

ENVIRONMENTAL PROTECTION AND DEVELOPMENT

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[Environmental protection has been an issue for the UN which was not foreseen when it was established 50 years ago. The UN's mandate to take action in respect of the environment is not clear in its Charter. However, numerous UN organs, specialised agencies and conferences — perhaps most significantly the UN Environment Program — have approached this issue from various perspectives. One of the most significant obstacles to action by any of these has been the conflict between the goals of UN members with respect to economic development and environmental protection. Recent reforms and newly-established bodies and instruments await assessment after an appropriate period of time.]

I INTRODUCTION: LACK OF ANY REFERENCE TO 'ENVIRONMENT' IN THE UN CHARTER

It is salutary to bear in mind that the founding fathers of the United Nations (UN) could not possibly have foreseen the events that would take place during the next 50 years. Almost immediately, the decision-making basis of the Charter was undermined by the advent of the Cold War and the arms race. It was then radically changed in the 1960s and 1970s by the effects of decolonisation and the emergence of many impoverished developing countries in the Southern Hemisphere whose main aim was to promote their economic development, as the countries of the North were still successfully doing. The North/South dialogue at first took place inside the UN with little, if any, awareness of the dangers of promoting development without having regard to its deleterious side effects, namely the excessive consumption of living and non-living global resources in which rapid, uncontrolled industrialisation results, as well as the degrading effects of the pollution it generates in the form of atmospheric emissions, discharges of effluents, dumping of waste and the like. The increasing use of fertilisers and pesticides in the agricultural industry also contributed to this growth in pollution of air, water and land.

As the world population increased, especially in developing countries, and uncontrolled development proceeded, other environmental problems such as desertification, deforestation and water shortages began to manifest themselves in the South, as they had done earlier in some Northern states following their earlier industrial revolutions. Yet it was not until the convening by the UN General Assembly of the Stockholm Conference on the Human Environment (UNCHE) in 1972¹ that an environmental perspective was effectively introduced into the policies and activities of the UN and its Specialised Agencies,

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¹ GA Res 2398, 23 UN GAOR (1733rd plen mtg), UN Doc A/Res/2398 (1968).

based on the principles promulgated in the Declaration adopted by that Conference.² Even then, the debates and programmes aimed at promoting economic development and environmental protection proceeded almost entirely on separate tracks. Despite the urgings of many critics, the need for their coalescence to achieve development on a sustainable basis was not fully and formally recognised by the UN until the Conference on Environment and Development (UNCED), convened by the General Assembly in Rio de Janeiro in 1992,³ adopted the Rio Declaration on Environment and Development⁴ and an Action Program entitled Agenda 21.⁵ These documents laid down the framework for the actions required to achieve sustainable development into the 21st century and beyond.

It is the purpose of this paper to examine why the UN took so long to tackle these problems, and why in its practice they were treated for so long as discrete issues despite their obvious symbiosis, and also to evaluate its progress in promoting both development and environmental protection during its first 50 years.

II HISTORICAL BACKGROUND.

Concluded after World War I, the main aim of the League of Nations Covenant was to establish a system of collective security to deter war and aggression. However, its loopholes had been exploited by its members, either to commit acts of aggression against other states or to avoid their responsibilities under the Covenant to take the necessary measures to deal collectively with such violations. These factors had led directly to the Second World War.

The drafters of the UN Charter were anxious, above all else, to avoid including the weaknesses of the League of Nations Covenant.⁶ Thus, the UN Charter's Preamble proclaims that the primary aim of establishing the UN is 'to save succeeding generations from the scourge of war'.⁷ Its first purpose is stated to be 'to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.⁸

Following revelation at the end of World War II of the gross breaches of basic human rights that had occurred under Hitler, the second preambular aim of the

² Report of the United Nations Conference on the Human Environment 15-6 June 1972, UN Doc A/Conf 48/14/Rev 1 (1972) and Corr 1 (1972); 11 ILM 1416.

³ GA Res 228, 44 UN GAOR (85th plen mtg), UN Doc A/Res/228 (1989).

⁴ UN Doc A/Conf 151/5/Rev 1, endorsed in GA Res 190, 47 UN GAOR (93rd plen mtg), UN Doc A/Res/190 (1992); 31 ILM 874.

⁵ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc A/Conf 151/26 (Vols I, II and III) (1992).

⁶ F Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (1963); F Walters, *A History of the League of Nations* (1960) *passim*.

⁷ Text in Ian Brownlie (ed), *Basic Documents in International Law* (3rd ed, 1983) 1.

⁸ UN Charter art 1(1).

UN was stated to be 'to reaffirm faith in fundamental human rights', reflected in the purpose that it was 'to achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms.'⁹

The League of Nations had made no reference to protection of human rights or to the need to resolve the underlying economic and social problems which contribute to war and the destabilisation of international peace and security, although it had eventually established committees to deal with some aspects of those problems. The UN, however, asserted in its Preamble its determination 'to promote social progress and better standards of life in larger freedom', and in its purposes, in Article 3, 'to achieve international co-operation in solving international problems of an economic, social, cultural and humanitarian character'. Finally, Article 1(4) stated that the UN was 'to be a centre for harmonising the actions of nations in the attainment of these common ends'.

Nowhere in the Charter is there any reference to the aim of protecting, preserving or conserving the natural environment. Thus, the UN's power to adopt any explicit policy or undertake any action directed solely toward this purpose has to be derived from a broad interpretation of the above purposes and of Article 55 which requires the UN to promote, firstly, higher standards of living, full employment and conditions of economic and social progress and development, and secondly, solutions to international economic, social, health, and related problems, and international cultural and educational co-operation. It can be assumed that environmental protection is an essential element in promotion of social progress and in the solving of economic and social problems and achieving better standards of life. However, the possibilities of inferring that environmental protection is necessary for the maintenance of international peace and security, that is, that environmental threats can be equated with other threats to international security, such as aggression, and thus can be dealt with by the Security Council under Chapter VII of the Charter, have not been explicitly exploited. Even in the Security Council Resolution¹⁰ dealing with the oil pollution caused by the burning of oil wells in Kuwait by Iraq at the end of the Gulf War the Council did not refer specifically to any concept of 'environmental security'.¹¹ Likewise the UN has not attempted to add any environmental rights, such as a right to a clean and healthy environment,¹² to its declarations or covenants on human rights¹³ to enable it to deal with

⁹ Ibid art 1(3).

¹⁰ SC Res 687, 46 UN SCOR (2981st mtg), UN Doc S/Res/687 (1991) paras 16-19; (1991) 30 ILM 852.

¹¹ Alexandre Timoshenko, 'Ecological Security: Response to Global Challenges' in Edith Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (1992) 413-56.

¹² For this approach see Alexandre Kiss, 'An Introductory Note on a Human Right to Environment' in Brown Weiss, above n 11, 199-204.

¹³ Universal Declaration of Human Rights, GA Res 217A, 3 UN GAOR 135, UN Doc A/810 (1948); International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; UKTS 6 (1977); (1967) 6 ILM 360; International Covenant on Civil and Political Rights 1966, 999 UNTS 171; UKTS 6 (1977); see text in Brownlie, above n 7, 230-97.

environmental issues under this heading, although some commentators now advocate this.

There was no awareness in 1945 that the UN would need to be involved in conserving resources, preventing pollution and promoting *sustainable* development. In the UN's early years, as during the League's life, few actions were taken to these ends and those which were taken were *ad hoc*, such as the establishment of some fishery commissions, agreements on migrating birds and a convention on whaling. There was no coherence among, or working programmes integrating, these activities. It was the growing concern of Non-Governmental Organisations (NGOs), especially in the United States, that prompted some governments to take the initiatives that led to the convening of the Stockholm Conference in 1972.¹⁴ Until then, and in the period immediately thereafter, promotion of development was the first priority for developing states.

III THE PARAMOUNTCY OF DEVELOPMENT IN THE UN IN THE 1960S AND 1970S¹⁵

As decolonised states began to join the UN, they started, especially in the forum of the UN Conference on Trade and Development (UNCTAD), to demand a radical transformation in the global framework of international economic relations. Even before this, as early as 1962, the UN General Assembly had adopted, as an economic aspect of self-determination, a Resolution on Permanent Sovereignty over Natural Resources. This was proclaimed as a right of peoples and nations which 'must be exercised in the interest of their national development and of the well-being of the people concerned'.¹⁶ It did not, however, provide for conservation of these resources or the sustainable maintenance of the yield from such living resources as fish. UNCTAD had, in May 1972, stressed the urgent need to establish generally-accepted actions to govern international economic relations systematically.¹⁷ The advent of the UNCHE Declaration (in June 1972) did not deflect the UN General Assembly from holding a Special Session on a Declaration on Establishment of a New International Economic Order (NIEO) in 1974, or UNCTAD from adopting, in December of that year, a Charter of Economic Rights and Duties of States which emphasised the need for economic development and the right of states to choose both the goals of and the means for realising the NIEO. The Preamble of this Charter did express the General Assembly's desire to contribute to the creation

¹⁴ Lynton Caldwell, *International Environmental Policy* (2nd ed, 1990) chs 2 and 3.

¹⁵ See K Dadzie, 'The UN and the Problem of Economic Development' in Adam Roberts and Benedict Kingsbury (eds) *United Nations, Divided World: the UN's Role in International Relations* (2nd ed, 1993) 297-326, who traces the four main phases and essential features of the UN's involvement with economic development and comments on the issues and challenges to be faced in the future.

¹⁶ GA Res 1803, 17 UN GAOR (1194th plen mtg), UN Doc A/Res/1803 (1962).

¹⁷ UNCTAD Res 45 (III), 18 May 1972. See A Diaz, 'Permanent Sovereignty over Natural Resources' (1994) 24 *Environment Policy and Law* 157-72, who shows how, after the UNCHE and UNCED, the Resolution on Permanent Sovereignty over Natural Resources could be used to protect the environment.

of conditions for the protection, preservation and enhancement of the environment and Article 3 did acknowledge that in the case of natural resource exploitation states must co-operate and inform and consult with each other. However, the specific aim was optimum use of the resources, subject only to the restriction that this must not damage the legitimate interest of the other states (which could, impliedly, include their interest in protecting their environments). The virtual separation of developmental and environmental interests continued. Although, outside the UN, the International Union for Conservation of Nature (IUCN, now known as the World Conservation Union), in its World Conservation Strategy of 1980 did call for *sustainable* use of resources,¹⁸ it was not until the World Commission on Environment and Development (WCED) published its report calling for a new approach, which it articulated as 'sustainable development', and advocated this as the goal for both developing and industrialised states, that a turning point leading to the convening of the UNCED was reached and formal adoption of this concept occurred.¹⁹

The UN's divergent goals of environmental protection and economic development were coalesced within this amorphous formula, the precise content of which is hard to define. The WCED had side-stepped this difficult problem by categorising it in very general and somewhat Delphic terms as a process that 'ensures that it meets the needs of the present without compromising the ability of future generations to meet their own needs.'

Even so, when this bland formula came before the Governing Council of the United Nations Environment Program (UNEP) for redefinition and a vote was called for, sustainable development was reformulated more narrowly as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs and does not imply in any way encroachment upon national sovereignty'.²⁰ Nonetheless, following the UNCED Rio Declaration, sustainable development became firmly established as a goal on the agenda not only of the UN itself but of its relevant specialised agencies and its numerous regional bodies, commissions and autonomous units,

¹⁸ *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, prepared by the International Union for Conservation of Nature and Natural Resources (IUCN) with the advice, co-operation and financial assistance of UNEP and the World Wildlife Fund (WWF, now known as the World Wide Fund for Nature) in collaboration with FAO and UNESCO (1980); see also the updated version prepared for the UNCED, *Caring for the Earth: A Strategy for Sustainable Living* (1991).

¹⁹ World Commission on Environment and Development, *Our Common Future* (1989); see also report of the UNCED's Legal Expert Group on Environmental Law, *Environmental Protection and Sustainable Development* (1987). The General Assembly welcomed the establishment of a special commission of concerned governments and suggested the terms of reference for its work - see GA Res 165, 38 UN GAOR (102nd mtg), UN Doc A/Res38/165 (1983); 'Process of preparation on Environment and Development (1985) 14 *Environmental Policy and Law* 4. For the UNCED's progress see 'The World Commission on Environment and Development' (1985) 14 *Environmental Policy and Law*, 4; 'Legal Principles Approved by Experts Group' (1986) 16 *Environmental Policy and Law* 140. The UNCED report was debated in the UN General Assembly on 19 October, 1987; for details see 'UNEP/WCED' (1989) 19 *Environmental Policy and Law* 218.

²⁰ P Thacher, 'The Role of The United Nations' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment, Actors, Interests and Institutions* (1992) 183-211, 190; Annex II to UNEP GC decision 15/2, May 1989.

some details of which are outlined in Section IV below. An understanding of this framework is a necessary pre-requisite to evaluation of the success or failure of the UN in promoting and achieving protection of the environment, which will be discussed in Section V, and in synthesising this with the developmental goals of the UN as explained above.

IV THE UN'S ORGANISATIONAL FRAMEWORK: ITS APPROPRIATENESS FOR IMPLEMENTATION OF SUSTAINABLE DEVELOPMENT

The League of Nations had been equipped only with an Assembly and Council. The Statute of the Permanent Court of International Justice (PCIJ) was established later by an independent treaty. The League had no separate functional organisations in special relationship with it other than the subsequently established International Labour Organisation. The failure of the League was attributed in part to the lack of an adequate international structure within which the underlying economic and social problems could be addressed.

The founders of the UN and other eminent persons set out to remedy this, not only by expressing the UN's aims in the wider terms referred to earlier, coupled with a commitment to co-operate to achieve them, but by ensuring — in Article 1(4) — that the UN would become 'a centre for harmonising the action of nations to achieve these common ends'. For this purpose it was equipped with a wide range of organisations including not only a General Assembly and Security Council, but also an Economic and Social Council (ECOSOC).²¹

Article 62 of the UN Charter provides that ECOSOC may: 'make and initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters' to the General Assembly, UN members and concerned specialised agencies; prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence; call international conferences on matters within its competence; and enter into agreements with the specialised agencies defining the terms on which they will be brought into relationship with the UN (subject to approval by the General Assembly) and co-ordinate their activities. Thus, it has the potential to play a major role in promoting not only development but also environmental protection, and in harmonising these goals to achieve sustainable development. So far, however, this potential has not been fully realised because in the past much of ECOSOC's role was largely taken over by the General Assembly. However, as ECOSOC, under Articles 70 and 71 respectively, can arrange for any UN member, as well as representatives of specialised agencies and NGOs concerned with matters within its competence, to participate in its deliberations, environmental as well as developmental concerns are likely to be pressed increasingly before it. The Secretary-General's reform initiative aimed at revitalising and restructuring the UN in economic, social and related fields is intended, *inter alia*, to re-focus ECOSOC and promote a more integrated approach to UN

²¹ UN Charter ch X arts 62-72.

programmes.²² The complementary nature of the work of the General Assembly and ECOSOC, including their respective roles in decision-making, review and monitoring, is being reviewed with a view to avoiding the existing duplication.

The consequent reforms, including the slimming down of the Secretariat, should lead to these bodies being better equipped to meet the demands of executing UNCED's Agenda 21. However, it is not yet clear, given the divergent approaches adopted at UNCED by North and South which have long dominated General Assembly and ECOSOC deliberations on environmental and developmental issues, whether this will bear fruit. Nevertheless ECOSOC is well-equipped to promote continued developments because of its powers to make recommendations to the Commission on Sustainable Development (CSD), the organisation established by the General Assembly after UNCED. Since 1992 a High Level Advisory Board, approved by the General Assembly and convened by the Secretary-General, has advised the Secretary-General on aspects of sustainable development. The Secretary-General has tried to overcome one of the main criticisms of the UN 'family' of organisations, that is that it lacks co-ordination and integration of programmes, by restructuring the Secretariat to create some identity of purpose.²³ However, there is still a need, as this has proved a long-standing, intransigent problem, for a better allocation of responsibilities among UN Headquarters and the other centres located in Geneva, Vienna and Nairobi where the developmental and environmental units and agencies are located. The CSD could promote ECOSOC's efforts in these respects, but as some NGOs regard ECOSOC as a moribund body it remains to be seen whether the CSD will have the strength and energy to act sufficiently vigorously (see Section VIII below).

In addition to the above-mentioned organisations, Chapters XII and XIII of the Charter equipped the UN with an International Trusteeship System, administered by a Trusteeship Council composed of UN members administering territories placed under the system by individual agreements. The territories qualifying were those held in 1945 under League of Nations Mandate, those detached from 'enemy' states following World War II, and those voluntarily placed under trusteeship by their administering states. The objectives of the system were to further international peace and security, and to promote the political, economic, social and educational advancement of the territories' inhabitants and their progressive development towards self-government and independence, as deemed appropriate to the circumstances of each territory and

²² See in particular, 'Restructuring and Revitalisation of the United Nations in the Economic, Social and Related Fields', GA Res 264, 45 UN GAOR (75th plen mtg), UN Doc A/Res/264 (1991); Secretary-General's address to the 47th session of the UN General Assembly (1993) in (1992) 22 *Environmental Policy and Law* 302, 305. See also 'Environment and Development: Towards a Common Strategy for the South in the UNCED Negotiations and Beyond', Geneva: South Centre [1991] which stresses the South's need for *rapid* development and exploitation of the resources to achieve it, and claims that it has the environmental spaces to do this.

²³ See for example 'Restructuring of the UN: extract from the Secretary-General Statement' (1992) 22 *Environmental Policy and Law* 305. In 1992-3 a Department of Policy Co-ordination and Sustainable Development was established in the UN Secretariat, headed by UN Secretary-General Desai.

its peoples and the freely expressed wishes of the people concerned, 'as may be provided by the terms of each Trusteeship agreement.'²⁴

Amongst the proposals considered by some NGOs in the run up to UNCED was that the Trusteeship Council, composed of members of the UN drawn from the categories identified in Article 86, might, as its former role is now negligible, be given the task of overseeing the progress of countries towards sustainable development. This is clearly not a role for which the system was designed or equipped and UNCED never seriously considered this option. However, states retain the power to voluntarily choose to place territories for whose 'administration' they are responsible under Trusteeship, and the system's purpose is to promote the 'political, economic, social, and educational advancement of the inhabitants' in a way that is appropriate to their circumstances and their 'freely expressed wishes'. So, if the disastrous decline in the internal administration of some states through civil war and the incompetence or non-existence of government continues, or even worsens in the twenty-first century, the question remains as to whether the Trusteeship system may not, with some adaptation, permit the peoples of such a territory themselves to seek to place it under UN Trusteeship. This might be appropriate when the ravages of gross environmental and developmental failure negate any prospect of progress towards sustainable development. Meanwhile, the route taken by UNCED (see below) of establishing the Commission on Sustainable Development is a much less radical, less ambitious and less controversial method of monitoring the *status quo* with a view to commenting on or making recommendations concerning a state's progress towards sustainable development.

The remaining organs of the UN which can play a role in achieving the objectives set out in the Stockholm and Rio Declarations and Action Plans include the Secretariat, the International Court of Justice and the subsequently established International Law Commission.

The Secretariat consists of the Secretary-General and 'such staff as the organisation requires'.²⁵ The Secretary-General, as chief administrative officer of the organisation,²⁶ acts in that capacity in all meetings of the other organs and must also execute 'such other functions as are entrusted to him by these organisations', and submit annual reports to the General Assembly on the work of the UN.²⁷ The Secretary-General may personally 'bring to the attention of the Security Council any matter *which in his opinion may* threaten the maintenance of international peace and security'.²⁸ All these tasks and responsibilities may well have environmental and developmental dimensions which are likely to increase. They must be carried out in the context of the UN's new goal of achieving sustainable development following the General Assembly's endorse-

²⁴ UN Charter art 76.

²⁵ Ibid art 97.

²⁶ Ibid.

²⁷ Ibid art 98.

²⁸ Ibid art 99 (emphasis added).

ment of the Rio Declaration and its innovative involvement in the negotiating process of, for example, the 1992 UN Convention on Climate Change which led to the establishment by the General Assembly of the International Negotiating Committee (INC) on a Framework Convention on Climate Change²⁹ and the servicing of the INC's work by the Secretariat in the lead up to UNCED. The General Assembly not only has the power to create subsidiary organs, which it could use for environmental purposes, but can also establish special programmes, often as autonomous units within the Secretariat. The United Nations Development Program (UNDP), UNCTAD and the UNEP are examples in point, and are playing a crucial role in the process of sustainable development.

The UN Charter requires states to settle their disputes by peaceful means which include, *inter-alia*, judicial settlement.³⁰ It also requires the Security Council, as it deems necessary, either to call upon disputing parties to do this or to recommend appropriate procedures, and in doing so to take into consideration that legal disputes shall, as a general rule, be referred by the parties to the International Court of Justice (ICJ).³¹ The ICJ thus has an as yet under-used potential for settling legal disputes concerning environmental and developmental issues and for clarifying over time, as its decisions and opinions accumulate, the legal content, if any, of the term 'sustainable development'.³² The UN General Assembly and Security Council and approved specialised agencies can seek advisory opinions from the Court but have not yet done so on environmental topics. WHO's recent request for an opinion on the legality of using nuclear weapons may open up this possibility for other agencies.³³ The Court's recent establishment of a panel to hear environmental disputes may also improve the situation.

The International Law Commission (ILC), composed of eminent lawyers appointed by the General Assembly, was established to promote the progressive development and codification of international law. It has the potential to clarify

²⁹ For details of the UN and the Secretariat's involvement in the process of conducting this convention and analysis of this see, J Barrett, 'The Negotiation and Drafting of the Climate Change Convention' in R Churchill and D Freestone (eds), *International Law and Global Climate Change* (1991) 183-200. The work contains the text of many relevant documents, presented in chronological order under sub-headings, at 211-436. The growing involvement of the UN and its specialised agencies, and the complementary effect on the UN of decisions and measures of other international bodies, are thus easily discerned.

³⁰ UN Charter art 33.

³¹ *Ibid* art 36.

³² For examples of disputes, some of which involve environmental issues or environmental significance which have been referred to the ICJ, see Roberts and Kingsbury, above n 15, 543-8. Cases with environmental/developmental significance include maritime boundary cases, which allocate, *inter alia*, exclusive access to resources; *The Anglo-Norwegian Fisheries Case* (United Kingdom v Norway) [1951] ICJ Rep 116; *The Corfu Channel Case* (Merits) (United Kingdom v Albania) [1949] ICJ Rep 4; *The Nuclear Test Cases* (Australia v France; New Zealand v France) [1974] ICJ Rep 253. The disputes between Australia and Nauru concerning exploitation of certain phosphate lands in Nauru; between Hungary and Slovakia concerning construction of a dam by the latter on the Danube (the Gabčíkovo-Nagymaros Project); and between Denmark and Finland concerning construction of a bridge across the Baelts, provide more recent examples.

³³ Request for an advisory opinion made by the World Health Organisation pursuant to Resolution WMA 46.40, 14 May 1993.

the concept of sustainable development. However, because the issues which the ILC is called to address are determined by the General Assembly, inherent political difficulties will no doubt prevent it from doing so.

The ILC has, however, been charged with a significant role in codifying and developing the law on state responsibility for damage to and the law concerning international water courses, and has seized the chance to introduce an environmental dimension into the texts it has elaborated on these issues.³⁴ However, the increasingly highly-charged political, economic, and social implications of such issues, including sustainable development, have led the General Assembly to avoid using the ILC in the recent development of relevant UN treaty law. Instead, it has convened UN conferences to gradually negotiate the texts of conventions through political processes rather than presenting already prepared drafts. Increasingly such UN conferences seek to secure consensus at all stages of this process, rather than resorting to a vote as was habitual in the early days of the UN. The contrasting approaches of the UN's brief First Conference on the Law of the Sea held in Geneva in 1958 which adopted texts prepared by the ILC,³⁵ and its prolonged Third Conference on the Law of the Sea (UNCLOS III), held in various venues, including New York and Geneva, between 1973-1982, which aimed at, but failed to achieve, consensus, illustrate the differences and difficulties.³⁶ The attempts to reach consensus (as evidenced in the Law of the Sea (LOS) Convention) and the use of the 'Framework Convention' approach where the treaty merely provides a very general framework, requiring subsequent negotiation of Protocols laying down specific measures (as for the Convention on Climate Change, discussed further below), inevitably, in the context of the increasing diversity of interests represented in the UN, leads to use of deliberately ambiguous language, often referred to as 'constructive ambiguity', as this enables acceptance of the convention because such terms are open to varying interpretations.

This approach is much criticised by environmentalists and has led to, rather than avoided, disputes and threats of unilateral actions in pursuit of a particular interpretation, as in the recent disputes between Canada, Spain and the European Union concerning alleged over-fishing on the high seas of straddling stocks and of highly migratory species which cross the boundaries of coastal zones and the high seas. However, the ILC has itself had to take account of

³⁴ On the ILC's role in state responsibility, see Patricia Birnie and Alan Boyle, *International Law and the Environment* (1992) 139-41; ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, opened for signature at Helsinki, 17 March 1992, Cmnd 2141, Misc No 5 (1993); (1992) 31 ILM 1312; Draft Articles on the Non-Navigational Uses of International Watercourses, UN DOC A/CN.4/L.492/Add. 1 (1994). The General Assembly is convening a conference in 1996 to elaborate a framework convention based on the ILC Draft.

³⁵ For the text and brief negotiations of the four conventions on the Territorial Sea and Contiguous Zone, The High Seas, Fishing and Conservation of the Living Resources of the High Seas and The Continental Shelf see Brownlie, above n 7, 85; the four conventions appear in UN Doc A/Conf 13/L.52-L.55; and Misc No 15 (1958).

³⁶ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, UN Doc A/Conf 62/122; (1982) 21 ILM 1261 (entered into force 1994). For extensive but succinct assessment see R Churchill and V Lowe, *The Law of the Sea* (1988).

divergent approaches among its members on the issues under discussion and may also resort to ambiguous language. The prolonged negotiation of the UNCLOS in 1982 reflected the deep divisions between states, which were not only divided along North and South lines — as evidenced in the endeavour to agree on the terms and conditions for Deep Seabed Mining, in the context of the General Assembly's 1970 Declaration of Principles³⁷ on this activity, which asserted that the Area of the Seabed Beyond National Jurisdiction was the 'common heritage of mankind', to be exploited 'only under an international regime to be established by a treaty of universal character, generally agreed upon' — but on issues ranging from navigational freedoms, archipelagic waters and exclusive economic zones, to the conduct of marine scientific research and protection of the marine environment — all key environmental and developmental issues. The divisions on these were related to the particular interests of states on the issue in question, such as distant water versus coastal state fishing interests, navigational versus coastal interests and so on.

The UN was equipped at its outset with five regional economic commissions — for Africa (ECAAF), Latin America (ECLA), Western Asia (ECWA), Asia and the Pacific (ESCAP) and Europe (ECE). Their original purpose of promoting economic development was quickly supplemented after the UNCHE by promotion of programmes and measures for environmental protection. The ECAF, for example, has, since the revelation in the 1980s that some industrialised states were dumping toxic waste in some African countries, become involved in matters pertaining to pollution control and waste management, as well as environmental assessment and management of the use of natural resources. The ECE has been particularly active, concluding in 1979 the only existing Convention on Long-Range Transboundary Air Pollution (LRTAP)³⁸ (a framework convention which has since been supplemented by Protocols requiring their parties to reduce emissions of specific pollutants such as sulphur), and the First Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).³⁹ It has also issued a Regional Strategy for Environmental Protection and Rational Use of Natural Resources.

Making good use of the breadth of the economic, social and other powers conferred upon it, the UN has gradually established numerous committees, commissions and autonomous units within its administrative structure which have adapted at various stages to developments inside and outside the UN, at global and regional level, as the strategy for sustainable development has gradually emerged. The General Assembly, for example, adopted in 1980 a World Charter for Nature,⁴⁰ a non-binding instrument setting-out in general

³⁷ Declaration of Principles Governing the Seabed and the Ocean, Flow, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res 2749, 25 UN GAOR (1933rd plen mtg), (1970), text in Brownlie, above n 7, 122-6; (1988) 27 ILM 701.

³⁸ (1979) 18 ILM 1442.

³⁹ (1991) 30 ILM 802.

⁴⁰ (1983) 22 ILM 455; on the debates leading up to this concerning the terminology used ('shall' rather than 'should') and the legal status of this instrument see Caldwell, above n 14, 90.

terms the goals for sustainable use of nature, and the Global Perspective to the Year 2000 and Beyond.⁴¹

But an evaluation of the UN's role in environment and development cannot be confined solely to the activities of its own organs and regional bodies. The work of its specialised agencies must also be taken into account, particularly that of UNEP, an agency established by the General Assembly as an autonomous unit within the UN Secretariat, in the same way as the UNDP and UNCTAD.

V THE UN SPECIALISED AGENCIES INVOLVED IN ENVIRONMENT AND DEVELOPMENT

Space does not permit a detailed explanation of the work of the concerned agencies which, through agreements with ECOSOC, have entered into a special relationship with the UN. The 16 existing agencies have broad responsibilities, within the confines of their constituent constitutions, based on *ad hoc* conventions which define their functions, purposes and goals and establish their administrative machinery and powers. In addition to those with a clearly-defined mandate to protect the environment or promote development, others also have some tangential involvement in these tasks.⁴² Apart from the financial agencies, such as the International Monetary Fund (IMF) and the World Bank, four major agencies are all directly involved in sustainable development. They are the International Labour Organisation (ILO), the Food and Agricultural Organisation (FAO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Health Organisation (WHO).

The financial institutions, after much criticism from NGOs concerning their funding, without prior environmental impact assessments, of development projects such as the building of dams and exploitation of forests, have now considerably revised their approach to such projects.⁴³ The ILO has developed numerous conventions and codes of practice setting standards for the health and safety of workers on land and on ships, and for protection of indigenous peoples' rights. It has unique enforcement procedures. The FAO is moving from a dominant development focus, promoting more extensive fishing and agriculture, to a sustainable approach taking account of the environmental effects of over-fishing, conservation needs, including habitat protection and the effects of pollution on fish, and also the deleterious effects of the use of chemical pesticides and fertilisers in agriculture.

UNESCO promotes both co-operation and research in the natural and social sciences, and technical assistance in training and education, and also maintains a prestigious International Oceanographic Commission (IOC) which is active

⁴¹ 'The Environment Perspective to the Year 2000 and Beyond' (1988) 18 *Environmental Policy and Law* 37.

⁴² For details of these activities see Birnie and Boyle, above n 34, 53-63.

⁴³ See The World Bank Environment Group, *Making Development Sustainable: The World Bank Group and the Environment* (1994); K Piddington, 'The Role of the World Bank' in Hurrell and Kingsbury, above n 20, 212-27; Dadzie, above n 15, 297-326.

in, among other things, research into marine pollution. It works closely with an inter-agency Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) which advises various bodies and which produced the first definition of 'marine pollution' (now amended), which has been widely used in UN and other conventions. The IOC's role will now be enhanced by the requirements of Ch XIII (Marine Scientific Research) of the UNCLOS 1982 following the Convention's entry into force on 16 November 1994. A World Heritage Convention concluded under UNESCO's auspices in 1972, provides for natural as well as cultural sites within the territory of its state parties to be listed for protective purposes and thus to qualify for financial support from the World Heritage Fund. Eighty-five natural sites were listed by 1991, which included Australia's Great Barrier Reef and the Daintree Rainforests.

WHO promotes the attainment of the highest possible level of health by all peoples. Clearly this requires a healthy environment or, as the UNCHE Declaration puts it, 'an environment of quality'. WHO, therefore, develops codes, sets standards and supports regulations or conventions (such as those on Conservation of Biological Diversity and Climate Change and pollution control) controlling factors adversely affecting a healthy environment, such as the use of drugs and chemicals and the discharge of pollutants which affect air and water quality. WHO also administers International Health Regulations.

The smaller International Maritime Organisation (IMO) has as its major roles the promotion of the safety of ships and prevention of pollution therefrom. It has concluded almost 40 conventions on these and related topics and has established a committee exclusively concerned with Marine Environment Protection (MEPC). It has also established the post of Special Assistant to the Director of its Marine Environment Division to advise the Director on sustainable development. The IMO's further involvement in activities promoting sustainable development is set out in a paper which was presented to the MEPC's 57th Session in March 1995.⁴⁴ The MEPC has been focusing its attention on creating means of making at least some of the recommended measures under it financially self-sustaining, for example by charging shipowners who use foreign seamen a fee to cover the training thereof in their states; by charging owners of ships using international straits a fee for the navigational aids provided therein by the coastal states; and by levying a port fee for vessels required to be inspected in ports of entry in order to conform to IMO treaty requirements.

Other intergovernmental organisations in close relation with the UN include the International Atomic Energy Agency (IAEA)⁴⁵ whose code of practice, regulations, conventions and safeguard agreements contribute to environment protection, and the General Agreement on Tariffs and Trades (GATT) which

⁴⁴ Report of the IMO to the Commission on Sustainable Development in fulfilment of GA Res 191, 47 UN GAOR (70th plen mtg), UN Doc A/Res/191 (1992), IMO DOC, MEPC 37/Inf. (1995) and Follow-Up Action to UNCED, MEPC 37/10/1, 23 March 1995.

⁴⁵ See Birnie and Boyle, above n 34, 348-57.

has recently been revised to introduce some environmentally-protective measures, though it is otherwise exclusively directed to promoting development through liberalisation of trade.⁴⁶

These organisations have made many contributions to environment protection and, especially since 1992, to promoting this in the context of sustainable development (which commonly requires provision of financial assistance to developing states — often through establishment of technical-assistance funds provided on an *ad hoc* voluntary basis by some of the organisations' member states — as well as transfer of technology and provision of training and advice — the funds in many cases being used to facilitate these activities). However, there remains much criticism of these organisations' activities in these fields, as well as of the UN's own activities. A major source of complaint is that the UN does not use the resources it has at its disposal adequately or efficiently, nor does it co-ordinate them in relation to the actions of its own internal divisions or to the activities of the UN *vis a vis* the various bodies within the UN 'family', still less with relevant outside bodies such as the IUCN, *ad hoc* Commissions or concerned NGOs. There is thus much duplication of effort and resultant misuse and wastage of resources.⁴⁷

It might be thought that UNEP, the specialised autonomous unit established within the UN Secretariat after the UNCHE, could fulfil this role and this was indeed the original intention of the UNCHE. For the reasons outlined below, however, this has not proved to be the case, and the co-ordinating role was left for many years to the UN's own Administrative Co-ordinating Committee (ACC), the pre- and post-UNCED reforms which will be detailed below.

⁴⁶ Benedict Kingsbury, 'Environment and Trade: The GATT/WTO Regime in the International Legal System' in Alan Boyle (ed), *Environmental Regulation and Economic Growth* (1994) 189-231; see also 'Other International Developments: GATT/WTO' (1994) 24 *Environmental Policy and Law* 313.

⁴⁷ As pointed out by Dr Holdgate, then Director General of IUCN, reflecting the view of many at the 15th Session of UNEP's Governing Council held in Nairobi in May 1989: 'Despite all the emphasis on co-ordination ..., the programmes of UN agencies, and other organisations, including my own are still conceived too independently, operated too separately and involve too many overlaps and inefficiencies ... The modest programme of my own organisation ... parallels that of UNEP in many ways.' He suggested that in the run-up to UNCED 'we should look again at our communications so that we work in greater mutual awareness, respect one another's defined mandates, make complementary use of the flexibility and commitment of the Non-Governmental Organisations and of the more formal and structured machinery of Government, and exchange results'. He proposed more use of Inter-Governmental Working Groups and establishment of priority issues, as well as 'the acceleration of programmes to bring people into an enduring harmony with their environment ... which combine economic growth, sustainable development of resources, health care and family planning' in order to avoid the undermining of environmental progress; '15th Session of the Governing Council' (1989) 19 *Environmental Policy and Law* 86, 92. See also Paul Szasz, 'Restructuring the International Organisational Framework' in Brown Weiss, above n 11, 340-84.

VI THE UNITED NATIONS ENVIRONMENT PROGRAM (UNEP)⁴⁸A *The United Nations Conference on the Human Environment (UNCHE)*1 *Origins*

Environmental issues had begun to be placed on the UN's and the Specialised Agencies' agenda well before the convening of the UNCHE in Stockholm in June 1972. Atmospheric pollution was on the agenda of WHO, WMO, ICAC, IAEA, FAO, UNESCO and, outside the UN, the OECD and NATO; pollution of the marine environment was on those of IMO, FAO, UNESCO, WHO and also OECD and NATO; pollution and water resource development was on those of WHO, FAO, UNESCO and IOC; urban problems were brought before the WHO, FAO, UNESCO, and standard-setting was undertaken by IAEA, OECD, IMO, UNESCO, WHO and NATO. The preparations for the UNCHE involved a wide-ranging review and audit of environmental activities not only by the UN but also by its agencies and by national governments, mainly in developed states. Spurred by the expanding international programmes of many NGOs, the General Assembly Resolution convening the Conference recognised that there was 'an urgent need for intensified action, at national and international level to limit, and where possible, to eliminate the impairment of the human environment'.⁴⁹ The Assembly's action resulted from a report from ECOSOC, which itself was responding to a Swedish proposal to put 'the human environment on its agenda'. This the General Assembly regarded as necessary for sound economic and social development purposes though this concern was not yet articulated in the synoptic terms of 'sustainable development'. The Declaration formulated by the Conference⁵⁰ took account of the developmental concerns of developing countries however, by laying down eight principles, among its total of 26, that related to developmental issues. The UNCHE's Secretary-General, Mr Maurice Strong, had immediately established a Panel of Experts on development and environment which met in Founex, Switzerland to address, in particular, the developmental aspects of environmental problems.⁵¹ The Panel promulgated 25 guidelines preserving developmental goals. This encouraged developing countries to participate in the Conference on the understanding that any environmentally protective measures resulting from it would not be used as the medium for inhibiting their further development by imposing extra costs upon them. Many regarded the environmental movement as a disguised attack

⁴⁸ For further details see A Petsonk, 'The Role of the United Nations Environment Program (UNEP) in the Development of International Environment Law' (1990) *AUJILP* 5, 351-92; Birnie and Boyle, above n 34, 39-52; Caldwell, above n 14; for an analysis of the UNCED's achievements see L Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Journal* 423-515; Patricia Birnie, 'The UN and the Environment' in Roberts and Kingsbury, above n 15, 327-83 and 337-55.

⁴⁹ GA Res 2398, above n 1; GA Res 2581, 24 UN GAOR (1834th plen mtg) (1969).

⁵⁰ Report of the UNCHE, above n 2, 35.

⁵¹ *Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment*, Founex, Switzerland, 4-12 June 1971.

on their aspirations by the capitalist and former colonialist states, whose own rapid development by unfettered industrialisation had been a prime cause of pollution and other forms of environmental degradation. But, although many developing states were among the 113 states participating in the UNCHE, the Eastern Block did not participate because the continuing non-recognition in 1972 of East Germany had resulted in it being barred from the UN and its specialised agencies and thus it was not invited to attend. The Eastern Block states did, however, join the preparatory process.

2 Results

The Conference resulted in four major initiatives at the normative, institutional, programmatic, and financial levels which provided the driving force for developments in the UN during the next two decades. The need to regulate the *use* of the planet's resources in conformity with the goal of maintaining developmental opportunities was accepted as a fundamental principle, though the means of doing so were not spelled out so clearly and extensively at that stage as they were in UNCED's Agenda 21.

The first initiative was the adoption of the Stockholm Declaration of Principles. The second was the establishment of UNEP, equipped with a Governing Council and an Environment Co-ordination Board. The third was the adoption of an Action Plan for the development of environmental policy, to be administered by UNEP, and the fourth was the establishment, on a voluntary basis, of an Environment Fund. All of these were innovative.

The General Assembly's establishment of a Preparatory Commission to make ready for the Conference resulted in activity throughout the whole UN system. Papers and proposals were prepared by the UN Secretariat, the various specialised bodies and governments, relating to all six subjects on the UNCHE agenda. These were planning and management of human settlements for environmental quality; environmental aspects of natural resource management; identification and control of pollutants and nuisances of broad international significance; educational, informational, social and cultural aspects of environmental issues of development and environment; and the international organisational implications of action proposals. The commitment to the process engendered by this, inspired by the strong personal leadership of the UNCHE's Secretariat provided by Mr Strong, led to a result which was and continues to be somewhat more positive than the critics of the UN's entry into this area had expected, but they did not overcome the entrenched difficulties inherent in the sectoral approaches outlined above. If anything, these difficulties were enhanced as the agencies struggled to appropriate the share of the required actions which they regarded as being within their scope.

UNCTAD, UNIDO, UNDP, and the World Bank and other financial bodies continued to progress further towards the NIEO asserted by the General Assembly in 1974. At the same time UNEP, established merely as an autonomous unit within the UN Secretariat, and located in Nairobi, far from the UN's main centres in New York and Geneva, in an attempt to foster the participation

of developing countries, endeavoured to introduce an environmental dimension to these activities.

3 *Limitations placed on the UNEP and attempts to overcome them*

The UNEP's Governing Council generally meets annually and consists of 58 states elected triennially by the General Assembly on the basis of equitable geographic distribution. It is responsible to that body and reports to it through ECOSOC. Financial restraints recently resulted in its meeting only biennially for a period. Its tasks are broad and include promotion of environmental co-operation; recommending policies; providing policy guidance for direction and co-ordination of environmental programmes within the UN; review of the world environment situation; and promotion of scientific and other technical inputs and of exchange of knowledge and information. However, on the whole the Governing Council has tended to restrict UNEP's activities to certain priority issues and to discourage more ambitious programmes, partly because of the restricted role conferred upon UNEP by the General Assembly Resolution establishing it, and partly because of the unwillingness of participating Governments, including some Governing Council members, to fund its programme budget. The UN itself supplies only support costs such as the salaries of UNEP personnel and related costs. UNEP's terms of reference limit it to acting merely as 'a focal point' for environmental action and co-ordination within the UN system. It was not envisaged that it would act as a manager or leader. It was

to promote international co-operation in the field of the environment and to recommend, as appropriate, policies to this end; [and] to provide general policy guidance for the direction and co-ordination of environmental programmes within a United Nations System.

It was expected to act in a secondary role as a catalyst in developing and co-ordinating an environmental focus in the programmes of other UN bodies. Mr Strong categorised its role as 'to complexify', that is, to 'remind others of, and help them to take into account all the systems interactions and ramifications implied in their work'. He observed that it was the lack of this cross-sectoral, cross-disciplinary view that had led to many environmental problems.⁵²

It is not surprising, and indeed it is desirable, that UNEP in its present form should limit itself to priority issues. At first these were: human settlements; people's health and environment; territorial ecosystems, their management and control, environmental and development; oceans; energy; and industrial wastes. Revisions over the years have led to the replacement of the last two by water, air, lands and desertification, the environment, and armaments and regional technical co-operation. Political pressures deriving from other items on the UN's own agenda (for example arms control) rather than a purely environmental focus have influenced the choices of priorities. It is notable that UNEP was neither initially nor subsequently given a specific mandate to develop

⁵² UNEP Governing Council, *Introductory Statement by the Executive Director* (11 February 1975), UNEP/GC/31, UNEP/GC/31/Add.1, UNEP/GC/31/Add.2, UNEP/GC/31/Add.3.

international environmental law, despite its relevance to most aspects of UNEP's role. Nonetheless the necessity for promotion of both binding and non-binding instruments to achieve its purposes was immediately appreciated. These include global treaties such as the 1985 Vienna Convention for the Protection of the Ozone Layer⁵³ and its Protocols, which treat the whole stratospheric ozone layer as a global unity. From 1974 onwards all reference to such thorny traditional legal concepts as 'sovereignty', 'shared resources' or 'common property' is avoided, indicating that a new status is emerging for the global stratosphere — that of a common resource or of 'common interest'. This formulation avoids the question of which state has sovereignty over the airspace that the ozone layer occupies. Other such treaties include the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal,⁵⁴ as well as UNEP's 11 Regional Seas treaties, negotiated from 1974 onwards. The Basel treaty preceded the 1992 Convention on Global Climate Change, concluded at UNCED, which, for particular reasons referred to later, introduced the concept of 'common concern' into the UN itself. All these concepts are now applicable to environmental issues and threats that transcend boundaries and which are not susceptible to resolution by any one state, that is, they can be resolved only by international co-operation, taking account also of the economic, social and political implications for development. This allows such issues legitimately to be placed on UNEP's and the UN's agenda.

This approach has led to UNEP's pioneering of its so-called 'framework treaties', referred to above, whereby the convention itself sets out the goals to be achieved and requires states to take measures to achieve them, with specification of the precise measures (regulations, administrative actions, etc) that are required to be developed or added by the parties by adoption of subsequent protocols which, for example, list the pollutants to be eliminated or controlled.⁵⁵ This approach allowed UNEP in the 1970s and 1980s to promote a series of Regional Conventions to deter or control marine pollution as part of its 'Regional Seas' Program.⁵⁶ It is easier to get initial agreement between states, especially if membership of developing countries is required to make the agreement fully-effective, globally or regionally, if the main convention is in terms of sufficiently-low commitment, expressed with sufficient generality to allow for broad interpretation. The method is not without criticism since it leads to disputed interpretations and permits evasion or deferment of the measures required to meet the convention's goals. Constant pressure then has to be exerted to ensure that the necessary protocols are both added and complied with.

⁵³ (1987) 26 ILM 1529.

⁵⁴ (1989) 28 ILM 657.

⁵⁵ Such an approach is not totally innovative. Fisheries treaties have long been based on a similar approach, with the substantial articles empowering a Commission of Member States, established by the convention, to take measures to conserve fisheries at levels allowing a sustainable catch, the precise regulations being listed in a Schedule, Annex or Protocol, which is amendable annually. Some pollution control treaties are similarly structured.

⁵⁶ They are the responsibility of UNEP's Oceans and Coastal Areas Program Activity Centre (OCA/PAC). UNEP also provides some secretariat activities.

Here the UN system is at its weakest since its member states have always evinced antipathy to attempts to confer or enhance any power of active enforcement on international bodies, though monitoring and reporting to the concerned bodies is now often provided for. The problem remains, in UNEP and other UN bodies, as to what action, if any, is taken on these reports. Progress on these aspects remains disappointingly slow on all fronts.⁵⁷ Recent disputes concerning fishing for straddling stocks and highly migratory species on the high seas have highlighted these weaknesses in another sphere that is of 'common concern' and which is fully within the scope of the UN and FAO as well as UNEP. These problems will be considered in more detail in connection with discussion of UNCED's Agenda 21 and its recommendations.

In addition to binding treaties, UNEP has also adopted several sets of non-binding instruments (conveniently referred to as 'soft law') in the form of guidelines, principles, goals and conclusions. These are presented in various forms, but are in effect merely recommendations concerning desirable conduct related to such diverse subjects as shared natural resources, weather modifications, off-shore mining, land-based sources of marine pollution, banning chemicals, management of hazardous waste and environmental impact assessment.⁵⁸ All these have had some influence on legislation drafted in some states on appropriate subjects.

B *The UNCHE Declaration of Principles*⁵⁹

This proved to be of considerable significance and influence throughout the UN system. Though formulated as a Declaration, a solemn form used in the UN to emphasise and enhance its importance (as, for example, in the Universal Declaration of Human Rights), and later endorsed by a Resolution of the General Assembly, it had only the status of the codes, namely that of a 'soft law', non-binding recommendation. In practice, however, it has proved influential. Some principles have formed the basis of guidelines developed by UNEP, and have since been incorporated into treaties, especially Principle 21. The extensive, and largely rhetorical Preamble stresses the need for both co-operation by states and action by international organisations in the common interest on problems that affect 'the common realm'. From this sprang the more recent developments already referred to: that preservation of the environment and its composite elements, especially that of areas beyond national jurisdiction, such as the climate, the ozone layer, biological diversity, the high seas including its fisheries, and highly migratory species of birds and mammals, and possibly Antarctica, is a legitimate 'common concern' of humankind, to be manifested, *inter alia*, through action taken on its behalf through the UN and its related

⁵⁷ See Birnie and Boyle, above n 34, 136-87, esp 160-79 for an overview.

⁵⁸ See Birnie and Boyle, above n 34, 49-52; *Environmental Law in the UNEP*, UNEP Environmental Law Unit (1991); Petsonk, above n 48.

⁵⁹ Report of the United Nations Conference on the Human Environment, above n 2.

bodies.⁶⁰ The text of the UN Charter is asserted by 'the peoples of the United Nations', who are 'determined ... to promote social progress and better standards of life in larger freedom' and to this end to eschew the use of force 'save in the common interest'. The UNCHD Declaration draws on this inspirational aspect. Its first principle proclaims that

[m]an [*sic*] has a fundamental *right* to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he [*sic*] bears a solemn responsibility to protect and improve the environment for present and future generations.⁶¹

Though Principle 1 is formulated as a right, UNEP's machinery is ill-suited to realisation of it as such. Neither the UN nor the European Convention on Human Rights have included or otherwise provided for it as such. It remains, like the right to development, an inchoate 'third or fourth generational' right, the asserting of which is conceived by some to have political value.⁶² The key principle, Principle 26, is also formulated as a right which is purportedly drawn from existing treaty and customary law. Thus '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'. However, while thereby recognising both sovereignty and implicitly its relation to state's developmental concerns, it introduces a balancing environmental consideration by adding 'which right is coupled with a corresponding 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'. Principles 2 to 5 require that the earth's natural resources 'must be safeguarded for the benefit of present and future generations', 'that its capacity to produce vital renewable resources must be maintained and, if practical, restored or improved', and that humans have a responsibility to 'safeguard and wisely manage the imperilled heritage of wildlife and its habitat'. The need to take account of nature conservation in economic development planning was identified, which did not rule out exploitation of natural resources. Non-living resources such as minerals were to be used so as to avoid their exhaustion and to ensure that benefit was assured to all people.

⁶⁰ See Birnie and Boyle, above n 34, 112-22, 424.

⁶¹ Report of the United Nations Conference on the Human Environment, above n 2, Principle 1 (emphasis added). For the significance of the inclusion of man's responsibility to protect the environment to preserve it for present and future generations see Edith Brown Weiss, 'Intergenerational equity: A legal framework for global environmental change' in Brown Weiss, above n 11, 385-412; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989); Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) *The American Journal of International Law* 84, 198.

⁶² See Alexandre Kiss, 'An introductory note on a human right to environment'; R Pathake, 'The human rights system as a conceptual framework for environmental law'; A Trindade, 'The contribution of international human rights law to environmental protection, with special reference to global environmental change' in Brown Weiss, above n 11, 199, 205 and 244 respectively.

Principles 6 and 8 relate to pollution control, calling for cessation of the discharge of toxic and other substances into the environment in quantities that exceed the environmental capacity to render them harmless, and to ensure that no irreversible damage is inflicted on ecosystems. The reference here to preservation of ecosystems, an approach long advocated by NGOs, was considered a significant step towards an ecosystem approach to environmental management. Perhaps the Principle which, despite strenuous efforts by UNEP and concerned governments and NGOs, has been promoted with the least success is Principle 22. Principle 22 requires states to further develop the international law on liability and compensation for pollution and other forms of environmental damage to areas beyond their jurisdiction caused by activities within their jurisdiction and control. Although IMO has adopted a convention relating to vessel-source pollution damage⁶³ and a supplementary convention establishing an independent additional compensation fund,⁶⁴ attempts by UNEP to negotiate liability protocols to its Hazardous Waste and Regional Seas Conventions have proved difficult. The UN Law of the Sea Convention postpones the issue by asserting (in Article 235) that 'States are responsible for the fulfilment of their international obligations to protect the marine environment' and requiring that they *shall* be liable but only 'in accordance with international law', without further specifics. It is equally imprecise in that although it commands states to co-operate in implementing *existing* law (of which little is laid down by treaty and much is left to the ambiguities of existing customary law), it only requires them to 'co-operate' in 'its further development'. Thus victims of pollution damage other than oil pollution damage (compensation for which under existing treaties is based on the narrow principles of the limited liability conventions and their protocols), have received little help from the UN.⁶⁵ Oil pollution damage is not a substantial threat to international areas. The only other existing convention falling partly under Principle 22 is the IAEA's Vienna Convention on Civil Liability for Nuclear Damage,⁶⁶ which is limited to impact and financial and other coverage.

Principles 8 to 15 address developmental concerns arising from the recognition that economic and social development is essential for ensuring a healthy living and working environment for humankind and for creating the necessary conditions for improving the quality of life. These are policy-oriented principles that draw attention to the need to take economic factors as well as ecological processes into account.

⁶³ International Convention on Civil Liability for Oil Pollution Damage 1969; (1970) 9 ILM 45.

⁶⁴ Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971; (1972) 11 ILM 284.

⁶⁵ For further discussion see Birnie and Boyle, above n 34, chs 4 and 5.

⁶⁶ (1963) 2 ILM 727-45.

C UNEP⁶⁷

It is important to realise that the UNEP is a programme for ensuring action on the aims set out in the Declaration of Principles and endorsed by the General Assembly and that as such it originally consisted of five elements:

- the UNCHE Declaration;
- an Action Plan setting out the policy goals in the form of 106 recommendations;
- a voluntarily subscribed Environment Fund, mainly used for supporting projects and other operational activities in pursuit of the Action Plan goals;
- a new mechanism for administering and directing the programme itself, an Environment Secretariat known as UNEP, located for political reasons in Nairobi; and
- the Environment Co-ordination Board (however this was soon abandoned in favour of use of the UN's existing machinery).⁶⁸

1 *The Action Plan*

The Action Plan was set out in the form of three components. The first was the establishment of a Global Assessment Program known as Earthwatch, which included a Global Environmental Monitoring Service (GEMS) and what is now known as the International Referral System for Sources of Environmental Information (INFOTERRA). GEMS' aims were to gather information, provide warning of environmental crises, stimulate scientific research, evaluate and review this, and link by computer all the environmental information held nationally. This last grandiose objective was soon reduced to linking only the global sources of 'information' through a Global Resource Information Data Database (GRID), which is reported even so to be under-used. An International Register of Potentially Toxic Chemicals has been maintained amongst other activities.⁶⁹ Duties under this component of the Plan are considered to have been well discharged.

The second part of the programme — goal setting, planning, consultation, and training, education and provision of information — has been limited by the constraints imposed on UNEP's role by the General Assembly (for example, its limitation to acting only as a 'focal point'), on its priorities as determined by its Governing Council, and by states' lack of financial support for the Environment Fund.

2 *The UNEP Secretariat*

UNEP was consciously established as a small unit, with a limited role and staff (originally 100, now nearer 400, though there is a constant turn-over of

⁶⁷ For a full account of its status, role and impact see Szasz, above n 47, 340-84; Birnie and Boyle, above n 34, 39-56, esp 47-52; Birnie, 'The United Nations and the Environment' in Roberts and Kingsbury, above n 15, 327-83, esp. 341-58; Thacher, above n 20, 183-211, esp 186-8.

⁶⁸ See the 1982 Annual Report of the UNEP Executive Director, ch III, paras 16-18.

⁶⁹ For details see Szasz, above n 47, 342-4.

personnel and not all posts can be filled at all times). It was not expected to encroach on the existing roles of the specialised agencies, either as set out in their constitutions or as developed in practice. It has no independent powers, still less supranational authority, and therefore can play only a support role in ensuring that either its proposed 'soft law' measures or the treaties developed under its auspices are implemented, applied, complied with or otherwise enforced. Its annual production of a report on the State of the World Environment is a form of monitoring, and so-called 'innovatory' practical measures of monitoring have been developed under the Ozone Convention which has established a committee to examine reports on performance from its states parties, but these have only minor effects. Nonetheless, its first Executive Directors, Maurice Strong and Mostafa Tolba, succeeded in gradually furthering the environmental awareness and perspectives, not only of the specialised agencies and other UN bodies, but of inter-governmental commissions and organisations outside the UN system, such as the European Union, OECD and the fishery conservation and pollution control commissions world-wide,⁷⁰ as well as concluding numerous codes and treaties and participating closely in the preparation of others. UNEP has worked closely with a large number of concerned organisations and bodies at all levels, including NGOs.

3 Funding

The aim of UNEP's Governing Council has been to ensure that UNEP adheres closely to providing only support for the programmes of others and does not establish major programmes of its own. However, it is possible for UNEP to obtain voluntary financial support tied to particular projects. Initially US\$20 million was pledged to the Environment Fund, but by 1975 UNEP was approving projects costing nearly US\$22million. Its budget was severely cut in the 1980s during the UN's policy of tight budgetary restraint when important regular contributors, such as the US and UK, reduced their contributions. It rose in the approach to UNCED, which highlighted the growing environmental concerns but even in 1987-90 UNEP's budget was only about US\$26million, a severe cut in real terms. This rendered it impossible to address such new issues as protection of the ozone layer, hazardous waste movements, possible climatic change and threats to biological diversity, which some considered required budgets of US\$100 million, without abandoning or drastically reducing existing priorities.⁷¹ In the lead-up to UNCED the Fund was brought up to US\$52.3 million, but this increased contribution only served to return it to the 1980 value.⁷² The UNCED did not, as some had expected, resolve this problem or enhance UNEP's legal status and role, though clearly it will play a vital part in achieving and promoting sustainable development throughout the UN system. Funds available for promoting development, however, hugely exceed those

⁷⁰ For details see Birnie and Boyle, above n 34, *passim*.

⁷¹ Szasz, above n 47, 347-51; Birnie in Roberts and Kingsbury, above n 48.

⁷² For details see Szasz, above n 47, 341.

available for protecting the environment.⁷³ This is at a time when in order to ensure, post-UNCED, that the environmental perspective is fully integrated into sustainable development policies within and outside the UN system, a major international programme of education, training and creation of public awareness of this perspective and the measures and policies to achieve it are of fast-growing importance. Nonetheless, UNEP, heeding the UNCED's Declarations and Principles relating to development and the need for development planning, has played a key role in creating awareness of the need for development funding and the need to incorporate environmental dimensions into such planning, which was generally neglected in the 1970s and early 1980s.

4 *Co-ordination*⁷⁴

The abandoned Environment Co-ordination Board, which proved unable to achieve its mandate to co-ordinate environmental activities of the specialised agencies throughout the UN system, due to its location in Nairobi, was replaced by the Interagency Board of Designated Officials on Environmental Matters (DOEM). More than 13 UN organs and eight agencies take part in DOEM which was created as a quasi-subsiary of the UN's own Administrative Committee on Co-ordination (ACC). ACC, under the Chairmanship of the Secretary-General, attempts to co-ordinate all the organs and organisations of the UN system at the Secretariat level under the direction of the General Assembly (assisted by the Committee for Programs Co-ordination (CPC)). Co-ordination of the UN's environmental bodies is now consistently under review in the UNCED context. The ACC, assisted by DOEM, reviews all programmes with an environmental focus that involve more than one UN body and makes recommendations concerning their co-ordination. The ACC's annual report, which is drafted by the UNEP Executive Director, assisted by DOEM, is directed to UNEP's Governing Council. The system is reported to work as well as can be expected given the limitation of its small size in relation to the vastness of the problems involved. It was improved, in the context of UNCED, when an Inter-Agency Committee on Sustainable Development was established. The members of this Committee are representatives of FAO, UNESCO, World Bank, WHO, UNDP, UNEP, IMO and IAEA, but it is open to interested ACC members and is now intended to act as the main source of advice to the ACC in discharging the duties laid upon it by UNCED to achieve sustainable development. UNEP is now also providing the Secretariat for DOEM *and* the more recent Committee of International Development Institutions on the Environment (CIDIE) on which UNEP, World Bank, UNDP and 11 other intergovernmental financial institutions are represented (the World Bank is not a member

⁷³ Dadzie, above n 15.

⁷⁴ Szasz, above n 47, 371.

of DOEM, despite its increased involvement in the environmental aspects of its activities).⁷⁵

UNEP also promotes co-ordination in other ways, for example, through joint programmes, inter-agency meetings and consultations, and by taking part in similar processes organised by other bodies. Nonetheless, its abilities in these roles was criticised during the preparation for UNCED and numerous proposals for reform were made.⁷⁶ These proposals included one that, in order to avoid considerable overlap, the UN System-Wide Medium Term Environment Program (SWMTEP)⁷⁷ formulated under UNEP's auspices devote more attention to describing relevant UN activities (including those addressed in UNCED's Agenda 21) rather than acting as a mechanism for welding these into a coherent environmental programme. Moreover, the UNEP inspired Program for the Development of Periodic Review of Environmental law (the Montevideo Program) addressed only certain selective priority issues, such as conclusion of international agreements, development of international principles, guidelines and statements, and provision of international assistance for national legislation and administration. Although the Montevideo Program was adopted by the Governing Council in 1989 and incorporated into the SWMTEP, it continues to be subjected to the same criticisms. It has, however, been more successful in promoting the development of treaties and 'soft law' instruments, as was acknowledged by a group of legal experts which reviewed it in 1991.⁷⁸

VII IMPACT OF UNEP ON THE UN SYSTEM

Though the UNCHE Declaration of Principles had addressed both environmental and developmental issues, and the need for 'co-ordination' of the concerned bodies in and outside the UN system was foreseen, neither the Declaration nor the Action Plan integrated these. Thus the UN system continued to follow a sectoral, pragmatic approach, with each sector pursuing its own programmes with the addition of an environmental dimension.⁷⁹ In its first decade the UN enhanced its environmental profile by convening a series of conferences in various venues round the world addressing: Habitat (Vancouver, 1974); Population (Bucharest, 1974); Food (Rome, 1974, in conjunction with FAO); Women (Mexico City, 1975); Desertification⁸⁰ (Nairobi, 1977); Water⁸¹

⁷⁵ But see *Making Development Sustainable: The World Bank Group and the Environment*, above n 43.

⁷⁶ See Lee Kimball, *Forging International Agreements: Strengthening Intergovernmental Institutions for Environment and Development* (1992); Szasz, above n 47; Thacher, above n 20; Peter Sand, *Lessons Learned in Global Environmental Governance* (1990).

⁷⁷ See UNEP, *UN Systems-Wide Medium Term Environment Program 1990-1995* (1988).

⁷⁸ UNEP/ENV. Law/2/3 (1991).

⁷⁹ See Birnie in Roberts and Kingsbury, above n 48, 355-62; Szasz, above n 47, 347-51; Thacher, above n 20, 190.

⁸⁰ The Convention to Combat Desertification in the Countries Experiencing Drought and/or Desertification, Particularly in Africa (1994); (1994) 33 ILM 1332.

(Mar del Plata, 1977); New and Renewable Sources of Energy (Nairobi, 1981) and the Third Conference on the Law of the Sea (New York, Geneva 1973-82). The General Assembly Special Sessions on raw materials and development calling for the NIED were also held discretely in this decade. These meetings, which were expensive in terms of time, finance and use of funds, provoked controversy, widened North/South and other political divides and resulted mostly in no more than rhetorical declarations and Plans of Action and other compromises. Though the UNCLOS III concluded by adopting a convention, it did not do so by consensus and the treaty entered into force only on 16 November 1994. This treaty, however, is one of the star achievements of this period. The oceans cover 70% of the globe, over which the UN has now established a comprehensive, integrated legal order, which, though not without its conflict-producing ambiguities, is a major contribution to world peace and security. This whole process can perhaps be said to have contributed directly or indirectly to the conclusion in the 1990s of UN conventions on rivers, desertification and, at UNCED, preservation of biological diversity. Some issues, such as population, still prove too controversial for progress on a global scale. Some minor institutions have also emerged such as the International Fund for Agriculture and Development and the Habitat Secretariat. The impact is difficult to evaluate. All that can be said is that although there was some outcome, it fell far short of the expectations of environmentalists (NGO representatives attended as observers in large numbers), mainly because of the continuing tension between environment and development.

UNEP's activities did succeed to some extent in 'greening' the appropriate specialised agencies, including the financial bodies. The World Bank, under NGO pressure and having received detailed critical reports of its policies, has set up for the first time environmental departments and posts, and allocated more funds for environmental protection and studies.⁸² The regional development banks in Asia and Africa and the Inter-American Bank followed its example, at some cost, as did the wealthier European Bank for Reconstruction and Development. The World Bank took on responsibility for administration of the new, voluntarily-funded Global Environmental Facility (GEF), established in 1991 as a pilot programme pursuant to the recommendations of the WCED. GEF aims to assist developing countries to resolve a limited number of problem areas including reduction of global warming by increasing energy efficiency; protection of international waters by pollution abatement and contingency planning; provision of reception facilities, and clean-up and preservation of unique water bodies (under which a major World Bank/IMO joint initiative (WCIS) is underway to enable implementation of IMO's MARPOL Convention

⁸¹ Convention on the Protection and Use of Transboundary Watercourses and Lakes 1992; (1992) 31 ILM 1312; ILC Draft Articles on the Non-Navigational Areas of International Watercourses, UN DOC A/CN.4/L.492 and Add.1 (1994), are belated outcomes.

⁸² Piddington, above n 43; The World Bank Environment Group, above n 43. For a critical view of past policy see H French, *After the Earth Summit: The Future of Global Environmental Governance* (1992).

in the Wider Caribbean area); preservation of biological diversity by supporting efforts to preserve this and prevent further depletion of ecosystems; and protection of the ozone layer from further depletion by aiding developing countries to transfer from the use of CFCs to substitutes, as required under UNEP's Vienna Convention and Protocol on financial assistance. By 1993 the sums available for these purposes through the GEF added up to the total amount of SDR one billion. Responsibility for its disbursement is shared with UNDP and UNEP. The fact that it is available for only a few purposes, its voluntary basis, the lack of developing-state participation and the limited funds available have all led to criticism. Nonetheless, at a conference attended by over 70 states in 1994 when the pilot programme ended, the GEF was restructured. It will now operate on a three year basis, with funds of US\$750 million contributed by donors, almost three times the original sum.⁸³ The major donors are the USA, Japan, the FRG, France and the UK. Some developing states will now be involved and decisions on allocation will be reached by consensus or, when this is not possible, by a complex 'double majority' voting system, which gives both developed and developing states a veto power. The new arrangements uniquely weld the UN and Bretton Woods financial practices.

The World Bank now regards itself as 'an important catalyst for integrating global environmental concerns into national development goals' through provision of grants and concessional funding through the GEF. However, financing the vast range of environmental measures now required under UNEP, UN and other conventions remains a major impediment to effective implementation of UNEP and UNCED's Action Plans and Agenda 21 respectively. New financial mechanisms are constantly sought. The range of existing and possible future mechanisms has recently been reviewed elsewhere. This reveals that some patterns of funding are now emerging, ranging from standard 'trust funds' to funds compensating states for carrying out certain environmental activities in the global interest, and highly innovative funds assisting states to protect resources that lie within the scope of their national sovereignty, as well as the GEF.⁸⁴ To these must be added the recent innovative proposals for self-financing of protection measures now being proposed. For example, within IMO proposals are under consideration for port inspection and vessel-owner levies, tourist taxes (as mooted also in the Caribbean and Mediterranean) and other forms of the 'user-pays principle' since international funding is decreasing in real terms.

Concern remains, however, at the adverse environmental impact of the further liberalisation of trade by reduction of tariffs and barriers under the updated General Agreement on Tariffs and Trade (GATT), the third element of the Bretton Woods system, and the new NAFTA agreement. This is particularly so following the ruling of the GATT dispute-settlement panel in 1991 that trade

⁸³ For full details see The World Bank Environment Group, above n 43, 132-5.

⁸⁴ Peter Sand, 'Trusts for the Earth: New Financial Mechanisms for International Environment Protection', The Josephine Onoh Memorial Lecture, University of Hull, 21 February 1994.

sanctions aimed at securing environmental benefit, in this case cessation of use of drift nets in the Mexican tuna fishery which incidentally trap dolphins, were illegal under GATT because they were discriminatory.⁸⁵ The effect of trade on the environment has thus become a new area of concern, inside and outside the UN system.

VIII THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT

It is obvious from the above sections that although the term 'sustainable development' had not been put on the UN agenda as such during this period, the problems it encountered were gradually becoming not only increasingly apparent, but more urgent if such complex and difficult emerging problems and measures as those required for global climatic change and preserving of biodiversity were to be resolved and the necessary actions taken by developing as well as developed states, and if the measures required under the now large number of existing conventions and the new ones being called for were to be put into effect. The review of UNEP's progress on its tenth anniversary by a conference held in Nairobi led to a Declaration⁸⁶ expressing dissatisfaction with the progress made by the UNEP at that date to adapt to the new perspectives. It devoted particular attention to the problems of developing countries and their need for more equitable distribution of technical and economic resources, use of appropriate technology and environmentally-sound methods of exploitation.

The situation improved in the next decade as the new strategies pressed in the IUCN's World Conservation Strategy, the UN's Charter for Nature and its Global Perspective to the Year 2000 and Beyond, all of which embrace the idea that use of the environment and its resources should be sustainable, began to make some impact within the UN. Treaties and 'soft law' instruments inside and outside the UN introduced new concepts of 'common concern', 'the precautionary principle', 'intergenerational rights' and others. The WCED report brought these ideas together in the concept of sustainable development but the process was already underway. What was needed was a focal philosophy around which the environmental and developmental programmes of the UN and other bodies could be integrated, coupled with a blue-print of the kind of measures needed to progress this synthesis. UNCED provided these.

During an elaborate two year preparatory process, the required agenda was negotiated as well as the text of a declaration to be put before the UNCED which is to be convened by the General Assembly 20 years after the UNCHE in Rio.⁸⁷ The UNCED agenda for the so-called 'Earth Summit' was laid down in

⁸⁵ GATT Panel Report on US Restrictions on Imports of Tuna (1991); 30 ILM 1598-623.

⁸⁶ Nairobi Declaration on the State of the World Wide Environment, adopted 19 May 1982 by UNEP Governing Council, Tenth Session, held in Nairobi 20 May - 2 June 1982; UNEP Doc UNEP/GC 10/Inf 5 of 19 May 1982; 21 ILM 676-8.

⁸⁷ For the key UNCED documents and commentary see S Johnson (ed), *The Earth Summit* (1993); see also N Robinson, *Agenda 21, Earth's Action Plan Annotated* (1993); for discussion and analysis of UNCED see Peter Sand, 'International Law on the Agenda of the UN Conference on Environment

various General Assembly Resolutions. A number of instruments were adopted after intensive negotiations during which considerable opposition was expressed by both developed and developing states to the formulation of the Rio Declaration. Many environmentalists had hoped the result would be a binding Earth Charter based on a convention, and not a 'soft law' instrument. Developing states held out successfully for inclusion of language recognising the principle of 'the common but differentiated responsibilities' of states for environmental protection in both the Rio Declaration and the Conventions on Climate Change and Biodiversity, and for some practical financial and technological manifestation of the higher responsibility on the part of developed states.

The Conference adopted several significant instruments, the most important being those discussed below.

1 *The Rio Declaration on Environment and Development*

This Declaration is comprised of 27 principles — expressed in general terms, open to various interpretations in their practical application, and carefully balanced to acknowledge the priorities of both developed and developing states — governing the behaviour of individuals concerning sustainable development. Principle 1 recognises that 'human beings are at the centre of concerns for sustainable development' and are 'entitled' to 'a healthy and productive life in harmony with nature'. Principle 2 revamps Principle 21 of the UNCHE Declaration. It provides that states have, under the UN Charter and within international law, 'the sovereign right' 'to exploit their own resources pursuant to their own environmental' and also their own 'developmental policies'. Although their responsibility to ensure that they do not damage international areas or other states' environments is retained, some commentators have expressed the fear that according equal value to developmental and environmental rights could undermine the steady improvement in the UN's protection of the environment.

The concept of meeting both the developmental and environmental needs of future generations is introduced in Principle 3, with environmental protection being required to constitute an integral but severable part of the development process in achieving sustainable development. However, a requirement that the needs of developing states must be given priority (Principle 6) may undermine this. A key new principle, the implications of which will have to be worked out in state practice and further agreements, is Principle 7 which lays down that states must co-operate 'in a spirit of global partnership'. However, Principle 7

and Development' (1992) 3 *Colorado Journal of Developmental and Environmental Law and Policy* 1; Peter Sand, 'UNCED and the Development of International Environmental Law' (1992) 3 *Yearbook of International Environment Law* 465; G Handl, 'Environmental Security and Global Change: The Challenges to International Law' (1990) 1 *Yearbook of International Environment Law*, 3; M Pallamaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' in Peter Sands (ed), *Greening International Law*, 1-19; A Adede, 'International Environment Law from Stockholm to Rio - An Overview of Past Lessons and Future Challenges' (1992) 22 *Environmental Policy and Law* 88; M Jahnke, 'UNCED - Rio Conference on Environment and Development' (1992) 22 *Environmental Policy and Law* 204; various authors (1993) 4 *Colorado Journal of Developmental and Environmental Law and Policy* 1-215.

also adds a novel provision that in view of their different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures that these societies place on the global environment and of the technological and financial resources they command. However it will be observed that there is no specific content to this commitment, though Principle 11 suggests that different environmental standards might be appropriate and Principle 8 suggests that to achieve sustainable development states 'should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies'.

Principle 15 is another key principle requiring that 'the precautionary *approach* shall be widely applied by States' (emphasis added) but adding 'according to their capabilities'. This reflects emerging state practice in the UN and other treaties and declarations. Principle 15 in effect 'defines' this approach as requiring at the global level that 'where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. Practical interpretation of this 'approach' is creating difficulties in pollution control and fisheries commissions since it is not clear when and where the lines are to be drawn and some go so far as to presume that the burden of proof that there is no threat of damage lies with the state undertaking the activity, not those opposing it, who would have to establish that the activity is likely to or may cause harm.⁸⁸ Principle 17 requires environmental impact assessment, but 'as a national, not international instrument' and only of proposed activities that are likely to have 'a *significant* adverse impact and are subject to a decision of a competent national authority' (emphasis added). The Declaration provides more scope for further debate and legislation than it adds to the clarity of emerging concepts. However, it does offer the possibility of striking a new balance to bridge the gaps between North and South. At this stage its impact cannot be assessed. A 'wait and see' policy has to be adopted. The same applies to the other Rio instruments. Much depends on the willingness of member states and the UN and states parties to the relevant treaties to implement and interpret their obligations in a way that makes the goals of sustainable development effective.

2 Agenda 21

This programme, set out in 40 chapters, covers over 100 issue areas ranging from alleviation of poverty to strengthening national and international societies'

⁸⁸ There is opposition to the precautionary principle from some scientists who consider that it does not allow effective and efficient use to be made of the earth's capacity to assimilate waste, for example, in the case of the moratorium on dumping low-level radioactive waste into the sea under the London (Dumping) Convention 1972, administered by IMO; see also K Bishop and H Hultberg, 'Ignorance, the Precautionary Principle and Subsidiarity' (1995) 24(2) *AMBIO* 92, 97, who point out that 'it is not a policy panacea ... there will never be unequivocal answers', it is 'more political than scientific'.

ability to protect the atmosphere, oceans and other waters, mountains and areas vulnerable to desertification (Chapter 12). The programme has led to conclusion of the Desertification Convention,⁸⁹ and Chapter 17 has already been influential in bringing about the first moves towards providing an integrated strategy for managing the oceans, regional seas and enclosed seas. It calls for implementation of the international law as reflected in the 1982 LOS Convention and, in particular, for a UN conference, which is now in session, to resolve the problems arising from the provisions on straddling stocks and highly migratory species, overfishing of which by foreign flag vessels is undermining some existing fisheries conservation treaties. Chapter 11 on deforestation has also facilitated conclusion of an International Tropical Timber Agreement.⁹⁰

Unlike the situation under the Stockholm Action Plan, however, there is no one body which is specifically allocated the task of executing it. Various UN specialised agencies, which are specifically referred to as appropriate throughout the text, are expected to act upon it, fleshing out its simple framework approach. Agenda 21 does, however, include a financial chapter (Chapter 33) requiring developed states to reach a target for development aid of 0.1 percent of their gross national product by the year 2000. Though several of the Heads of Developed States attending UNCED made oral commitments to provide funds amounting to US\$7 billion per annum, it has been reported that several are already defaulting on this undertaking or postponing it. Agenda 21 was expected to need US\$12.5 billion to implement it. It also refers to the provision of 'Earth Increments' to bolster the International Development Association's funds, and calls for GEF reforms (which have now been partially executed, as indicated) to broaden its base *vis-à-vis* developing states. Prospects for raising the necessary financial assistance from developed states seem poor at present, but the requirements of Agenda 21 will continued to be pressed by NGOs and agencies.

What was left out of Agenda 21 was especially significant, however, and is illustrative of the continuous difficulties facing the UN system. These abandoned items included such contentious issues as population, reduction of chemical pollutants, export of hazardous wastes and the role of the military. But the Agenda does draw attention to the need to deal with 'cross-cutting' issues, recognising the inter-connections between economic, environmental, poverty and developmental issues, tries to integrate them, and greatly encourages the roles of NGOs, women and indigenous peoples and promotes respect for their rights.

⁸⁹ United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (17 June 1994); (1994) 33 ILM 1328; see articles in (1994) 6 *Our Planet: The United Nations Environment Program Magazine for Sustainable Development (UNEP)* 1-15, esp A Henrati, 'Taking Effective Action' 5-7 and B Kjellen, 'A New Departure?' 8-9.

⁹⁰ (1994) 33 ILM 1016-42; for discussion see H M Schally, 'Forests: Towards an International Legal Regime' (1993) 6 *Yearbook of International Environment Law* 4, 30-50.

3 *Forest Principles*⁹¹

It had been hoped that UNCED would adopt a convention on deforestation but certain developing states were opposed to this since forests are always found within areas of national sovereignty. Instead a somewhat weakly-expressed and curiously-entitled set of 'Non-legally Binding Forest Principles for a Global Convention on the Management and Conservation and Sustainable Development of All Types of Forests' was adopted.

4 *The Framework Convention on Climate Change*⁹²

This originated in initiatives and drafts produced by UNEP and IUCN. Efforts to secure a General Assembly Resolution declaring the climate to be the 'common heritage of mankind', like the deep seabed, failed. The General Assembly instead recognised it as 'the common concern of mankind'⁹³ and took over the negotiating process from UNEP. The new concept has proved a surprisingly useful one which has been respected and repeated in the Framework Convention on Climate Change. The Convention disappointed many in that it did not set targets for reduction of carbon dioxide and other gases (although some oral commitments were made and some 'unjustifiable' limitation of free trade resulted from measures taken). The Preamble recognises that developed countries bear the major responsibility for reducing emissions and also recognises the concerns of states vulnerable to sea-level rise. However, the Convention merely recommends provision of financial assistance and technology transfer without setting specific requirements for how this is to be provided. Some states present, on signing the Convention, made declarations reserving any right of the parties to decide the amount, nature, frequency and size of the financial contributions to be made to the financial mechanism established to aid developing states parties. The vague terms in which it is drafted enabled 153 states to sign the Convention at Rio, but Protocols filling in the specifics will now need to be negotiated by its parties through the UN (as for the Ozone (UNEP) and Long Range Transboundary Air Pollution (ELE) treaties).

⁹¹ United Nations Conference on Environment and Development: Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests; (1992) 31 ILM 881.

⁹² (1992) 31 ILM 849; see Sebastian Oberthur, 'Climate Change Convention: Preparation for the First Conference of the Parties' (1994) 24 *Environmental Policy and Law* 299, who suggests that differences among the Parties will continue.

⁹³ GA Res 43, UN GAOR (70th plen mtg), UN Doc A/Res/53 (1988). For a full history of the Convention including the negotiating system established by the General Assembly, see Churchill and Freestone, above n 29.

5 *Convention on Biological Diversity*⁹⁴

Although the Convention's provisions are subject to numerous vague qualifications such as 'as far as possible and appropriate' and no definite measures are laid down, it does require its parties to take several important actions. For example, the parties are required to develop national plans for sustainable use of biodiversity; make inventories of its components; develop *in situ* mechanisms for its conservation in and outside protected areas and establish complementary mechanisms *ex situ*; restore degraded ecosystems and endangered species; regulate releases of genetically modified organisms; preserve indigenous and local management systems and equitably share benefits with local communities. But a negative view can be taken if the confused provisions on intellectual property rights and the use of the limited GEF as the funding mechanisms are emphasised, as well as the failure to tackle such key issues as land reform, the role of local communities and the debt aspects. The First Meeting of the Conference of the Parties has now taken place in Nassau in November/December 1994, but it is unclear to what extent parties will proceed to remedy these weaknesses, spurred on by the UN. Once again assessment of its impact will have to be delayed.

6 *The Commission on Sustainable Development (CSD)*

As we have seen, the perceived weakness of the UN has been the duplication of effort in the sectorally organised, unsystematic array of UN 'in-house' bodies, specialised agencies and other entities. If 'sustainable development' is even to be aimed at, still less achieved, these weaknesses need to be remedied, but a body with more clout than the ACC and its support bodies (DOEM and CIDIE) will surely be required. However, UNCED rejected proposals for strengthening UNEP by re-instituting its Co-ordination Board (though the UN may yet do so), establishing a strong supervisory Intergovernmental Standing Committee, or adapting the roles of the Security Council or Trusteeship Council (which would be very difficult to do as it would involve amending the Charter). Instead, the UN established the CSD which now reports to ECOSOC, which then had almost 200 bodies reporting to it.⁹⁵ It is unclear how successful the UN Secretary-General's endeavours to remedy this in his 'initiative' will be. The CSD consists of representatives of 53 states elected by ECOSOC for three year terms. NGOs had hoped for some role on this but had to rest content with the setting up of a High Level Advisory Board of eminent experts on environment and

⁹⁴ (1993) 31 ILM 818, for analysis see Alan Boyle, 'The Convention on Biological Diversity' in Luigi Campigle *et al* (eds), *The Environment after Rio: International Law and Economics* (1994), 114ff; F Burhenne-Guilmin and S Casey-Lefkowitz, 'The Convention on Biological Diversity: A Hard Won Global Achievement' (1992) 4 *Yearbook of International Environment Law* 3, 42-59; M Bowman and C Redgwell (eds) *International Law and Biodiversity* (forthcoming, 1995) *passim*. For the outcome of the First Meeting of the Conference of the Parties to the Rio Convention see 'First Meeting of the Conference of the Parties to the Rio Convention' (1995) 25 *Environmental Policy and Law* 38. UNEP is reported to have prepared well. It is providing the Secretariat for this and the Climate Change Convention. Some progress was made on organisational issues. A Bahamas Declaration on the Convention on Biological Diversity was adopted.

⁹⁵ GA Res 191, 47 UNGAOR (70th plen mtg) (1992), above n 44.

development to advise the Secretary-General and through him the CSD, ECOSOC and the General Assembly. The Advisory Board consists of experts drawn from all sections of society, particularly NGOs and industry.

The CSD now meets annually for two to three weeks and had its first substantive session in June 1993.⁹⁶ It is served by a discrete secretariat which also serves the new Inter-Agency Committee on Sustainable Development, which itself co-ordinates the work of the various involved UN agencies. This is funded, as far as possible, under the General Assembly's mandate, from the UN budget. The General Assembly laid upon the CSD the following tasks: to monitor the progress of the implementation of Agenda 21, and the other UNCED instruments; to review the financial and other provisions; to enhance the dialogue between the UN, NGOs and other outside bodies; and to consider information on sustainable development put forward in annual reports by governments and other documents. CSD is to adopt 'a multi-year thematic' work programme, indicating what will be discussed and when. Chapter 17 (Oceans) will be reviewed in 1996. The vastness of that task alone suggests that the review will not be particularly thorough or wide-ranging or have serious input, but we must again agree to wait and see. Issues expected to be discussed will include financial resources and transfer of technology; implementation of Agenda 21 at all levels in an integrated manner and the convening in 1997 of a high-level meeting with ministerial involvement to deliberate upon an integrated overview of Agenda 21's implementation; to consider energy policy issues; and, finally, to try to stimulate the political impetus required to promote progress on the UNCED instruments.

As the CSD has no direct route to the General Assembly or Security Council, its progress is likely to be slow, and it will not have a strong co-ordinating role within the UN. Much will depend on whether it uses the information with which it will undoubtedly be supplied by NGOs and others, to improve implementation of environmental instruments, as happened in the UN Human Rights Commission. Governments can inform the CSD of the problems they encounter in relation to Agenda 21. Although UNCED did act to strengthen the ACC under the Secretary-General's leadership it left it to states to decide on the precise way to further support the ACC and the Inter-Agency Commission.

A major unresolved problem is that UNCED left unchanged the separate and independent status of UNDP and UNEP (UNCTAD had already been reformed) and the specialised agencies. CSD can do little about the problems this creates.

IX CONCLUSIONS

Fifty is not regarded a very great age today and it is certainly a short space of time in the broader historical context. It is true that the UN has not fulfilled in

⁹⁶ For an account of this and its Second Meeting by Nitin Desai, Under-Secretary-General for Policy Co-ordination and Sustainable Development, and by Klaus Topfer, then-Chairman of the CSD; see (1995) 25 *Environmental Policy and Law* 9-10. After a slow start at the First Meeting, progress on establishing priority issues and relevant committees was made at the Second Meeting.

the field of environment and development the high hopes placed on it by environmentalists. However, given that its Charter was designed to deal with many far-different problems and purposes than those which it has to handle today, and that the Charter makes no mention of any UN role in protecting the environment, it is remarkable how far the UN has progressed towards not only doing this but also in at least endeavouring to create awareness of the need to integrate its environmental and developmental programmes to achieve the goal of sustainable development.

Although its critics draw attention to its faults and factions, it in fact has many things to offer a world as diverse as the one in which it now lives. As Hurrell and Kingsbury have pointed out, 'it would be wrong to assume that the universal rhetoric of ecological interdependency translates readily into effective international action.' There are still too many post-colonial problems acting as a wedge between North and South and above all else, the UN is a political organisation in which the wide-ranging views of its diverse members can be voiced. This is at one and the same time a vice and a virtue — a vice because too often there is more talk than action, a virtue because the UN now provides the world with a large, perhaps too large, variety of organs and fora in which the views of all regions and cultures can be represented. The UN is the only central organisation that can act on their behalf. Its record in building into its fora the consensus necessary to promote sustainable development in a polarised world, through convening of conferences and drafting of texts, is remarkable as this paper has demonstrated.

However, its future challenges will be different. There is less need for treaties, although an all-embracing framework International Covenant on Environment and Development is now being contemplated. The concepts of 'sovereignty' and 'territory' endure but are being steadily eroded by the developments outlined in this article. It remains to be seen whether in the 21st century the learning process of the UN and its member states will enable it to improve its co-ordination of its agencies *inter se* and of its own relationship to the bodies outside that are engaged in common aims. Will it be able to face the administrative and funding problems involved in achieving sustainable development? Will it be able to improve its present low role in overseeing compliance with its resolutions, action programmes and treaties? Will it be able to promote the challenging new concepts of 'common concern', 'common but differentiated responsibility', 'the precautionary principle', 'future generational rights' and 'the human right to a healthy environment'? The challenges are there. Will 'all the peoples of the world' encourage and enable it to try to resolve these problems or will most share the views of a UK Prime Minister who once said 'It is exciting to have a real crisis on your hands when you have spent half your political life dealing with humdrum issues like the environment.'⁹⁷

⁹⁷ Margaret Thatcher, Speech to Scottish Conservative Party Conference, 14 May 1982 (referring to the Falklands campaign, 1982), cited in Hugo Young *One of Us* (1990) ch 13, reproduced in A Partington (ed), *The Oxford Dictionary of Quotations* (4th ed, 1992) 691.