sustainable development at the international level, role of the GA, role of the Economic and Social Council, role and function of the CSD, role of international institutions, strengthening international arrangements for sustainable development at the regional level, strengthening international arrangements for sustainable development at the national level, and participation of major groups. Institutional initiatives are crucial for achieving sustainability, or at least better environmental protection in that to date the international infrastructure dealing with the environment has been particularly weak. *Plan of Implementation*, *supra* note 57.

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.[68] However, because of the resistance by the United States and the Organisation of Petroleum Exporting Countries ("OPEC") states, there was not enough political will to facilitate treaty adoption. The United States 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.[69] 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.[70]

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."[71] 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.[72] However, progress was made on the alleviation of world poverty and the elaboration of social development as the third pillar of sustainable development.[73] Further, 'partnerships' between governments and with business were a major theme of the WSSD and were recognized as a

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68. The timetable envisaged that by 2015 states would derive at least fifteen *percent* of their total energy needs from renewable sources. Aside from the EU's interest in creating a global renewable energy timetable, it has created regional targets which involve doubling its use of renewable energy by 2010, representing twelve *percent* of its total energy consumption.

69. Pring, *supra* note 54, at 416.

70. 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.

71. Hans Christian Bugge & Lawrence Watters, *A Perspective on Sustainable Development After Johannesburg on the Fifteenth Anniversary of Our Common Future: An Interview with Gro Harlem Brundtland*, 15 GEO. INT'L ENVTL L. REV. 359, 361 (2002–03).

72. *Plan of Implementation*, *supra* note 57, at art. 1.

73. Hari M. Osofsky, *Defining Sustainable Development After Earth Summit 2002*, 26 LOY. L.A. INT'L & COMP. L. REV. 111, 123 (2003–04).

major vehicle for the achievement of sustainable development.[74] 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 United States, 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.[75] Evidence of this 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."[76] 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

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74. S. Jacob Scherr & R. Juge Gregg, *Johannesburg and Beyond: The 2002 World Summit on Sustainable Development and the Rise of Partnerships*, 18 GEO. INT'L ENVTL L. REV. 425, 439–40 (2005–06).

75. Ekundayo 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. Ekundayo George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government be Held Liable for not Attaining this Goal?*, Ekundayo 27 WM & MARY ENVTL. L. & POL'Y REV. 651 (2003). George quotes Simon Rippon, writing in 1997:

> It is well-established from various international scientific studies that the best long-term 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.

Id. at 690–91.

76. U.S. Dep't of State, *Advance Sustainable Development and Global Interests* (2003), *available at* http:// www.state.gov/t/pm/rls/rpt/walkearth/2004/37224.htm.

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."[77] 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 U.S. 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 the 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.[78] Furthermore, commitment of states to sustainable development is reflected by ongoing work in diverse areas.[79] 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.[80] At the same time, many states have incorporated sustainable development's environmental principles into domestic planning and environmental legislation. Are

77. Heidemarie Wieczorek-Zeul, *Development Policy After September 11: Towards a Comprehensive Peace and Security Policy Approach*, D+C DEVELOPMENT AND COOPERATION 4–5 (Mar.–Apr. 2002), *available at* http://www.inwent.org/E+Z/zeitschr/de202-3.htm. Heidemarie Wieczorek-Zeul is the German Federal Minister for Economic Cooperation and Development.

78. *See infra*, notes 108–15, 120–22.

79. 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. Joseph Abrams, *Lost and Found: Senate Moves Toward Ratification of U.N.'s 'Law of the Sea Treaty'*, FOXNEWS.COM (Mar. 12, 2009), http://www.foxnews.com/politics/2009/03/12/lost-found-senate-moves-ratification-un-treaty/.

80. U.N. Doc. A/63/304 (Aug. 18, 2008).

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 the environmental principles into legally binding rules? Custom, which is based on the practice and commitment 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").[81] 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, which undermines effective implementation of the concept.[82] Thus, despite widespread use of the WCED definition, a more precise definition of sustainable development eludes.[83] Even if states were to agree on a definition for sustainable development, "widespread agreement on a principle does not translate

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81. 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. subject to the provisions of Article 59, 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.

Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1031, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

82. 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?

83. Priscilla Schwarz, *Sustainable Development in International Law*, 5 NON-STATE ACTORS & INT'L L. 127, 132–34 (2005); Graham Mayeda, *Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law*, 15 COLO. J. INT'L ENVTL. L. & POL'Y. 29, 32 (2004).

into agreement on the principle's normative content."[84] Despite its beginnings as a powerful concept it is suggested that sustainable development has become meaningless over the last two decades.[85]

> 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.[86]

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 principles of policy, and whether of specific or general application."[87] 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 goal is of a collection of rules (for instance a statute). Principles usually contain a high moral and/or legal value.[88]

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.[89] Sustainable development is thus the

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84. Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, YALE J. INT'L L. 363, 364 (2007).

85. Victor, *supra* note 41, at 103.

86. J. Verschuuren, *Sustainable Development and the Nature of Environmental Legal Principles*, 57 POTCHEFSTROOM ELECTRONIC L.J. 1, 15 (2006).

87. F. Maes, *Environmental Law Principles, Their Nature and the Law of the Sea: A Challenge for Legislators*, *in* ENVIRONMENTAL LAW PRINCIPLES IN PRACTICE 59, 59 (Sheridan M & Lavrysen eds. 2002).

88. Verschuuren, *supra* note 86, at 4.

89. 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

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."[90] 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."[91]

B. State Practice

Does the state practice evidence a customary rule where policy makers use environmental factors in their decisionmaking? 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.[92]

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 is thus key to achieving the concept's goals.

> To operationalize sustainable development we need to recognize that one principle—integrated decisionmaking—holds the other principles together . . . . Of all principles contained in the sustainable

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application of the concept and its principles.

90. Verschuuren, *supra* note 86, at 13.

91. Alhaji B. M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT'L ENVTL. L. REV. 21, 59 (2003) (citing *Report of a Consultation on Sustainable Development: The Challenge to International Law*, REV. EUR. COMM. INT'L ENVTL. L., 1–16 (May 1993)).

92. Lee, *supra* note 3, at 43.

> development framework, integrated decisionmaking is perhaps the principle most easily translated into law and policy tools.[93]

Effective environmental integration requires law and policy, including developmental decisionmaking, 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 European Union's new Sustainable Development Strategy ("SDS")[94] that identifies the main challenges as being to gradually change current unsustainable consumption and production patterns and the non-integrated approach to policymaking.[95] A key objective of the SDS is to break the link between economic growth and environmental degradation.[96]

Generally, environmental integration means that environmental policy is integrated into all facets of policymaking (policy integration). However, environmental integration can also refer to procedural legal obligations pertaining to decisionmakers 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

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93. John C. Dernbach, *Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking* 10 IND. J. GLOBAL LEGAL STUD. 247, 248 (2003).

94. 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 the "integration of environmental concerns into other policies must be deepened in order to move towards sustainable development." *Environmental Integration*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/integration/integration.htm (last visited Nov. 13, 2010). Further, on June 9, 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 [g]lobal [p]overty." Particular priority is to be given to climate change and clean energy. Press Release, European Council, Commission Issues First Sustainable Development Report (Oct. 24, 2007).

95. Council of the European Union, Note from General Secretariat to Delegations, Review of the EU Sustainable Development Strategy [EU SDS] – Renewed Strategy, at 2, SEC (2006) 10917/06 final (June 26, 2006).

96. *Id.* at 3.

> 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.[97]

2. Prevention of Transboundary Environmental Harm

States have a duty to prevent transboundary environmental harm under customary international law.[98] The duty is recognized in Principles 21 and 2 of the Stockholm and Rio Declarations respectively, and it is a cornerstone rule of IEL reflecting a composite duty[99] 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.[100]

The duty to prevent is the subject of the Articles on the Prevention of Transboundary Harm from Hazardous Activities ("Prevention

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97. Sebastien Jodoin, *The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives* 14 (CISDL Legal Working Papers 2005), *available at* http://www.cisdl.org/pdf/sdl/SDL_Integration.pdf.

98. The duty to prevent transboundary environmental harm originates in Trail Smelter Arbitration (United States v. Canada), 33 AJIL 182 (1939) and 35 AJIL 684 (1941), *available at* http://www.lfip.org/laws666/trailsm.htm#first, where it was found that Canada had to refrain from emitting fumes affecting the United States. The duty was further elaborated on by the ICJ in the *Corfu Chanel* 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" Memorial of United Kingdom, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Pleadings 19 (Sept. 30, 1947), *available at* http://www.iilj.org/courses/documents/CorfuChannel.UnitedKingdomv.Albania.pdf. 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.

Rio Declaration, *supra* note 22, at princ. 21. Principle 21 has been reiterated in numerous initiatives and judicial pronouncements.

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

100. PATRICIA BIMIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 140 (3d ed. 2009).

Articles").[101] The "articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."[102] The Prevention Articles elaborate on the Rio Declaration[103] and demonstrate that states are fully aware of the risks between the environment, human rights, and uncontrolled development. Their adoption by the International Law Commission ("ILC") in 2001 evidences state support as does their favorable GA discussion and judicial consideration.[104] The articles emphasize appropriate risk analysis as a precursor to any kind of preventive approach.

> Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on the assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.[105]

Despite the apparent acceptance by states of the duty to prevent transboundary environmental harm, they 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.

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."[106] 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

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101. International Law Commission, *Prevention of Transboundary Harm from Hazardous Activities, ILC Report*, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf. 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." *Id.* at art. 2(c).

102. *Id.* at art I.

103. *Rio Declaration*, *supra* note 22, at princs. 2, 10, 11, 17, 18, 19.

104. The MOX Plant Case (Ir. v. U.K.), 2001 I.T.L.O.S. No. 10, Provisional Measures, (Dec. 3), *reprinted in* 41 INTERNATIONAL LEGAL MATERIALS 405 (2002); Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J.

105. International Law Commission, *supra* note 101, at art. VII.

106. James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L COMP. L. REV. 1, 2 (1991).

> 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 act *now* to protect the environment and to avoid delay by waiting until all scientific facts are known. Enough is 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 decisionmaking it is 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.[107]

There is significant debate as to whether precaution is a principle overarching all policy and decisionmaking 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,[108] Montreal Protocol on Substances that Deplete the Ozone Layer,[109] CBD,[110] UNFCCC,[111] Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes,[112] Kyoto Protocol,[113] Cartagena Biosafety Protocol,[114] and

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107. Mayeda, *supra* note 83, at 66.

108. U.N. ENVIRONMENT PROGRAMME, *The Vienna Convention for the Protection of the Ozone Layer*, 1, *available at* http://www.unep.org/ozone/pdfs/viennaconvention2002.pdf.

109. Montreal Protocol on Substances that Deplete the Ozone Layer, pmbl. Sept. 16, 1987, 26 I.L.M. 1541, *available at* http://www.unep.org/ozone/pdfs/montreal-protocol2000.pdf.

110. CBD, *supra* note 23.

111. UNFCCC, *supra* note 23.

112. Convention on the Protection and Use of Transboundary Watercourses and International Lakes [Helsinki Convention] art. 2(5)(a), Mar. 17, 1992 31 I.L.M. 1312, *available at* http://www.unece.org/env/water/pdf/watercon.pdf.

113. *Kyoto Protocol*, *supra* note 50, at arts. 2, 3(3).

114. Cartagena Protocol on Biosafety to the Convention on Biological Diversity arts. 10(6)–11(8), Sept. 11, 2003, *available at* http://bch.cbd.int/protocol/publications/cartagena-protocol-en.pdf.

Persistent Organic Pollutants Treaty.[115] However, the diverse versions are also problematic as they reflect a lack of uniformity in meaning and state practice, thus making it less probably that states will recognize a 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 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."[116] Statements of legislative objects then weave into a 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."[117]

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.

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115. Stockholm Convention on Persistant Organic Pollutants, arts. I-VIII, annex A-C, May 22, 2001, 2256 U.N.T.S. 119, *available at* http://chm.pops.int/Convention/tabid/54/language/en-US/Default.aspx#convtext.

116. Charmian Barton, *Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making*, 13 GEO. INT'L ENVTL. L. REV. 837, 839–40 (2000–01).

117. *Id.* at 891.

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.[118] It is provided for in many legal systems and plays a central role in safeguarding the inclusion of environmental considerations into decisionmaking 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, although many states have 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.[119] However, the duty also exists regionally in the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention").[120] Further, the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context[121] requires strategic environmental assessment ("SEA") to be undertaken much earlier in the decisionmaking process than project EIA and is thus seen as a key tool for sustainable development.[122]

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118. NEIL CRAIK, THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION (2008).

119. International Law Commission, *supra* note 101, at arts. 7, 9 (assessment of risk, consultation on preventative measures).

120. Convention on Environmental Impact Assessment in a Transboundary Context art. 7(1), Feb 25, 1991, 1989 U.N.T.S. 309, *available at* http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish. pdf.

121. Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, May 21, 2003, U.N. Doc. ECE/MP.EIA/2003/, *available at* http://www.unece.org/env/eia/documents/legaltexts/protocolenglish.pdf.

122. The Protocol also provides for extensive public participation in government decisionmaking in numerous development sectors.

C. Case Law of International Courts and Tribunals

The most important evidence of customary acceptance of sustainable development's environmental principles is the ICJ's—and other international courts and tribunals—recognition of them. Judicial decisions are a subsidiary means for the determination of rules of law[123] and are 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 protecting the environment and development, and it confronts the role of sustainable development in resolving these disputes. Overall, however, judicial consideration of environmental principles is disappointing because it does not explicitly apply the environmental principles to the disputes nor does it adequately elaborate on their legitimacy. Further, the judgments are far from clear on the relationship between sustainable development's environmental principles. Despite these flaws, certain individual judgments support the view that customary international law has crystallized around some of these newly-emerging 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),[124] New Zealand requested the ICJ review earlier proceedings against France alleging that the French nuclear 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.[125] Although the court dismissed New Zealand's request because France used alternative modes of testing, the three dissenting judgments addressed 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,[126] and the EIA was prima facie applicable in the current state of IEL.[127] 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

123. Statute of the International Court of Justice, *supra* note 81, at art. 38(1)(d).

124. 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) Case, 1995 I.C.J. 288 (Order of Sept. 22), *available at* http://www.icj-cij.org/docket/files/97/7557.pdf.

125. *Id.* at 288–90.

126. *Id.* at 341–45 (Weeramantry, J., dissenting).

127. *Id.* at 345 (Weeramantry, J., dissenting).

may now be a principle of customary international law relating to the environment."[128] 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.[129]

In the *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)* (Merits) ("*Gabčikovo-Nagymaros* case"), the ICJ had to resolve a dispute regarding the construction of a series of locks and dams.[130] Even though the case involved 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. Although the court did not apply the environmental principles, it 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.[131]

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 [sic] a principle with normative value."[132] 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."[133] He also confirmed that "EIA, being a specific application of the larger principle of caution, embodies the

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128. *Id.* at 412.

129. *Id.* at 347 (Weeramantry, J., dissenting), 370 (Koroma, J., dissenting).

130. Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 11 (Sept. 25).

131. *Id.* at 78.

132. *Id.* at 88 (separate opinion of Vice-President Weeramantry).

133. *Id.* at 95.

obligation of continuing watchfulness and anticipation."[134] 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 United Nations Convention on the Law of the Sea ("LOSC").[135] Despite the ITLOS declining to take a stance on the customary international law status of the precautionary principle, "its decision reflected a classic 'precautionary approach.' "[136] In separate opinions, however, Judge Treves indicated that a precautionary approach seems inherent in the very notion of provisional measures,[137] while Judge ad hoc Shearer found that "the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach."[138]

In *MOX Plant (Ireland* v *United Kingdom),* ("*MOX Plant* case"), the ITLOS considered protection of the Irish Sea from radioactive pollution from a proposed power plant on the English coast.[139] 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 found that "[i]t is still a matter of discussion whether the precautionary

134. *Id.* at 113.

135. Southern Bluefin Tuna (Request for Provisional Measures) (New Zealand v Japan; Australia v Japan), 117 I.L.R. 148 (Int'l Trib. L. of the Sea 1999).

136. TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 225 (2009).

137. Southern Bluefin Tuna, *supra* note 135, at 180 (separate opinion of Judge Treves).

138. *Id.* at 187 (separate opinion of Judge Shearer).

139. MOX Plant (Request for Provisional Measures) (Ireland v. United Kingdom), 126 I.L.R. 260 (Int'l Trib. L. of the Sea 2001).

principle or the precautionary approach in international environmental law has become part of international customary law."[140]

The most dramatic judicial consideration of sustainable development and its environmental principle occurred within the World Trade Organization ("WTO").[141] In *EC Measures Concerning Meat and Meat Products (Hormones)* ("*Beef Hormones* case"),[142] the WTO's Appellate Body ruled that it did not need to declare on the precautionary principle's customary international law status.[143] It determined that an EC ban on the import of U.S. 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."[144] In *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp-Turtle I*"),[145] the United States imposed a prohibition on the importation of shrimp that utilized harvesting methods involving a high incidental mortality of turtle. 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.[146]

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

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140. *Id.* at 296 (separate opinion of Judge Wolfrum).

141. Controversy surrounded the different approaches adopted by the EU and United States with respect to the precautionary principle. The EU maintained that the precautionary principle has customary international law status while the U.S. 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 that should be viewed as subservient to more specific rules, for example the rules of the WTO.

142. Appellate Body Report, *EC - Measures Concerning Meat and Meat Products (Hormones)*, 1, WT/DS26/AB/R (Jan. 16, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm.

143. *Id.* at 47–48.

144. *Id.* at 78, 80.

145. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, 1–2, WT/DS58/AB/R (Oct. 12, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58.

146. *Id.* at 48.

of law.[147] The case law of sustainable development and its environmental principles has been the subject of some worthy discussion by commentators. Indeed, some commentators have argued that the *Gabčikovo-Nagymaros* case endorsed sustainable development as having a role in reconciling the competing interests of development and environmental protection.[148] The judgment "suggests that we are dealing with a legal principle, however confined, rather than a mere policy or moral invocation . . . . [R]equiring 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."[149] 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 *Gabčikovo-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."[150]

By and large, however, the academic writing on sustainable development is often 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,[151] some of which has suggested that the principle is a rule of customary international law.[152]

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147. Statute of the International Court of Justice, *supra* note 81, at art. 38(1)(d).

148. Afshin A-Khavari & Donald R. Rothwell, *The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?*, 22 MELBOURNE U. L.R. 507, 527 (1998).

149. A. E. Boyle, *The Gabčikovo-Nagymaros Case: New Law in Old Bottles*, 8 Y.B INT'L ENVTL. L. 13, 18 (1997).

150. Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 23 (Alan Boyle & David Freestone eds., 1999).

151. Sonia Boutillon, *The Precautionary Principle: Development of an International Standard*, 23 MICH. J. INT'L L. 429 (2002); James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1 (1991); James Cameron & Juli Abouchar, *The Status of the Precautionary Principle in International Law*, *in* THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 29 (David Freestone & Ellen Hey eds., 1996); Jaye Ellis & Alison Fitzgerald, *The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality*, 49 MCGILL L. J. 779 (2004); Gullett Warwick, *Environmental Protection and the "Precautionary Principle": A Response to Scientific Uncertainty in Environmental Management*, 14 ENVTL. & PLAN. L. J. 52 (1997); Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4

> 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.[153]

Most commentators agree that sustainable development's environmental principles have not obtained a customary status.[154] However, some commentators are more optimistic, viewing the legality of sustainable development in less absolute terms: "[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."[155] In this sense, environmental principles—although not binding customary rules—help shape the dialogue that informs policy and law.

> 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.[156]

Environmental principles, although abundant, lack the requisite uniformity for customary incorporation. Indeed, the "[m]ere repetition of soft law principles, by itself, does not result in the realization of those

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GEO. INT'L ENVTL. L. REV. 303 (1992); James E. Hickey Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L. J. 423 (1995); Jacqueline Peel, *Precaution – A Matter of Principle, Approach or Process?*, 5 MELB. J. INT'L L. 483 (2004); Christopher D. Stone, *Is There a Precautionary Principle?*, 31 ENVTL. L. REP. 10790 (2001); Jon M. Van Dyke, *The Evolution and International Acceptance of the Precautionary Principle*, *in* BRINGING NEW LAW TO OCEAN WATERS 357 (David C. Caron & Harry N. Scheiber eds., 2004).

152. Brunneé, *supra* note 47, at 630; Van Dyke, *supra* note 151, at 357; Philippe Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I 212–13 (1995).

153. Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary Interntional Law* 9 J. ENVTL. L. 221, 235 (1997).

154. Schwarz, *supra* note 83, at 138–39.

155. *Id.* at 139.

156. BIMIE ET AL., *supra* note 100, at 127.

principles."[157] As for state practice, states have not generally recognized environmental principles in an "extensive and virtually uniform"[158] way.

The principles, cases, and commentary also do not demonstrate the requisite *opinio juris* for the creation of a customary rule. Despite the 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, 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

Unsustainable development practices are continuing because environmental protection and sustainable use of natural resources are not yet integrated into the policy of development. Thus, as we have not yet attained environmental sustainability, 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 the end 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."[159] 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 cause havoc. Despite controversy surrounding achievement targets for

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157. Nicholas A. Robinson, *"Colloquium: The Rio Environmental Law Treaties" IUCN's Proposed Covenant on Environment & Development*, 13 PACE ENVTL. L. REV. 133, 142 (1995).

158. North Sea Continental Shelf (F.R.G. v. Den.;F.R.G. v. Neth.) 1969 I.C.J. 3 (Mar. 8, 1967).

159. HUNTER ET AL., *supra* note 38, at 206.

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."[160] The central message of sustainable development is that we need to use natural resources at rates where the resources replenish themselves. To do this, states must recognize that they have a 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 under-development cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits."[161]

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."[162] 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 reaffirm the principles and duties of these widely supported soft-law statements and distil them into a clear treaty."[163] The adoption of soft law first followed by subsequent treaty-adoption is a well-established approach in international human rights law.[164] In this way the soft-law Rio Declaration and Agenda 21 can be viewed as a precursor of a UN global treaty.[165] Although, in making this nexus between soft and hard law instruments the Rio Declaration can be

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160. Victor, *supra* note 41, at 103.

161. WCED, *supra* note 14, at 27.

162. Susan H. Bragdon, *The Evolution and Future of the Law of Sustainable Development: Lessons from the Convention on Biological Diversity*, 8 GEO. INT'L ENVTL. L. REV. 423, 434 (1996).

163. Robinson, *supra* note 157, at 142.

164. In 1948, states adopted the non-legally binding Universal Declaration of Human Rights [UDHR], G.A. Res. 217A (III), U.N. Doc. A/RES/217A(III) (Dec. 12, 1948). It was not until 1966, however, that the terms of the UDHR were provided for in treaty. International Covenant on Civil and Political Rights [ICCPR], Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

165. *New Treaty in the Making*, SOVEREIGNTY INTERNATIONAL, INC. (Jan./Feb. 1998), http://sovereignty.net/p/sd/covenant.htm.

distinguished from the Universal Declaration on Human Rights, the precursor to the twin covenants on human rights.[166]

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.[167] 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[168] (Draft Covenant) is a valuable model for a treaty on sustainable development's environmental principles. The Draft Covenant contains 72 articles organized into eleven parts. Part II of the Draft Covenant provides for fundamental principles that will assist the parties in achieving the Covenant's objective[169] and includes the duties to prevent[170] and to act with precaution,[171] as well as a duty to undertake EIA,[172] including transboundary EIA.[173]

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

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166. Marc Pallemaerts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J.L. & COM. 623, 629 (1996) (citing Philippe Sands, *International Law in the Field of Sustainable Development*, 65 BRIT. Y.B. INT'L L. 303, 322 (1994)).

167. U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission*, 43, U.N. Doc. A/56/10 (2001).

168. The World Conservation Union & Int'l Council of Envtl. Law, Comm'n on Envtl. Law, *Draft International Covenant on Environment and Development* (Envtl. Policy & Law Paper No. 31 Rev. 2, 2004), [hereinafter *Draft Covenant*], *available at* http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf.

169. "The objective of this Covenant is to achieve environmental conservation and sustainable development by establishing integrated rights and obligations." *Id.* at art. 1.

170. *Id.* at art. 6.

171. *Id.* at art. 7.

172. *Id.* at art. 37.

173. *Id.* at art. 33(a).

be supplemented by specific 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 *Gabčikovo-Nagymaros* case it was noted that a treaty is not static, but may be clarified and adapted by emerging norms of environmental law.[174] 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.[175]

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 inter-disciplinary 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 trying 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.

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174. *See* Gabčikovo-Nagymaros Project, *supra* note 130, at 115.

175. *Id.*

Furthermore, global environmental problems are more appropriately dealt with by 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.