
A CRITIQUE ON THE CONCEPT OF SUSTAINABLE DEVELOPMENT

Introduction

As we look to the world today, one factor stands out glaringly, be it in the developed country or in a developing country, it is that, most of the current economic activities are not sustainable. Demands of a growing human population and an expanding global economy are placing increasing stresses on natural systems such as the forests, grasslands, wetlands and river systems which in turn threaten the very existence of diversity of species.

It has been commented that despite efforts for conservation, recycling and forms of socially responsible business, the end result falls far short of sustainability.¹ Nelder went on succinctly to say that in our current market dynamics and resource utilisation, we are by definition seeing to our own demise. The challenge facing the world presently is to generate individual economic opportunities and national wealth necessary for economically healthy societies while at the same time lessening the environmental risks and social inequities that have accompanied past economic development.² The very continuation of the existence of human life on the planet depends on the continued existence of its physical and biological systems within a relatively narrow range of parameters.³ Thus it is no longer an excuse for states to assert that they may do whatever they please within their own territory or on the high seas when we know that certain types of activity may well cause damage to the environment globally and thus affect other states.⁴

¹Chris Nelder, *Envisioning a Sustainable Future*.

²The NCSD Sustainable Development Report on United States, <http://ncsdnetwork.org/global>.

³ Alan Boyle and David Freestone, *International Law and Sustainable Development*.

⁴However, the concept of state sovereignty by no means does away with the emergence of sustainability as can be noted in the Rio Declaration.

Interestingly, Albert Einstein postulates that "*We shall require a substantially new manner of thinking if mankind is to survive.*" Therefore, as can be seen in the discussion below, that over the last quarter of a century two new and complementary themes have had considerable impact on the development of contemporary international law, ie. Environmental protection and sustainable development.

What Is Sustainable Development?

Webster's dictionary defines sustainability as 'using a resource so that it is not depleted or permanently damaged'. The key words are 'resource' and 'use'. It is generally considered that this concept was first referred to by the 1987 Brundtland Report which defined it as '*development that meets the need of the present without compromising the ability of future generations to meet their own needs.*'⁵ Since then, it is generally agreed that politicians, industrial leaders and environmental groups have endorsed it too, especially in the face of increasing public concern about the endangered environment. The Brundtland Report emphasises the mutual reinforcing of economic growth, social development and environmental protection. It is largely on this basis that this concept could be supported by many different and often antagonistic parties, in that it apparently offers the panacea of combining economic growth and environmental protection. However, the application of this concept also depends in a large part on prior social consensus on issues of political economy.

Nevertheless, this concept has a fundamental nature and serves as the basis for other new and innovative concepts and principles arising within environmental conventions. This concept is a strategy for a kind of development that provides real improvements in the quality of human life and at the same time conserves the vitality and diversity of the Earth.⁶ The goal is development that meets these needs in a sustainable way. Current development often fails because it meets the human needs incompletely and often destroys or degrades its resource base. Therefore, in order to address that problem, this concept encourages development

⁵See Philippe Sands, *Principles of International Environmental Law I*.

⁶Caring for the Earth, A Strategy for Sustainable Living.

that is both people-centered, concentrating on improving the human condition and conservation-based, maintaining the variety and productivity of nature.⁷

As was suggested by Sands⁸, sustainable development contains two concepts:

- (a) The concept of 'needs' where overriding priority should be given to the essential needs of the world's poor; and
- (b) The idea of limitation imposed by the state on the environment's ability to meet present and future needs.

Whereas, the International Union for the Conservation of Nature⁹ defines sustainable development as responding to 5 broad requirements:

- (a) Integration of conservation and development;
- (b) Satisfaction of basic human needs;
- (c) Achievement of equity and social justice;
- (d) Provision of social self-determination and cultural diversity; and
- (e) Maintenance of ecological integrity.

However, what sustainable development really means rests much on how the concept is to be interpreted and employed by those interested in environmental problems. The problem lies in the attempt to find a definition for this concept. Groups as diverse as neoliberal free-marketeters and radical bioregionalists agree that it is significant, but disagree about its implications.¹⁰ Different groups share the concept but have different conceptions of sustainable development. It has been suggested by commentators that it is a known fact that the term has been corrupted by political opponents leading to the loss of its radical edge that has led many greens to disown the principle.¹¹

⁷*Ibid.*

⁸*Supra* n. 6.

⁹In the 1986 Conference on Conservation and Development held in Ottawa, Canada of which 50 countries agreed on the said statement.

¹⁰James Connelly and Graham Smith, *Politics and the Environment*.

¹¹*Ibid.*

Some examples of what sustainable development means are "...sustainability equals conservation plus stewardship plus restoration,"¹² "...development that links the environment, economy and social equity into practices that benefit present generations without compromising future generations;"¹³ or that "Sustainability is the [emerging] doctrine that economic growth and development must take place, and be maintained overtime, within the limits set by ecology in the broadest sense – by the interrelations of human beings and their works, and the biosphere... It follows that environmental protection and economic development are complementary rather than antagonistic processes."¹⁴ At the present moment, the dominant interpretation of sustainable development is that associated with the idea of ecological modernisation which has challenged 'the fundamental assumption of conventional wisdom, namely, that there was a zero-sum trade-off between economic prosperity and environmental concern.'

Sustainable Development and International Law

The 1992 Declaration on Environment and Development

It is worth mentioning that the concept and application of sustainability is given further boost during the U.N. World Commission on Environment and Development (UNCED)'s 1992 Earth Summit in Rio de Janeiro where 120 nations agreed to **Agenda 21** to sustain global development in the twenty-first century. **Agenda 21** has been considered as the most thorough and ambitious attempt at the international level to specify what actions are necessary if development is to be reconciled with global environmental concerns.

Very briefly **Agenda 21** consists of 4 sections:

- (a) Social and economic dimensions;
- (b) Conservation and management of resources for development;
- (c) Strengthening the role of major social groups;
- (d) Means of implementation

¹²Sim Van der Ryn, 1994.

¹³Finding Common Ground: Toward a Sustainable North Carolina.

¹⁴William D. Ruckelshaus, *Scientific American*, September 1989.

It has been noted by commentator, Boyle that this declaration is part of an ongoing process of codification and development of international environmental law and also seen by other writers as marking a transition from international environmental law and international economic law to an international law of sustainable development.¹⁵

Some factors that give the Rio Declaration significant authority and influence.¹⁶ They are :

- (a) Unlike the earlier Stockholm Declaration of 1972, its language is in most cases obligatory, ie. Most of the principles start with 'States shall ...' Many of its carefully drafted terms are capable of being and were intended potentially to be norm-creating or to lay down the parameters for further development of the law. The UN General Assembly endorsed the declaration, referring to it as containing '*fundamental principles for the achievement of sustainable development, based on a new and equitable global partnership*'.
- (b) Reflects a real consensus of developed and developing states on the need for generally agreed norms of international environmental protection. Despite United States making reservations as to Principles 3,7,12 and 23, the principles as a whole have a universal significance and reflect an international consensus on some core principles of law and policy concerning sustainable development.

However, its 27 principles represent something of a 'package deal', negotiated by consensus rather like the 1982 UNCLOS and must be read as a whole. Thus, this declaration has thus been described 'a text of uneasy compromises, delicately balanced interests and dimly discernible contradictions, held together by the interpretative vagueness of classic UN-ese.'¹⁷ It can be noted that some of its provisions reflect the interest of developed states such as Principles 4,10,15 and 17 while others, are strongly supported by developing states such as principles

¹⁵See Sands, *International Law in the Field of Sustainable Development* (1994) 65 Bybl 303.

¹⁶*Supra* n.3.

¹⁷Porras in Sands, *Greening International Law*, 20(1993). This issue has divided many greens over the impact of Rio as they view that it was simply 'greenwash' and that the conference merely reinforced existing political and economic relations.

3,5,6 and 7.¹⁸ The whole thrust of this declaration is to integrate the needs of development and environmental protection in a single albeit not wholly coherent, text. It is to be noted also that the Rio Declaration makes no mention of animal rights, the preservation of natural heritage and the human right to a decent environment.

Despite the said omissions, this declaration is deemed by many as a breakthrough for international environmental law and, more specifically, sustainable development. As observed by Freestone:

*In other words, a system of international environmental law has emerged, rather than simply more international law rules about the environment.*¹⁹

JUDICIAL RECOGNITION

The International Court of Justice in the Case concerning the Gabčíkovo-Nagymaros Dam²⁰ recognised for the first time 'this need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development'. The court's judgement has significant impact on the law of international watercourses and has greatly modernised the older customary law to reflect the existing circumstances. The 1997 UN convention on the Non-Navigational Uses of International Watercourses was amended to take account of the principle of sustainable utilisation, of which, is also one of the new principles applied to high seas fisheries by the 1995 Agreement Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks.²¹

¹⁸*Supra* n.3.

¹⁹The Road from Rio: International Environmental Law after the Earth Summit (1994) 6 JEL 193.

²⁰(1997) ICJ Reports 7 para. 140.

²¹Articles 5 and 6.

ELEMENTS OF SUSTAINABLE DEVELOPMENT:

In the legal sense, sustainable development contains basically four elements (of which are also mentioned above in the Rio Declaration) as are reflected in international agreements.²²

- (a) The need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);
- (b) The aim of exploiting natural resources in a manner which is 'sustainable' or 'prudent' or 'appropriate' (sustainable use);
- (c) The 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use or intergenerational equity); and
- (d) The need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects and that development needs are taken into account in applying environmental objectives (the principle of integration).

Future Generations

The theory of intergenerational equity argues that we hold the environment of our planet in common with all members of our species: past, present and future. Therefore, as members of the present generation, we hold the Earth in trust for future generations yet at the same time, we are entitled as beneficiaries to use and benefit from it.²³ In other words, each generation is to use and develop its natural and cultural heritage in such a manner that it can be passed on to future generations in no worse condition than it was received.²⁴

The idea that as "members of the present generation, we hold the earth in trust for future generations"²⁵ is a well received one in the international scene. Reference could be noted in international environmental treaties such as the 1946 International Whaling

²²*Supra* n. 6.

²³UNEP's New Way Forward: *Environmental Law and Sustainable Development*.

²⁴Brown and Weiss, *In Fairness to Future Generations* (1989).

²⁵E. Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' 84 AJIL 198 (1990).

Convention,²⁶ the 1968 African Conservation Convention,²⁷ and the 1972 World Heritage Convention.²⁸ Efforts in preserving other natural resources have also adopted some elements of 'sustainable development' in one way or another for the present and future generations, namely, marine environment,²⁹ wild flora and fauna,³⁰ natural heritage,³¹ natural resources,³² water resources,³³ biological diversity,³⁴ essential renewable natural resources,³⁵ the climate system,³⁶ and the resources of the earth.³⁷

This element of sustainable development was also noted in international declaration. For example, Principle 1 of the 1972 Stockholm Declaration states that man has '*a solemn responsibility to protect and improve the environment for present and future generations.*' The Rio Declaration also associates intergenerational equity with the right to development which could be seen in Principle 3 that the '*right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*'. These international declarations indicate the importance now attached in international policy to the protection of the environment for the benefit of future generations.

²⁶The Preamble recognises the 'interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.'

²⁷The Preamble recognises that natural resources should be conserved, utilised and developed 'by establishing and maintaining their rational utilisation for the present and future welfare of mankind'.

²⁸Article 4 provides that the parties agree to protect, conserve, present and transmit cultural and natural heritage to 'future generations'.

²⁹Preamble to the 1978 Kuwait Convention; the 1983 Cartagena de Indias protocol.

³⁰Preamble to 1973 CITES.

³¹Preamble to 1985 Nairobi Convention.

³²Preamble to 1985 ASEAN Convention.

³³Article 2(5)(c) 1992 Transboundary Waters Convention.

³⁴Preamble to 1992 Biodiversity Convention.

³⁵Preamble to 1976 South Pacific Nature Convention.

³⁶Article 3(1) 1992 Climate Change Convention.

³⁷Preamble to 1979 Bonn Convention.

Intergenerational equity is also fast becoming part of international jurisprudence.³⁸ In *Denmark v Norway*,³⁹ the International Court of Justice, Judge Weeramantry's separate opinion on equity notes that "[in] respect for these element constituents of the inheritance of succeeding generations, dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come".

Institutionally, there are also interesting developments at the national and sub-national level that focus on intergenerational concerns. For example, the French Council on Future Generations which is intended to bring the intergenerational perspective to bear on government policies.

Sustainable use of natural resources

This second element focuses on the adoption of standards governing the rate of use or exploitation of specific natural resources as opposed to the first element of preservation for future generations. This concept is widely used for the protection of marine living resources where for example, a standard requiring exploitation to be conducted at levels which are 'sustainable' or 'optimal'. The 1946 International Whaling Convention⁴⁰ provides as its stated objective of achieving 'the optimum level of whale stocks' and confining whaling operations 'to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales depleted in numbers'. Similar efforts to limit the exploitation of marine resources can also be noted for species such as tuna,⁴¹ North Pacific fish,⁴² and Pacific fur seals.⁴³

As for non-marine resources, sustainable use has also found place in international treaties, for example, the 1968 African Nature Convention, which provides that the utilisation of all natural resources 'must aim at satisfying the needs of man according to the carrying

³⁸*Supra* n. 24.

³⁹Maritime Delimitation in the Area Between Greenland and Jan Mayen, No. 93/14 June 14, 1993.

⁴⁰The failure of the Whaling Convention can be measured by their failure to achieve their stated objectives of preventing the depletion of whales.

⁴¹Preamble to 1949 Tuna Convention, Article IV(2)(b) Atlantic Tuna Convention 1966.

⁴²Preamble and Article IV(1)(b)(ii) North Pacific Fisheries Convention 1952.

⁴³Preamble and Article II(1)(a), V(2)(d), XI Pacific Fur Seals Convention.

capacity of the environment'⁴⁴ and the 1983 ITTA which provides that '*sustainable utilisation and conservation of tropical forests and their genetic resources*'.⁴⁵ As for other international agreements, the 1985 ASEAN Agreement was one of the first to require members to adopt a standard of 'sustainable utilisation of harvested natural resources... with a view to attaining the goal of sustainable development'⁴⁶ and in respect of land use, which is to be based 'as far as possible on the ecological capacity of the land'⁴⁷. Other examples could be found in the **1992 Climate Change Convention, Article 3(4) and Article 2 of the 1992 Biodiversity Convention** which defines 'sustainable use' as '*the use of components of biological diversity, in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations,*' and **Article 1** sets out one of its main objectives as the conservation of biodiversity and the sustainable use of its components.

Other international instruments also relied upon the concept of 'sustainable development' whether directly or base their agreements upon the spirit which underlies this concept. For example, even though the 1972 Stockholm Declaration did not expressly adopt the concept of 'sustainable development' it did encourage for the non-exhaustion of renewable natural resources and the maintenance and improvement of 'the capacity of the earth to produce vital renewable resources'.⁴⁸ Treaties and other international acts have also supported the development of the concept of 'sustainable use', namely, the 1992 Rio Declaration which actively calls for 'further development of international law in the field of sustainable development' or through the use of terms which are closely associated, for example, encouraging conservation measures and programmes which are 'rational', 'wise', or 'appropriate' or a combination of the above. These terms do not carry any specific definition and are often used interchangeably. Thus, the meaning of each term will depend upon its application in each instrument.⁴⁹

⁴⁴Preamble to the said convention.

⁴⁵Article 1(h)

⁴⁶Article 1(1)

⁴⁷Article 12(1)

⁴⁸Principles 3 and 5.

⁴⁹*Supra* n. 6.

The terms 'rational' utilisation and management are the governing standards for migratory birds,⁵⁰ fisheries,⁵¹ seals,⁵² and hydro resources.⁵³ They are also the required standards for **Principle 13 & 14 of the Stockholm Declaration**. The Legal Experts Group of the World Commission on Environment and Development defined 'conservation' as the :

*"management of human use of a natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. It embraces preservation, maintenance, sustainable utilisation, restoration and enhancement of a natural resource or the environment."*⁵⁴

Whereas the term 'wise use' has been endorsed for flora and fauna,⁵⁵ wetlands,⁵⁶ and natural resources generally.⁵⁷ Proper' utilisation and management have been used as the governing standards for fisheries,⁵⁸ and forests.⁵⁹ Other standards introduced by international agreements include 'judicious exploitation',⁶⁰ sound environmental management⁶¹ and ecological sound and rational⁶² use of natural resources.

As mentioned above, these terms or standards do not have an absolute meaning but their interpretation is set or implemented by states acting co-operatively or by decision of international organisations

⁵⁰Article VII Western Hemisphere Convention 1940.

⁵¹Preamble and Article VIII Danube Fishing Convention 1958; Preamble and Articles 1 & 7 Black Sea Fishing Convention 1959; Preamble to Southeast Atlantic Fisheries Convention 1969.

⁵²Article 3(1) Antarctic Seals Convention 1972.

⁵³Article V Amazonian Treaty 1978.

⁵⁴Para (1) WCED Legal Principles, 1986.

⁵⁵Article VII(1) African Conservation Convention 1968; Principle 4 Stockholm Declaration 1972.

⁵⁶Article 2(6) & 6(2)(d) Ramsar Wetlands Convention 1971.

⁵⁷For example, the preamble to the Bonn Convention 1979.

⁵⁸Preamble & Article IV(a) General Fisheries Council for Mediterranean 1949.

⁵⁹Article III(1)(a) Latin American Forest Institute 1959.

⁶⁰Preamble, Niger Basin Act 1963.

⁶¹Articles 4(1) & 14(3) Abidjan Convention 1981.

⁶²Article 2(2)(b) UN/ECE Transboundary Waters Convention 1992.

or in the event of a dispute, by international judicial bodies. However, the significance of these terms cannot be dismissed as each recognises the limits placed by international law on the rate of use or manner or exploitation of natural resources including those resources which are shared or are in areas beyond national jurisdiction.⁶³ Underlying all of these agreements is a concern for the more rational use and conservation of natural resources and a desire to strengthen existing conservation law.

The precautionary principle (Principle 15 of the Rio Declaration) also endorses the concept of sustainable use as it addresses the key question of uncertainty in the prediction of environmental effects.

Despite the many treaties embracing the concept of sustainable use, the fact that so many species and natural resources are in fact being exploited even to the point of extinction illustrates the difficulties in translating the concept of sustainable development into practical use.

Equitable use of natural resources

International law has a long tradition of invoking principles of equity to interpret documents and reach just decisions. Presently, equity serves several functions: filling gaps in the law, providing the basis for the most just interpretation (*infra legem*), providing a moral basis for making an exception to the normal application of a rule of international law (*contra legem*), and as providing a basis for deciding a case in a way that disregards existing law (*ex aequo et bono*).⁶⁴ Thus, equity and equitable rules and principles are frequently relied upon, for example by UNCED, in the absence of detailed rules, to provide a flexible means of leaving the extent of rights and obligations to be decided at a subsequent date. UNCED operates in many ways according to the principles of equity: how to allocate future responsibilities for environmental protection between states which are at different levels of economic development.⁶⁵ They have approached differently to

⁶³*Supra* n. 6.

⁶⁴*Ibid.*

⁶⁵However at the 1992 conference the countries though agreed on the concept of sustainable development, they disagreed about who should pay for it and how much.

different problems and issues according to different environmental and developmental needs and priorities. In both the Brundtland and Agenda 21, emphasis was given to redress the imbalance in wealth between the developed and developing worlds. Intra-generational equity addresses inequity within the existing economic system.⁶⁶ For example, **Principle 3** of the Rio Declaration invokes the 'right of development' as a means of 'equitably' meeting the developmental and environmental needs of future generations.⁶⁷ The Declaration further provides under **Principle 5** to 'increase the standard of living and better meet the needs of the majority of the people of the world,' provide for priority treatment to 'the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable (**Principle 6**) and recognise that 'in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities (**Principle 7**).' Furthermore, the objectives of the 1992 Biodiversity Convention include the 'fair and equitable' sharing of the benefits arising out of the use of genetic resources.⁶⁸

Equity also agrees with the principle of common but different responsibility which takes into account the needs and capabilities of different countries and their historic contribution to particular problems and the allocation of shared natural resources. Under the Climate Change Convention all the parties undertake to be guided on 'the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities⁶⁹ in their actions to achieve the objective of the Convention.

Principle 7 of the Rio Declaration states that :

'state shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibilities that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

⁶⁶Supra n. 3.

⁶⁷Supra n. 6.

⁶⁸See Articles 1 & 15(7).

⁶⁹Article 3(1).

The principle of common but differentiated responsibility includes 2 elements :

- (a) The common responsibility⁷⁰ of states for the protection of the environment or parts of it at the national, regional levels.
- (b) The need to take account of differing circumstances, especially in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat.⁷¹

According to Sands, the application of this principle has at least two consequences :

- (a) It entitles, or may require all concerned states to participate in international response measures aimed at addressing environmental problems.
- (b) It leads to environmental standards which impose differing obligations on states.

Equity has also been relied upon in relation to the participation of states in environmental organisations, for example, under **Article 8(2) World Heritage Convention 1972** provides for the 'equitable representations of the different regions and cultures of the world' on the World Heritage Committee. Equity also found a place in financial and other contributions⁷² to activities and the equitable distribution of the benefits of development.⁷³

According to Sands, it is in the area of allocation of shared natural resources that equity is likely to play an important role in the coming years. The Preamble to the 1987 Montreal protocol reflects the aim of

⁷⁰Briefly, it describes the shared obligations of two or more states towards the protection of a particular environmental resource, taking into account its relevant characteristics and nature, physical location and historic usage associated with it.

⁷¹The 1972 Stockholm Declaration, Principle 23 put it aptly by stating that 'the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

⁷²Article 1 Baltic Sea Fishing Convention.

⁷³Preamble to the Amazonian Treaty 1978.

controlling 'equitably total global emissions of substances that deplete the ozone layer', an aim which in turn would be translated into specific obligations through the process of intergovernmental negotiations.⁷⁴ Finally, in conventions where the rules of equity are being used, states still have the obligations to set the specific obligations and rights to be followed. Some factors in determining these obligations include the context of its negotiation and adoption, the provisions that are involved and the subsequent practice by the organs it establishes and by parties.

Integration of environment and development

The fourth element is the commitment to integrate environmental considerations into economic and other developments and also to take into consideration the economic needs and other social developments in utilising, applying and interpreting environmental rights and obligations.⁷⁵ If socio-economic factors are not considered, the environment will not be effectively protected. Conversely, without regard for sustainable use and the environment generally, it is impossible to achieve development which is truly sustainable. Its application requires the collection and dissemination of environmental information and the conduct of environmental impact assessments.

During the past decade, a difference of approach is seen in the international arena where they recognised the need to integrate environmental and development issues together and not deal with them separately.⁷⁶ This is not so historically where international economic organisations such as the World Bank and GATT do not address environmental protection issues and even if they do, it is only marginally. Environmental issues are only discussed in separate international forums such as the UNEP. This causes both constitutional problems and a difference as to approaches in dealing with environmental problems. Thus, in order to address this problem the Rio Declaration states under **Principle 4** that '*In order to achieve sustainable development, environmental protection shall constitute an*

⁷⁴See the 1990 and 1992 Adjustments and Amendments to the 1987 Montreal Protocol.

⁷⁵*Supra* n. 6.

⁷⁶*Supra* n. 6.

integral part of the development process and cannot be considered in isolation from it. The purpose of this principle is to ensure that development decisions do not disregard environmental considerations.

This integrated approach has significant practical consequences, notably that environmental issues will be a feature of international economic policy and law. This approach could be seen in the 1957 EEC Treaty where a Title on the environment was included, the establishment of an Environment Department at the World Bank, the convergence of trade with environment at the GATT, the development of environmental jurisprudence in competition, subsidy and intellectual property law.⁷⁷ Furthermore, since 1989 the World Bank and then the other multilateral development banks have sought to integrate environmental assessment into their lending policies.⁷⁸ The Preamble to the Climate Change Convention affirms *“that responses to climate change should be coordinated with social and economic development in an integrated manner...”*

Regional treaties also support this approach, for example, the Preamble to the 1978 Kuwait Convention which provides that *‘integrated management approach...which will allow the achievement of environmental and development goals in a harmonious manner’*, the 1978 Amazonian treaty which affirms the need to *‘maintain a balance between economic growth and conservation of the environment’*, and the 1985 ASEAN Convention which ensures that *‘conservation and management of natural resources are treated as an integral part of development planning at all stages and at all levels.’*

Thus it is important to be able to complement environment with trade policies, in other words, they should be mutually supportive. Environmental protection measures must reflect the relationship between environment and socio-economic development in order to be effective. The relationship between trade and environment arises from two concurrent trends – an increase in environmental protection and a continuing effort to remove restrictions to world trade. Therefore trade provisions where necessary, should be appropriately used within environmental conventions to facilitate the reduction and limitation of

⁷⁷*Supra n. 6.*

⁷⁸All investment projects proposed for World Bank considerations must be screened for their potential environmental impact.

the negative impacts of trade and to enhance the complementarity of the multilateral trade regime with the imperatives of environmental protection in the interests of environmental protection and sustainable development.⁷⁹ This importance was addressed under **Agenda 21 Chapter 2 of UNCED** where it provides that “*the international economy should provide a supportive international climate for achieving environment and development goals by : promoting sustainable development through trade liberalization; making trade and environment mutually supportive;...encouraging macroeconomic policies conducive to environment and development.*”

Some Difficulties In Applying The Concept Of Sustainable Development

As discussed above, the concept of sustainable development whether it was adopted expressly or impliedly is widely embraced by international environmental policy makers. However, its application is not without problem and as to date there remains fundamental uncertainties about the nature and application of sustainable development.

First of all the Rio Declaration does not address the issue of the legal status of this concept. If it is a principle to be interpreted, applied and achieved primarily at national level, by individual governments, there may be only a limited role for international definition and oversight.⁸⁰ If, on the other hand, there is to be international accountability for achieving sustainability, then it must be clear what the criteria for measuring this standard is, and what is the evidential burden in assessing the performance of individual states. As commented by Boyle and Freestone, there is no easy answer to the question whether international law requires that all development should be sustainable. It is suggested by Sands and McGoldrick⁸¹ that although it is possible to identify the main elements of the concept, it is far from being certain what their specific normative implications are or indeed how

⁷⁹Sun Lin, *Trade provisions in Multilateral Environmental Agreements*.

⁸⁰*Supra* n.3.

⁸¹*Sustainable Development and Human Rights: An Integrated Conception* (1996) 45 ICLQ 796.

they relate to each other, or to human rights law and international economic law. Lowe⁸² argued that the concept of sustainable development cannot form part of the binding norms of international law in the strict **Article 38(1) of the Statute of the International Court of Justice** sense, but it may exemplify another species of normativity which is of great potential value in the handling of international environmental law.

On the other hand, from the above discussion, it is clear that this concept has received wide international endorsement. Thus, it is argued that there would be few quibbles by states over the issue of managing natural resources in a sustainable way. On this basis, Judge Weeramantry in the **Case Concerning the Gabcikovo-Nagymaros**⁸³ notes that *'the principle of sustainable development is thus a 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.'*

Nevertheless, given the social and economic value judgements involved in deciding on what is sustainable and the necessity of weighing conflicting factors, of which environmental protection is only one of them, substantial discretion ultimately rests with states in interpreting and giving effect to the alleged principle, unless specific international action has been agreed.⁸⁴ The possibility of an international court reviewing national action and concluding that it falls below the standard of "sustainable development" is very slim. Thus, normative uncertainty together with the absence of justiciable standards for review, strongly suggest that there is as yet no international legal obligation that development must be sustainable.⁸⁵ Furthermore, there is still the conflict of principle of state sovereignty over natural resources, the doctrine of acquired rights or the freedom of high seas fishing and navigation, just to name a few.

On the other hand, it has also been argued that even though international law may not require development to be sustainable, it does require development decisions to reflect and promote sustainable

⁸²Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*.

⁸³*Supra* n. 21.

⁸⁴*Supra* n. 2.

⁸⁵ Handl, *Environmental Security and Global Change: The Challenge to International Law* (1990) 1 YbEL 25.

development. International court or international institution even though may not review judgements based on factors such as inter and intra-generation, may however ensure that they are taken into consideration in decision-making. This can be seen in the **Case Concerning the Gabcikovo-Nagymaros**⁸⁶ where the court while did not ask the question whether the project was sustainable⁸⁷ did however require the parties in the interests of sustainable development to 'look afresh' at the environmental consequences and to carry out monitoring measures in accordance with contemporary standards set by international law. This approach allows the international courts to further the objective of sustainable development without entangling themselves in the web of deciding whether the project is sustainable or not and the issue of legal status of sustainable development.

Another problematic area is that, states still face the very difficult issues of fairness in negotiating international environmental agreements. For example, in the negotiations under the United Nations Economic Commission for Europe (UNECE) to control specific pollutants, countries have found it difficult to reach consensus on the base line year for establishing acceptable pollution levels.⁸⁸ The problem is that countries that are beginning to industrialise do not want to be burdened with an early base line year as they try to reach parity with more industrialised countries, and those industrialised countries that have already started controlling pollution want to receive appropriate credit in the selection of the base line year.

The negotiation and adoption of these instruments is only half the battle. It is the eventual implementation of and compliance with such conventions by nations that will give effect to the regimes and bring about the protection of the environment as envisaged. The Rio Declaration addressed this issue by adopting the principle of 'common but differentiated responsibilities' (of which was discussed above) and the polluter pays approach in internalising environmental costs. The problem does not end there. The issue remains whether to establish common or differentiated pollution control standards (as in the per

⁸⁶*Supra* n.21.

⁸⁷Indeed the majority judgement did not even mention the term 'sustainable development'.

⁸⁸*Supra* n. 24.

capita chemicals consumption base line standard for Article V developing countries in the Montreal Protocol on Substances that Deplete the Ozone Layer)⁸⁹, or to offer flexible deadlines for meeting standards that consider level of national economic development (as in the 10 year delay for Article V countries to phase-out controlled chemicals under the Montreal protocol), and the extent to which a group of countries should be held responsible to particular countries who may suffer harm in the future from actions taken globally today (for example, the claims of island countries that industrialised countries establish a trust fund today to cover the cost of the rise of ocean levels in the future due to global warming).⁹⁰

Furthermore the debate about environmental fairness frequently takes the form of controversy over who pays for controlling pollution, for environmental damage suffered or for assistance to enable States and local communities to develop on a sustainable basis.⁹¹ For example, under the Rio Declaration, controversy over financing sustainable development was central. This is critical as the important factor for successfully implementing sustainable development is financial and technical resources. To date, states' willingness to contribute significantly to funds for sustainable development has been minimal. The Global Environmental Facility, the special funds attached to international agreements (Montreal Protocol Fund and the Bali Partnership Fund) shows the controversies about fairness in the distribution of the costs of complying with international agreements and more broadly with sustainable development.⁹²

Besides, one cannot deny the fact that political developments will affect the view of states with regard to sustainable development or what is 'equitable in sustaining the environment. International legal instruments have affirmed that countries have the right to control the exploitation and use of natural resources within their jurisdiction or

⁸⁹September 16, 1987, 26 ILM 1550.

⁹⁰For further details on equity issues, see Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual*, 1 Colo. J. Int'l Envi'l Law & Pol'y 69 (1990)

⁹¹*Supra n. 24.*

⁹²*Ibid.*

control (in recognition of the concept of national sovereignty).⁹³ This has caused new claims with regard to fairness in bearing the burden of sustainable development.

With regard to the issue of 'inter-generational equity', the interest of future generations has often not been identified and adequately represented in the negotiations. What is also lacking is the representation of these generations before international tribunals independently of the states and international institutions which are at present the only competent parties in international litigation.⁹⁴ It is rather obvious that the present generation has a bias in favour of itself.

Conclusion

It is to be noted that even though there exists wide consensus for the concept of sustainable development internationally, there are still enormous difficulties which require tremendous effort to address it in order to translate this concept into successful actions. Sustainable development at the present moment has gained immense popularity in international environmental law but it has yet to achieve the status of 'international law' given the difficulties in proving *opinio juris* base in the face of the difficulties encountered. However, the key point is that decision-makers need not wait on state practice and *opinio juris* to develop the concept of sustainable development in the way that a primary rule of international law would be developed – they may take the initiative and develop the concept themselves.⁹⁵ There is definitely a pressing need to integrate legal, economic and technological considerations into the processes of international environmental law. This is where careful elaboration of the concept of sustainable development would be crucial.

On the other hand, it takes more than mere agreement to this concept alone for international environmental issues to be addressed successfully. States have to be willing to pay the price (for example, to forgo the usage of CFC) to maintain a sound environment. As is

⁹³See Principle 21 of the Stockholm Declaration on the Human Environment.

⁹⁴*Supra* n.3.

⁹⁵*Supra* n. 83.

stated in Agenda 21 itself, sustainable development and ultimately the issue of creating an environmentally friendly place, require a commitment to sound economic policies and management, and effective and predictable public administration, the integration of environmental concerns into decision-making and progress towards democratic government which allows for full participation of all parties concerned.

Lastly, in the matter of sustainability, it must be reiterated that :

Sustainability is an economic state where the demands placed upon the environment by people and commerce can be met without reducing the capacity of the environment to provide for future generations. It can also be expressed in the simple terms of an economic golden rule for the restorative economy: Leave the world better than you found it, take not more than you need, try not to harm life or the environment, make amends if you do.⁹⁶

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⁹⁶Paul Hawken, *The Ecology of Commerce: a declaration of sustainability*, 1st ed. New York, NY : Harper Business , 1993

**CONTRACTS (RIGHTS OF THIRD PARTIES) –
ACT 1999 - LEGISLATIVE REFORM OF THE
DOCTRINE OF PRIVY IN THE UNITED
KINGDOM**

I. Introduction

In the United Kingdom, the new millennium witnessed a revolution of some sort in the law of contracts. The century old doctrine of privity of contract, which prohibits a person who is not a party to the contract¹ from suing under the contract, has been modified with the enactment of the Contracts (Rights of Third Parties) Act 1999.²

At common law, only parties to the contract may enforce and seek remedies under the contract. A stranger to the contract³ cannot sue under the contract even though it was made for the sole purpose of granting a benefit to him. It flows therefrom that the third party cannot take any legal action to enforce any terms of the contract or avail himself of any remedy or remedies for any breach of contract.

The 1999 Act changes the common law position. The third party is now permitted to enforce the rights conferred on him under the said contract.

Since the 1999 Act has a profound effect on all commercial transactions subject to the laws of England, Wales or Northern Ireland,⁴ the Act did not come into force immediately. It came into

¹Hereinafter referred to as 'the third party'.

²Hereinafter referred to as 'the 1999 Act'. The long title of the 1999 Act reads "An Act to make provision for the enforcement of contractual terms by third parties".

³Hereinafter referred to as 'the third party'.

⁴Section 10(4) of the 1999 Act. Scotland recognises and enforces the rights conferred on the third parties under contracts.