

‘Sustainable Development’ – Mere Rhetoric or Realistic Objective?

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Abstract

The year 2012 will mark a significant anniversary for international environmental law — 10 years post the World Summit on Sustainable Development, 20 years after the *Rio Declaration on Environment and Development*, 25 since the *Brundtland Report* and 40 following the *Stockholm Declaration*. It would seem timely to reconsider whether governments are taking effective action on sustainable development, particularly given the continuing degradation of the Earth’s environment. Arguably, further reforms are necessary, including major changes to the Commission on Sustainable Development and to global environmental governance, in order to achieve sustainable development. Otherwise, it may be possible that future generations will regard the present efforts of the international community to take action on sustainable development as mere rhetoric rather than a commitment to achieve a realistic objective.

I INTRODUCTION

In spite of the persistent efforts of the international community to draw attention to the concept of sustainable development, human activities have resulted in the deterioration of ecosystems and a reduction in natural resources. The Millennium Ecosystem Assessment report states as follows:

- Over the past 50 years, humans have changed ecosystems more rapidly and extensively than in any comparable period of time in human history, largely to meet rapidly growing demands for food, fresh water, timber, fibre, and fuel. This has resulted in a substantial and largely irreversible loss in the diversity of life on Earth.¹

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¹ Millennium Ecosystem Assessment, *Ecosystems and Human Wellbeing: General Synthesis* (Island Press, 2005) 1 ‘Four Main Findings’. The other three main findings were as follows:

- The changes that have been made to ecosystems have contributed to substantial net gains in human well-being and economic development, but these gains have been achieved at growing costs in the form of the degradation of many ecosystem services, increased risks of nonlinear changes, and the exacerbation of poverty for

As a consequence of the findings in the Millennium Ecosystem Assessment report, it is likely that the interests of future generations will be impacted by serious environmental degradation. Clearly, the international community should take more effective action to achieve progress towards the objectives of sustainable development. The problem is that there are continuing pressures on natural resources, and inadequate measures for the implementation of sustainable development. Some uncertainty persists about what action is required for the protection of natural resources and how sustainable development operates in this context. If a treaty or convention specifically covers the resource in question and a monitoring body (such as a secretariat or an administrative body) is established under the treaty there is likely to be more protection for that natural resource. At the present time, even though there is some doubt about whether sustainable development could form a legal obligation, Birnie, Boyle and Redgwell point out that sustainable development

does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the practice of states and international organizations, and may lead to significant changes and development in the existing law. In that very important sense, international law does appear to require states and international bodies to take account of the objective of sustainable development, and to employ appropriate processes for doing so.²

The World Commission on Environment and Development (WCED) in their report *Our Common Future (Brundtland Report)* considered how to manage environmental resources to ensure that humans can sustain present and future generations. The often quoted definition of sustainable development adopted by the WCED in *Our Common Future* is as follows:

some groups of people. These problems, unless addressed, will substantially diminish the benefits that future generations obtain from ecosystems.

- The degradation of ecosystem services could grow significantly worse during the first half of this century and is a barrier to achieving the Millennium Development Goals.
- The challenge of reversing the degradation of ecosystems while meeting increasing demands for their services can be partially met under some scenarios that the Millennium Ecosystem Assessment has considered, but these involve significant changes in policies, institutions, and practices that are not currently under way. Many options exist to conserve or enhance specific ecosystem services in ways that reduce negative trade-offs or that provide positive synergies with other ecosystem services.

² Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009) 127. See Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law Principles, Practices and Prospects* (Oxford University Press, 2004) 45 'Sustainable development has been accepted as a global policy'.

Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future. Far from requiring the cessation of economic growth, it recognizes that the problems of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits.

[Sustainable development] contains within it two key concepts:

1. The concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
2. The idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.³

The *Brundtland Report* indicates the significance of linking economic and ecological factors in environmental decision making.⁴ This report also noted the intragenerational and intergenerational aspect of sustainable development where present and future generations have a right to an adequate environment. According to this report:

The concept of sustainable development does imply limits — not absolute limits but limitations imposed upon the present state of technology and social organisation on environmental resources and by the ability of the biosphere to absorb the effects of human activities.⁵

The effect of the operation of sustainable development is that it may place restrictions on economic growth.⁶ A distinction which can be made is that between sustainable growth and sustainable development. 'Growth' is quantitative and refers to the physical expansion of the economic system, whereas 'development' is qualitative and refers to the improvement or deterioration of an economic system which exists in a state of balance with its environment.⁷ This problem of the confusion of development with economic growth, has led to the preference that the term 'sustainability' be used instead of 'sustainable development'.⁸ However

³ World Commission on Environment and Development, *Our Common Future* (Oxford University Press, Australian ed, 1987) 43 (*Brundtland Report*).

⁴ *Brundtland Report*, above n 3, 62.

⁵ *Ibid* 8.

⁶ Robert Goodland and Herman Daly, 'Environmental Sustainability: Universal and Non-negotiable, Ecological Applications' in David Hunter, James Salzman and Durwood Zaelke (eds) *International Environmental Law and Policy* (Foundation Press, 2nd ed, 2002) 154, 155.

⁷ See Robert Goodland, 'The Case that the World has Reached Limits: More Precisely that Current Throughput Growth in the Global Economy Cannot be Sustained' in Robert Goodland et al (eds), *Environmentally Sustainable Development: Building on Brundtland* (UNESCO, 1991) 16: 'It seems unlikely that the world can sustain a doubling of the economy, let alone Brundtland's five- to ten-fold increase. Throughput growth is not the way to reach sustainability; we cannot "grow" our way into sustainability.'

⁸ Ben Boer, 'Implementing Sustainability' (1992) 14 *Delhi Law Review* 1,1.

the latter term continues to be adopted in national and international documents, and so must be considered in the light of these agreements. Clearly the retention of a system of economics based upon continued growth is unrealistic given limitations for life provided for by the planet. Rather, the aim of sustainable development is to ensure that the action concerned can continue forever⁹ and in order to do this the ecological balance of the environment must be taken into account.

If nature is not part of economics when there is already evidence of environmental destruction such as the ozone hole, the greenhouse effect, loss of biological diversity and overpopulation of humans then it may be too late for this destruction to be prevented.¹⁰ The integration of economics and the environment requires a departure from the traditional economics discipline because it fails to take into account natural systems and the economies which depend upon them.¹¹

'Sustainable development' has been discussed in the *Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo Case)* where the majority in the International Court of Justice (ICJ) accepted 'sustainable development' as a concept of international law.¹² The court considered that sustainable development should balance development with environmental concerns.¹³ This concept also encompasses a concern for social equity, both intragenerational equity and intergenerational equity.

There is some evidence of increasing significance of the sustainability of resources in environmental conventions. For example, the following definition of 'sustainable use' in the *United Nations Convention on Biological Diversity*¹⁴ (*Biological Diversity Convention*):

'Sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations .

⁹ The World Conservation Union (IUCN), World Wildlife Fund for Nature (WWF), United Nations Environment Program (UNEP), *Caring for the Earth: A Strategy for Sustainable Living* (IUCN, WWF, UNEP, 1991) 10.

¹⁰ See Robert Goodland, above n 6, 9–15.

¹¹ See R Costanza, 'The Ecological Economics of Sustainability' in Robert Goodland et al (eds), *Environmentally Sustainable Development: Building on Brundtland* (UNESCO, 1991) 83: 'To achieve sustainability we must develop an *ecological economics* that goes well beyond the conventional disciplines of ecology and economics to a truly integrative synthesis'.

¹² *Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment)* [1993] ICJ Rep 1997 [140].

¹³ *Ibid*; see also *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 2010 [75]–[76].

¹⁴ *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

Sustainable use also forms part of the objective set out in Article 1 of this Convention as set out below:

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components.

The aim of this Convention is to protect and conserve biological diversity, and to change the direction of progress, so that future development no longer occurs without taking into account the consequences for the health of the environment. Rather, sustainable development operates to protect and preserve environmental resources for present and future generations.¹⁵

Sustainable development is integral to the purpose¹⁶ and implementation¹⁷ of the *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific*, and the definition of sustainable development in this Convention includes the whole ecological balance of the region as well as protection of the interests of present and future generations.¹⁸ This concept also forms part of the main objective of the *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification (Desertification Convention)* in Article 2(1):

The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with *Agenda*

¹⁵ See M C W Pinto, 'Reflections on the Term Sustainable Development and its Institutional Implications' in Konrad Ginther, Eric Denters and Paul de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff, 1995) 72, 73.

¹⁶ *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific*, opened for signature 18 February 2002, TRE 001350, art 1.

¹⁷ *Ibid* art 10.

¹⁸ *Ibid* art 3(1)(a):

'Sustainable development' means the process of progressive change in the quality of life of human beings, which places it as the centre and primordial subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and the full participation of people in peaceful coexistence and in harmony with nature, without prejudice to and ensuring the quality of life of future generations.

21, with a view to contributing to the achievement of sustainable development in affected areas.¹⁹

The concept of sustainable development has continued to evolve. In 2002, the World Summit on Sustainable Development (WSSD) in Johannesburg led to the negotiation of the *Declaration on Sustainable Development* on 4 September 2002 and the *Plan of Implementation (POI)*.²⁰ At this time, the WSSD recognised that social development should form the third component of sustainable development:

These efforts will also promote the integration of the three components of sustainable development — economic development, social development and environmental protection — as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development.²¹

The needs of the poor were considered significant in the *Brundtland Report* and the WSSD extended the concept of sustainable development to include the objective of eradicating poverty and to maintaining human rights,²² including the rights to health, clean water and food.²³ The *Plan of Implementation* also included globalization, poverty and unsustainable production and consumption patterns in some of the early chapters concerning the implementation of sustainable development.²⁴

Unfortunately, as Pallemmaerts has pointed out, occasionally sustainable development has been defined in a way that permits development to continue as usual and this approach has resulted in confusion.²⁵ In fact, the focus should be on sustaining the environment and maintaining natural resources for present and future generations,²⁶ as essential requirements for sustainable development to be achieved so that humans

¹⁹ *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

²⁰ *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

²¹ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [2] (WSSD POI).

²² Cordonier Segger and Khalfan, above n 2, 29.

²³ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [102].

²⁴ *Ibid* chapters II, III, V.

²⁵ See M Pallemmaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future?' in Philippe Sands (ed), *Greening International Law* (Earthscan Publications, 1993) 1, 14. Pallemmaerts refers to the expression sustainable development being used interchangeably with 'sustainable growth'.

²⁶ Pinto, above n 15, 75.

may continue to live within the carrying capacity of the earth's environment.²⁷

Human beings need to change their behaviour in order to achieve sustainable development and this requires a change in ethics. It is possible that the concept of sustainable development may evolve further in the future to incorporate an ethical and holistic perspective, and this may require a reconsideration of the relationship between human beings and nature.²⁸ WSSD *POI* also indicates the significance of ethics in the implementation of sustainable development:

We acknowledge the importance of ethics for sustainable development and, therefore, emphasize the need to consider ethics in the implementation of *Agenda 21*.²⁹

Some of the changes in behaviour necessary to implement sustainable development could include moves to eradicate poverty,³⁰ manage natural resources sustainably,³¹ adopt sustainable consumption and production patterns,³² and investment in cleaner production³³ in energy-efficiency and renewable energy.³⁴

There are two aspects of sustainable development. First, the procedural aspect or the consideration of how sustainable development may apply to a particular development, and secondly, the substantive element that extends to the implementation of sustainable development objectives. Environmental impact assessments, and the right to public participation in environmental decision-making, are examples of the procedural elements of sustainable development. Substantive elements include the sustainable use of natural resources and the equitable allocation of resources between and among different generations.³⁵ To date, there has been a large amount of focus on the procedural elements rather than on the substantive elements of sustainable development. Dernbach raises the question whether the emphasis on sustainable development is merely rhetoric, or

²⁷ Michael Jeffrey, 'Environmental Imperatives in a Globalised World: The Ecological Impact of Liberalising Trade' (2007) 7 *Macquarie Law Journal* 25, 26: 'The unabated escalation in global environmental problems will significantly affect the quality of life led by human society as the increasing desolation of our natural world through unsustainable human activities threatens to surpass the ecological limits of our biosphere.'

²⁸ See Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (RSVP Publisher, 1995) 160. Bosselmann discusses the ecocentric environmental ethic.

²⁹ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [6].

³⁰ *Ibid* [7]–[13].

³¹ *Ibid* [24].

³² *Ibid* [14]–[23].

³³ *Ibid* [16].

³⁴ *Ibid* [20(b)]–[20(c)].

³⁵ Birnie, Boyle and Redgwell, above n 2, 116.

whether actions to implement sustainable development do in fact protect the environment.³⁶ Arguably, future action by the international community should focus on the achievement of the implementation of sustainable development.

Part II of this article commences with an overview of international law and management of natural resources. This is followed by a discussion about the use by states of environmental impact assessments (EIA) and other related impact assessment procedures. Even though EIAs have been adopted by many states, and the procedure can now be regarded now part of customary international law, widespread environmental degradation continues to occur. As a result, the final part of this article discusses whether changes to the operation of the Commission on Sustainable Development (CSD), and environmental governance reform, could lead to more effective implementation of sustainable development by states.

II INTERNATIONAL LAW AND NATURAL RESOURCES

In international law, the regulation of natural resources depended upon whether the resources were located within the jurisdiction of a particular state, or whether they were shared resources (or a common resource) held for the benefit of all states.³⁷ This position may now be further qualified by the duty of states to ensure the sustainable use of natural resources. There is, at present, no binding legal agreement to set out the environmental rights and obligations of states specifically for sustainable development.³⁸ However, there are a number of international agreements that are 'soft law'³⁹ and together with evidence of state practice these agreements indicate how the principles of international environmental law and sustainable development operate.

There are also a number of diverse treaties and conventions that fall within areas covered by sustainable development. These include treaties

³⁶ John Dernbach, 'Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development' (2002) (27) *William and Mary Environmental Law and Policy Review* 79, 79. 'A nagging question is the extent to which sustainable development actually, as opposed to rhetorically, protects the environment.'

³⁷ Birnie, Boyle and Redgwell, above n 2, 190.

³⁸ Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003) 234.

³⁹ See, eg, *World Charter for Nature*, GA Res 37/7, UN GAOR, Plenary, 37th sess, 48th mtg, Agenda Item 21, UN Doc A/RES/37/7 (28 October 1982); *Agenda 21: Programme of Action for Sustainable Development* (United Nations Publication, 1992); *Programme for the Further Implementation of Agenda 21*, GA Res S/19-2, UN GAOR, Plenary, 19th special sess, 11th mtg, Agenda Item 8, UN Doc A/RES/S-19/2 (19 September 1997) Annex 1; *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1 ('*Rio Declaration*'); United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

covering the environmental protection of natural resources, prevention of desertification and control of hazardous wastes, treaties concerning social protection including the protection of social and cultural rights, and those covering labour organisations as well as others governing trade and agriculture.⁴⁰ Those treaties specifically dealing with natural resources are also numerous, and include those that cover climate, biological diversity, water and fishing stocks for example the *Biological Diversity Convention*,⁴¹ *United Nations Framework Convention on Climate Change (UNFCCC)*⁴² and the *Desertification Convention*.⁴³ Generally, there is some consensus amongst states that natural resources should be managed in accordance with the concept of sustainable development. However there is a lack of agreement amongst states about what the definition of sustainable development is, and how it will apply to specific circumstances.⁴⁴ So it remains unclear whether states have a general obligation to conserve and sustainably use natural resources.⁴⁵ It is only in the circumstances where states have negotiated specific treaty agreements concerning natural resources, such as fisheries or water resources, that the concept of sustainable use may be applied to determine whether the natural resource exploitation is permitted.⁴⁶

The WSSD acknowledged the commitments to sustainable development in the *Declaration of the United Nations Conference on Environment and Development (Rio Declaration)*,⁴⁷ the full implementation of *Agenda 21*⁴⁸ and the *Programme for the Further Implementation of Agenda 21*.⁴⁹ At the WSSD, the *POI*⁵⁰ reaffirmed and extended these commitments.

⁴⁰ See Cordonier Segger and Khalfan, above n 2, 32–3.

⁴¹ *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

⁴² *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁴³ *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification*, opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

⁴⁴ Birnie, Boyle and Redgwell, above n 2, 125. 'It is clear, given the breadth of international endorsement for the concept, few states would quarrel with the proposition that development should in principle be sustainable and that all natural resources should be managed in this way. What is lacking is any comparable consensus on the meaning of sustainable development, or on how to give it concrete effect in individual cases.'

⁴⁵ Ibid 199.

⁴⁶ Ibid 201.

⁴⁷ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1.

⁴⁸ *Agenda 21*, above n 39.

⁴⁹ *Programme for the Further Implementation of Agenda 21*, GA Res S/19-2, UN GAOR, Plenary, 19th special sess, 11th mtg, Agenda Item 8, UN Doc A/RES/S-19/2 (19 September 1997) Annex 1.

⁵⁰ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

However, these key sustainable development agreements are 'soft law' and are not legally binding.⁵¹ In *Agenda 21*, the responsibility for action extends beyond states to include all sectors such as governments at all levels, intergovernmental organisations, indigenous peoples, non-governmental organisations and other groups including business and scientific communities. These groups should develop strategies to conserve biological diversity and to ensure the sustainable use of biological resources.

The international community is relying upon the goodwill of participating states to achieve the objectives in the sustainable development agreements. It is possible that these agreements could be considered to be merely a form of 'rhetorical commitment'⁵² and if this is the case, the goals in these agreements will never be achieved. On the other hand, there is also potential for these agreements to be further developed so that they lead to the emergence of treaties or protocols,⁵³ or customary international law on sustainable development that may impose obligations on states to conserve natural resources.

The interests of future generations are not often referred to in *Agenda 21*. Instead, the focus is on indicating the current action on environmental problems that can be taken to achieve sustainable development where these actions are undertaken for the benefit of future generations.⁵⁴ However, *Agenda 21* is to be carried out 'in full respect of all of the principles contained in the *Rio Declaration*'⁵⁵ and the need to take into account the interests of future generations is referred to in this agreement.⁵⁶ In fact, the significance of future generations, from the point of view of equity and wise stewardship of resources, was acknowledged in a separate opinion by Judge Weeramantry in *Maritime Delimitation in the Area Between Greenland and Jan Mayen* in the context of the law of the sea.⁵⁷

⁵¹ See Cordonier Segger and Khalfan, above n 2, 4–35.

⁵² Dernbach, above n 36, 134.

⁵³ *Ibid.*

⁵⁴ See Edith Brown Weiss, 'Environmental Equity and International Law' in Sun Lin and Lai Kurukulasuriya (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP, 1995) 7, 16–17.

⁵⁵ *Agenda 21*, above n 39, preamble.

⁵⁶ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1. Principle 3 states: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'

⁵⁷ *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway) (Judgment)* [1993] ICJ Rep 38, 274 (Judge Weeramantry):

A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends inter-

As the present generation should manage natural resources for the benefit of future generations, the precautionary approach should be adopted in order to ensure the sustainable use of natural resources. According to the precautionary principle, measures must be taken to ensure that action is prevented from causing harm to the environment even if there is a lack of full scientific certainty about the effects of the activities in question.⁵⁸ For example the *Rio Declaration* Principle 15 states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁵⁹

The precautionary principle encourages the adoption of prevention measures in the face of serious environmental damage, however the extent to which this principle must be applied by all states remains questionable.⁶⁰ Generally, states should respect the precautionary principle as it now is found in a large number of multilateral environmental agreements. In addition, states should appreciate the requirement to take measures to prevent harm to the environments of other states and to the area of the global commons. According to the *Rio Declaration* Principle 2:

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 and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁶¹

The first part of this principle refers to the traditional recognition of the sovereign right of a state to exploit resources within jurisdiction. However, this right is supplemented by the responsibility of states to make sure that their activities do not cause damage to the environments of other states or common areas. The latter responsibility is set out in

temporally, like the '*sui generis*' status accorded to such planetary resources as land, lakes and rivers, the concept of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.

⁵⁸ See *The Bergen Ministerial Declaration on Sustainable Development in the ECE Region 15 May (1990) 20 Environmental Policy and Law* 100.

⁵⁹ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1 Principle 15.

⁶⁰ Birnie, Boyle and Redgwell, above n 2, 159.

⁶¹ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1, Principle 2.

Principle 21 of the *Stockholm Declaration*.⁶² The second part of this Principle 2 has now generally⁶³ been recognised as forming part of customary international law and was set out in the decision of the Arbitration Tribunal in the *Trail Smelter* decision as follows:

No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁶⁴

The International Law Association (ILA) *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (*New Delhi Declaration*) is not soft law,⁶⁵ but this declaration by legal experts provides useful guidance for states about their duties to take action on sustainable development. This declaration points out that sustainable development is now generally acknowledged as a global objective,⁶⁶ and outlines a number of principles of law that are instrumental for the achievement of the objective of sustainable development including the following principle concerning natural resources:

States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. States must take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.⁶⁷

It is arguable that states also have a global responsibility as part of the common concern of humankind to protect, preserve and enhance the natural environment and in particular the flora and fauna of the Earth.⁶⁸

⁶² See Report of the United Nations Conference on the Human Environment, UN Doc E/73/II.A/14 (1972) Principle 21 (*Stockholm Declaration*).

⁶³ See Birnie, Boyle and Redgwell, above n 2, 145.

⁶⁴ *Trail Smelter Case (United States v Canada) (Awards)* (1941) 35 AJIL 716.

⁶⁵ International Law Association (ILA), 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' in ILA, *Report of the Seventieth Conference* (ILA, 2002) (*New Delhi Declaration*). Please note these views of legal experts do not form part of international law and are not binding.

⁶⁶ *Ibid* [1].

⁶⁷ *Ibid* [1.2].

⁶⁸ *Ibid* [1.3] 'The protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind. The resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind.'

This concept of common concern has a role to play in the global protection of natural resources as is indicated in the following section.

A *General Concepts – Common Concern of Humankind and Common Heritage of Humankind*

The concepts of the common concern of humankind (CCH) and the common heritage of humankind⁶⁹ may also apply to common resources held by states. The common heritage may refer to all living and non-living natural resources, or to the global environment, however in legal terms its use is found chiefly in the 1979 *Moon Treaty*,⁷⁰ and in 1982 *United Nations Convention on the Law of the Sea (UNCLOS)*.⁷¹ This common heritage of humankind regime indicated that the resources were held as a type of trust based upon international management, shared benefits and the use of the resources for peaceful purposes.⁷²

The CCH was applied to resources such as the atmosphere in the *UNFCCC*, and to biodiversity in the *Biological Diversity Convention*.⁷³ When the *Biological Diversity Convention* was being negotiated, some states considered that the common heritage of humankind concept should not apply to the management of biological resources within the jurisdiction of individual states.⁷⁴ They argued that the application of this concept would imply that the benefit of exploiting these resources should be shared with other states. So, the CCH was adopted instead and this concept may be expanded further to include other common areas including natural resources. In fact, this concept promotes sustainable development⁷⁵ because it focuses on international cooperation to resolve environmental problems.

⁶⁹ These are the gender neutral versions of the common concern of mankind and the common heritage of mankind.

⁷⁰ *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty)*, opened for signature 5 December 1979, 1362 UNTS 3 (entered into force 11 July 1984).

⁷¹ *United Nations Convention on the Law of the Sea (UNCLOS)*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

⁷² Cordonier Segger and Khalfan, above n 2, 120.

⁷³ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) preamble [1]; *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) preamble [3].

⁷⁴ See, eg, A Yusuf, 'The UN *Convention on Biological Diversity*' in N Al-Nauimi and R Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law* (Martinus Nijhoff, 1995) 1163, 1171; C Shine and P Kohona, 'The *Convention on Biological Diversity: Bridging the Gap Between Conservation and Development*' (1992) 1(3) *Review of European Community and International Environmental Law* 282.

⁷⁵ *New Delhi Declaration*, above n 66, [2]. In this paragraph, it is emphasised that sustainable development is a matter of common concern.

These two concepts indicate that each state's management of the natural resources within its jurisdiction forms part of the concern of the international community.⁷⁶ As part of their duty to the international community, states should manage their resources sustainably (taking into account the rights of future generations), and place limitations on the consumption of resources. The ambit of the CCH concept remains uncertain, however there are two other consequences that flowing from it. First, the CCH implies that the international community has a joint responsibility to take action on the sustainable development of global resources, such as the atmosphere and biological resources.⁷⁷ So states should engage in collaborative decision making and planning in order to counter environmental hazards. Secondly, where resources are covered by the CCH concept, and a state is party to an agreement such as the *UNFCCC* or the *Biological Diversity Convention*, it is likely that the state will have standing to sue if another state fails to meet its obligations.⁷⁸ So, if a state fails to comply with the obligations in the international agreement, this state could be accountable to any state that is party to that agreement.

The difficulty is that there is a conflict between the concepts of CCH and the traditional doctrine of state sovereignty, and many states may prefer to rely on the doctrine of permanent sovereignty over natural resources in order to maintain control over activities within their jurisdiction.⁷⁹ The advantage of the CCH concept is that it indicates that international cooperation is necessary to address the sustainable development of natural resources.⁸⁰ The key question is whether the institutions that have been established under treaty regimes are adequately monitoring the situation, in order to ensure that national and international efforts to achieve sustainable development are effective. The following section considers the impact of international conventions on natural resource management and discusses the lack of adequate protection for forests. This example illustrates the problems of trying to reconcile the need to protect forest resources for the benefit of the international community, in circumstances where states are reluctant to give up the sovereignty over the natural resources within their jurisdiction.

⁷⁶ Birnie, Boyle and Redgwell, above n 2, 124.

⁷⁷ Ibid 130.

⁷⁸ Ibid 234:

That they create obligations whose intended beneficiaries are the international community as a whole has been partially acknowledged by the new terminology of 'common concern of mankind' found in the Climate Change and Biological Diversity Conventions. The ILC has in effect now acknowledged that all parties have a collective and individual interest in the enforcement of such treaties. In these cases any party will have standing to sue for non-compliance.

⁷⁹ Hunter, Salzman and Zaelke, above n 6, 397.

⁸⁰ Birnie, Boyle and Redgwell, above n 2, 130.

B *Treaties and Conventions*

There are a number of multilateral environmental agreements that cover the conservation of natural resources either in specific areas or concerning particular types of resources, such as the *Biological Diversity Convention*⁸¹ and the *Desertification Convention*.⁸² Many of these multilateral environmental agreements contain broadly worded obligations that may be ambiguous or unclear, so it becomes difficult to establish core binding obligations on the protection of natural resources for those states that have ratified these conventions. Whether some of the aims of these agreements are achieved may also depend upon the application of effective monitoring by the international organization responsible for administering the particular convention. Reliance on multilateral environmental agreements has generally proven to be an ineffective response to protect resources because states have often only reached agreement on the basis of lower standards,⁸³ rather than on achieving the best possible outcome for the protection of natural resources in the future. So the international community should identify standards of sustainability that could be achieved by all countries. In certain circumstances, higher standards for developed countries could be introduced, based upon the common but differentiated responsibilities principle, as there is an expectation that 'developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.'⁸⁴ Clear criteria and standards are required if, in the future, states are to be accountable for inadequate action (or a failure to act) on sustainable development at international law.⁸⁵

Another difficulty is that significant areas of natural resources such as forests are not adequately protected by either environmental treaties or a multilateral convention. The *Non-Legally Binding Authoritative Statement of Forest Principles*⁸⁶ was agreed to only after attempts to adopt an international convention on forest protection were not successful due to a lack of agreement amongst states. This failure of negotiations resulted in a very inadequate agreement that does not provide 'even the

⁸¹ *Biological Diversity Convention*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

⁸² *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification*, open for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

⁸³ See Kevin Gray 'International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement' (2000) 11(1) *Colorado Journal of International Environmental Law and Policy* 83, 125.

⁸⁴ *New Delhi Declaration*, above n 66, [3.4].

⁸⁵ Birnie, Boyle and Redgwell, above n 2, 125.

⁸⁶ United Nations Conference on Environment and Development, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, 31 ILM (1992) 881. See also *International Tropical Timber Agreement* (2006) <<http://www.itto.int/en/itta>>.

most elementary basis for the protection of the world's forests.'⁸⁷ Obviously forest protection has not been comprehensively addressed by the international community and this serious omission should be reconsidered in the future. In accordance with the CCH concept and the joint responsibility of states to take action to achieve sustainable development, further international agreements should be negotiated to protect forests. This could be realized in the immediate future through sustainable development plans and also by negotiating carbon sequestration arrangements as part of action taken to reduce the threat of climate change. The following section considers the role of Environmental Impact Assessments and whether these assessments are effective to achieve environmental protection.

III IMPACT ASSESSMENT

Three methods of assessment can assist in developing more accountable and transparent action by states. First, Environmental Impact Assessment (EIA) is widely used in many countries to assist assessing environmental impacts at the project level.⁸⁸ Secondly, Strategic Environmental Assessment (SEA) is now used more frequently at the higher levels of policy and planning and finally, Sustainability Impact Assessment (SIA) is a method of strategic assessment to assist countries working towards the evolution of a National Strategy for Sustainable Development. These three procedures are considered in the next sections.

A *Environmental Impact Assessment*

Gradually, as methods of information collection about the environment improved, it became necessary to establish procedures for integrating this information with development plans, in order to ensure that development would be sustainable.⁸⁹ This led to the emergence of the EIA. This form of assessment:

[D]escribes a *process* which produces a *statement* to be used in guiding decision-making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Secondly, it requires decisions to be influenced by that information. And thirdly, it provides a mechanism for ensuring the

⁸⁷ Birnie, Boyle and Redgwell, above n 2, 695.

⁸⁸ Cordonier Segger and Khalfan, above n 2, 181. These authors define 'project' in this context as 'the execution of particular construction works or of other particular interventions in the natural surroundings and landscape including those involving the extraction of minerals.'

⁸⁹ *Brundtland Report*, above n 3, 64.

participation of potentially affected persons in the decision-making process.⁹⁰

The United Nations Environment Programme (UNEP) *Goals and Principles of Environmental Impact Assessment* promotes the application of EIAs to development activities within state jurisdiction in circumstances where there is likely to be a significant effect on the environment.⁹¹ The use of the EIA has developed internationally⁹² and it has been endorsed in the *Rio Declaration*,⁹³ in *Agenda 21* and in *WSSD POI*.⁹⁴ This assessment procedure became an effective sustainable development process because it has been widely adopted by countries to apply both to public projects as well as to government enterprises, and it incorporates public participation in the decision making concerning the planning of the projects. So EIA is a tool which can be used to integrate environment and development in order to achieve sustainable development. ‘Public participation’ indicates that groups, organisations and individuals should receive information about the environment and the proposed development, and also, that people can take part in decision making especially in relation to the local environment where they live.⁹⁵ This participation also encourages commitment and responsibilities on the part of the members of the public concerned.⁹⁶

⁹⁰ Sands, above n 38, 800.

⁹¹ *Goals and Principles of Environmental Impact Assessment*, United Nations Environment Programme (17 June 1987) endorsed in UNGA Res 42/184, UN GAOR, 2nd Comm, 42nd sess, 96th mtg, UN Doc A/Res/42/184 (11 December 1987). This is a non-binding agreement. According to Principle 1:

States (including their competent authorities) should not undertake or authorise activities without prior consultation, at an early stage, of their environmental effects. Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive environmental impact assessment should be undertaken.

⁹² See *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (in force 27 June 1997); *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (in force 30 October 2001).

⁹³ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1 Principle 17. ‘Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.’

⁹⁴ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [135]: ‘Develop and promote the wider application of environmental impact assessments, inter alia, as a national instrument, as appropriate, to provide essential decision-support information on projects that could cause significant adverse effects to the environment.’

⁹⁵ *Agenda 21*, above n 39, [23.2]; *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1, Principle 10.

⁹⁶ See *Agenda 21*, above n 39, [23.2].

Agenda 21 frequently refers to EIAs and includes them in reference to programmes such as deforestation⁹⁷ and protection of the atmosphere.⁹⁸ There are also more general proposals that EIAs precede environmental decision making⁹⁹ and that suitable procedures be adopted to assess the impacts of decisions.¹⁰⁰ More exacting EIA procedures have also been included in treaties such as the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*,¹⁰¹ and the 1991 *UN ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*,¹⁰² which requires parties to undertake an EIA where a proposed activity is 'likely to cause a significant adverse transboundary impact.'¹⁰³ The *Draft International Covenant on Environment and Development* sets out more detailed provisions on EIAs.¹⁰⁴ The *Rio Declaration* indicates that the basis for determination of whether an EIA is required occurs where the activities are 'likely to have a significant adverse impact on the environment'.¹⁰⁵ In the *Gabčíkovo case*, Judge Weeramantry (in a separate opinion) indicated that the requirement for an environmental impact assessment would be read into treaties that have a significant impact on the environment, whether the treaty specifically provided for this requirement or not.¹⁰⁶ More recently, in *Pulp Mills on*

⁹⁷ Ibid [11.23(b)].

⁹⁸ Ibid [9.12(b)].

⁹⁹ Ibid [7.41(b)].

¹⁰⁰ Ibid [8.5(b)].

¹⁰¹ *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 30 ILM 1461 (1991) (entered into force 14 January 1998).

¹⁰² *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (in force 27 June 1997).

¹⁰³ Ibid art 2(3).

¹⁰⁴ Commission on Environmental Law of IUCN and International Council of Environmental Law, *Draft International Covenant on Environment and Development* (2nd ed) <http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf>. Note this is a non-binding document, see also art 37. According to art 37(2):

The assessment shall include evaluation of

- a) cumulative, long-term, indirect, long-distance, and transboundary effects,
- b) the possible alternative actions, including not conducting the proposed activity, and
- c) measures to avert or minimize the potential adverse effects.

¹⁰⁵ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/Conf.151/26 Vol 1 (12 August 1992) Annex 1, Principle 17. Some other treaties also have similar requirements see, eg, *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (in force 27 June 1997) art 2(2).

¹⁰⁶ *Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment)* [1993] ICJ Rep 1997 201. According to Judge Weeramantry:

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

the River Uruguay (Pulp Mills), the ICJ recognized that environmental impact assessment forms part of customary international law:

[A] practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a trans-boundary context, in particular, on a shared resource.¹⁰⁷

However, customary international law does not set out specific requirements for the EIA procedure, and so the determination of these regulatory provisions falls within the discretion of individual states when they decide how the relevant authority will implement EIA procedures. Indeed, the ICJ pointed out this position to the parties in the *Pulp Mills* case:

Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.¹⁰⁸

Evidently, EIA may have limited authority as customary law because there is no uniform adherence by states to agreed procedures of assessment.¹⁰⁹ However, the recognition that the EIA is now part of customary international law and that continuous monitoring forms part of this requirement (where necessary) are welcome developments.

In the past, many states have encouraged the application of EIA to major development projects, however generally these procedures have not proved to be effective at resolving the problems of environmental deterioration and the continued depletion of natural resources.¹¹⁰ So other approaches have emerged that may be more successful at dealing with the integration of environmental, economic and social concerns at the policy development level. One of these methods is called strategic environmental assessment (SEA) and this process is outlined in the following section.

¹⁰⁷ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 2010 [204].

¹⁰⁸ *Ibid* [205].

¹⁰⁹ Gray, above n 83, 94–5.

¹¹⁰ Cordonier Segger and Khalfan, above n 2, 181.

B *Strategic Environmental Assessment Procedures*

Strategic Environmental Assessment (SEA) procedures extend beyond the assessment of projects to cover policies plans and programs and can apply to regional plans.¹¹¹ These procedures were developed to cover higher levels of decision making that are not included in the EIA process. The UNEP report entitled *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach (UNEP Report)* defined these procedures as follows:

Put simply, SEA refers to a formal, systematic process to analyse and address the environmental effects of policies, plans and programmes and other strategic initiatives. This process applies primarily to development-related initiatives that are known or likely to have significant environmental effects, notably those initiated individually in sectors, such as transport and energy, or collectively through spatial or land use change. As with EIA, SEA can and should be interpreted broadly, for example to include social, health and other consequences of a proposed action and their relationship to sustainable development concepts and strategies.¹¹²

Two advantages of the SEA procedures are firstly, that they address the superior levels of decision making and secondly, that there is potential to integrate environmental issues into development designs. Another feature of these decisions at higher levels is that they provide information about the likely cumulative effects of both larger and smaller projects, some of which may not qualify for the EIA threshold test.¹¹³

The *Protocol on Strategic Environment Assessment* was introduced as a protocol to supplement the *Espoo Convention* in 2003. This protocol defines the process of SEA,¹¹⁴ and provides that parties to this protocol should take into account the environmental consequences of their official draft plans and programmes.¹¹⁵ This evaluation may also be applied to policies and legislation. Even though the SEA is carried out at an earlier stage than an EIA, it is regarded as an important means of achieving sustainable development. Significantly, there is also provision for widespread public participation in government decision making so that the public are provided with the information about the development areas,

¹¹¹ Ibid.

¹¹² Hussein Abaza, Ron Bisset and Barry Sadler, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP, 2004) 86.

¹¹³ Ibid.

¹¹⁴ *Protocol on Strategic Environmental Assessment*, opened for signature 21 May 2003, 1998 UNTS 309 (entered into force 10 July 2010) art 2(6). Strategic environmental assessment 'means the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.'

¹¹⁵ Ibid see arts 11 and 13.

the right to comment and for these opinions to be taken into account when the decision is made.¹¹⁶

The *UNEP Report* considered that the differences between the two assessment processes and indicated that:

Some of the distinctive characteristics of SEA compared to EIA, include:

- greater uncertainty about the effects of a policy (general directive) as compared to a project (concrete actions);
- broader range of environmental consequences to be considered (from implications to impacts);
- wider set of linkages and trade-offs with economic and social issues (eg a national energy policy or plan compared to a power station); and
- larger scale/ longer time frames to take account of environmental effects and consequences.¹¹⁷

Overall, the *UNEP Report* considers that these SEA procedures are more likely to give effect to environmental sustainability because the decision-making process is transparent and engages in an integrative method for impact assessment and environmental management.¹¹⁸ This promotes sustainable development and is also in accordance with objectives of the *WSSD POI*.¹¹⁹ Clearly it is an advantage to operate on the basis that policy is influenced by the objectives of sustainable development rather than introducing the considerations at a later stage of a development project (as occurs in the EIA process). According to the *UNEP Report*:

¹¹⁶ Ibid art 8, annex V.

¹¹⁷ Abaza, Bisset and Sadler, above n 112, 87.

¹¹⁸ Ibid 85.

¹¹⁹ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [19]:

Encourage relevant authorities at all levels to take sustainable development considerations into account in decision-making, including on national and local development planning, investment in infrastructure, business development and public procurement. This would include actions at all levels to:

- a) Provide support for the development of sustainable development strategies and programmes, including in decision-making on investment in infrastructure and business development;
- b) Continue to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment;
- c) Promote public procurement policies that encourage development and diffusion of environmentally sound goods and services;
- d) Provide capacity-building and training to assist relevant authorities with regard to the implementation of the initiatives listed in the present paragraph;
- e) Use environmental impact assessment procedures.

See also [135].

Particular stress is placed on the need for such an approach to promote sustainable development, for example by reviewing macroeconomic policies, investment, trade and development programmes, and energy, transport and other sector plans that are known to have a significant impact on the environment.¹²⁰

The following section discusses the advantages of Sustainability Impact Assessment (SIA) procedures as a method designed of strategic assessment.

C *Sustainability Impact Assessments*

Additional guidelines have been developed to assist countries (particularly developing countries) to take action to achieve sustainable development. One of the activities recommended in *Agenda 21* is that countries adopt a National Strategy for Sustainable Development.¹²¹ These strategies should progress and blend in with the economic, social and environmental policies in the country where the objectives are to conserve resources and the environment for future generations.¹²² The SIA has been promoted as a method of strategic assessment to facilitate procedures for countries when they are developing a National Strategy for Sustainable Development in order to take action on sustainable development.¹²³ The SIA procedure can be defined as follows:

Sustainability appraisal or sustainability impact assessment (SIA) is a method of integrated strategic assessment which accords the same level of consideration to economic, social and environmental impacts, and is now beginning to be adopted at the international and national level of decision making, as a means of measuring the potential or actual impact of development policies and strategic interventions on sustainable development.¹²⁴

So SIAs take environmental, economic and social issues into account and these procedures may be adopted as a more successful method of dealing with sustainable development.¹²⁵ However these processes have only recently been introduced and future review is required in order to determine their overall effectiveness. The following section discusses

¹²⁰ Abaza, Bisset and Sadler, above n 112, 85.

¹²¹ *Agenda 21*, above n 39, [8.7].

¹²² *Ibid* [8.7]. See United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [135].

¹²³ Clive George and Colin Kirkpatrick, 'Methodology For Assessing the Effectiveness of National Sustainable Development Strategies' (Working Paper Series Paper No 1, Impact Assessment Research Centre, 2003) <http://www.sed.manchester.ac.uk/research/iarc/pdfs/iarc_wp01.pdf>.

¹²⁴ *Ibid* 4.

¹²⁵ See Cordonier Segger and Khalfan, above n 2, 187.

whether an international convention on EIA may be an option to ensure that more effective EIA processes are adopted by states in the future.

D *An International Agreement to Cover EIA Procedures*

Even though a number of tools have been developed to assist states to achieve sustainable development, some questions remain about the overall impact of these procedures and whether they are effectively implemented. The EIA process forms part of international customary law and this development is significant, particularly in circumstances where the impact on the environment is likely to be serious¹²⁶ or involves a trans-boundary impact. However these procedures are subject to many different applications by states, depending upon the circumstances, and states may also qualify the process to suit their own individual country's requirements.¹²⁷ Gray points out that these differing approaches would not lead to binding legal obligations to be imposed upon states.¹²⁸ It may be necessary to aim to achieve greater effectiveness of these procedures by negotiating an international legal framework to support countries to achieve sustainable development objectives through the establishment of a global EIA regime¹²⁹ rather than fragmented approaches to the EIA process.¹³⁰ Indeed, Gray suggests that there should be an international scheme with an agreed process that would be flexible enough to accommodate the needs of different peoples and yet continue to permit engagement in the process.¹³¹

It would be possible to establish a secretariat or committee that could referee disputes¹³² and facilitate access for non-nationals to avail themselves of domestic remedies in appropriate cases involving trans-boundary disputes. A strong compliance body could be established, or alternatively, international pressure could encourage states to comply with the provisions of this convention.¹³³ The other option is to encourage the use of domestic legal systems to ensure EIA provisions are complied with where the circumstances occur within the jurisdiction of the state. Provisions in the agreement could ensure that the decision-making process is transparent, that there is appropriate public participation, environmental screening and ongoing monitoring of the development. This inclusion of provisions for public participation as a requirement for an effective EIA would overcome another problem emerging from the outcome of the *Pulp Mills* decision. It was alleged in this case that the

¹²⁶ Gray, above n 83, 127; see also Sands, above n 38, 834.

¹²⁷ Gray, above n 83, 127.

¹²⁸ Ibid.

¹²⁹ Ibid 83.

¹³⁰ Ibid.

¹³¹ Ibid 128.

¹³² Ibid 126.

¹³³ Ibid.

EIAs provided by Uruguay were incomplete because they did not include adequate public consultation of the affected population.¹³⁴ However the court found that there was no legal obligation for consultation of the affected parties in this case.¹³⁵ It is arguable that this reasoning may be confined to the particular circumstances of this case. The ICJ had limited jurisdiction to the interpretation of the provisions of 1975 *Statute of the River Uruguay*,¹³⁶ and the states in the case were not parties to the *Espoo Convention* and the ICJ also noted that the *UNEP Goals and Principles of Environmental Impact Assessment* are not legally binding.¹³⁷ So the ICJ was not considering more recent obligations under treaties such as the *Espoo Convention* and the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters*.¹³⁸ Specific provisions in an international convention on EIA could clarify the necessity for public participation as part of the EIA process.

States may be accountable for their failure to take action on sustainable development, because of inadequate EIA procedures or where violations of human rights occur, however, it is unlikely that litigation will be effective to resolve these issues because of the costs, delay and risks involved. The failure of the ICJ to take the opportunity to discuss some of the key principles of international environmental law¹³⁹ in the *Pulp Mills* case has left a large amount of uncertainty about the effectiveness of these principles. Even though the *Pulp Mills* decision has assisted to establish the significance of EIA procedures, it has also created doubt about whether public participation is an essential element of this process.

The development of an international agreement could be more effective if it covered both SEAs and EIAs and is negotiated quickly. The inclusion of the SEA process has advantages because it encourages initiatives to be taken at an earlier stage and may be more likely to prevent environmental degradation¹⁴⁰ So this procedure could also be included if a framework convention on EIA is negotiated in the future. The difficulties with the

¹³⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 2010 [118].

¹³⁵ *Ibid* [216]. 'The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.'

¹³⁶ *Ibid* [48].

¹³⁷ *Ibid* [205].

¹³⁸ *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus)*, opened for signature 25 June 1998, 2161 UNTS 447 (entered in force 30 October 2001).

¹³⁹ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 2010 [62]–[63]. The ICJ did not agree with arguments raised by Argentina that the 1975 *Statute of the River Uruguay* included a referral clause that allowed consideration of other international environmental agreements. The ICJ refused to consider the other agreements as they were not applicable and did not fall within the jurisdiction of the Court in this case.

¹⁴⁰ See Gray, above n 83, 124.

development of this international agreement are that it could take some time, and even if an agreement is eventually negotiated, it is possible that the results could lead to a watering down of some of the provisions in order to gain agreement from as many states as possible.

The adoption of EIA has been significant both in international and national legal systems. However these are procedural assessments only and do not provide any indication of whether the substantive aims of sustainable development are being achieved at national or global levels. Dernbach argues that distinct timetables and targets¹⁴¹ could assist countries to establish what action is necessary for state governments to meet their environmental protection objectives in international agreements concerning sustainable development. Even in the circumstances where the agreements are not binding, there continues to be an expectation by the international community that countries will adhere to soft law commitments.¹⁴² Before states can be made accountable for their performance the evidential basis for assessing state performance must be established.¹⁴³

Agenda 21 indicates that specific objectives for the further development of international law on sustainable development include the promotion of 'international standards for the protection of the environment that take into account the different situations and capabilities of countries.'¹⁴⁴ The International Organization for Standardization (ISO) is poised to take action to ensure that international standards to achieve sustainable development are promoted in the future.¹⁴⁵ This organization has already contributed to the development of standards on sustainable development including social responsibility and other specific areas such as transport, energy and climate change.¹⁴⁶

One of the main requirements for the implementation of sustainable development is the accountability of all actors (including states, citizens, the private and public sectors), and in particular at the international level,

¹⁴¹ Dernbach, above n 36, 81.

¹⁴² See Birnie, Boyle and Redgwell, above n 2, 246.

¹⁴³ Ibid 125 'If, however, it is intended that states should be held internationally accountable for achieving sustainability, whether globally or nationally, then the criteria for measuring this standard must be made clear, as must the evidential burden for assessing the performance of individual states.'

¹⁴⁴ *Agenda 21*, above n 39, [39.3(d)].

¹⁴⁵ International Organisation for Standardisation, *How ISO's Technical Programme and Standards Contribute to a Sustainable World* (2008) <http://www.iso.org/iso/sustainable_world_2008.pdf> 1. 'ISO is a trusted partner for developing standards contributing to the objectives of sustainable development.' At 2 it is indicated that in the ISO *Strategic Plan* one of the aims is to achieve standards for a sustainable world.

¹⁴⁶ International Organisation for Standardisation, *ISO Promotes Role of International Standards in Tackling Climate Change at COP15* (22 December 2009) <<http://www.iso.org/iso/pressrelease.htm?refid=Ref1278>>.

there should be effective implementation of natural resource commitments as set out in WSSD *POI*.¹⁴⁷ Birnie, Boyle and Redgwell consider that there are some key ways that states can be held accountable if the standards for measuring sustainable development are more explicitly determined. International law 'does require development decisions to be the outcome of a process which promotes sustainable development.'¹⁴⁸ So the failure of a state to follow the decision making process through EIA or possibly, through the more recently developed SEA could be a basis for legal action. Alternatively, a failure to take into account intergenerational and intragenerational equity, or to cooperate in the management of global conservation of natural resources, could also be the basis for a legal dispute.

Standards and targets could be measured at a national level, and reported to an international organisation to determine whether national and international sustainable development objectives are likely to be achieved. Together with these standards, systems of good governance should be adopted to ensure fairness and accountability of the institutions that are determining whether these standards and targets are complied with. Good governance of institutions is necessary for effective implementation of sustainable development at international and national levels.¹⁴⁹ One approach is to improve good governance by states, and to facilitate the adoption of these practices by institutions, business enterprises and civil society so that they may take responsible action on sustainable development issues. The implications of the movement towards good governance practices are discussed in the following section.

IV GOOD GOVERNANCE

Gradually, good governance principles are beginning to be adopted both at international and national levels and particularly in circumstances where environmental issues form part of the decision-making process. WSSD *POI* emphasizes the importance of good governance for effective sustainable development:

Good governance within each country and at the international level is essential for sustainable development.¹⁵⁰

¹⁴⁷ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [24]–[46].

¹⁴⁸ Birnie, Boyle and Redgwell, above n 2, 126.

¹⁴⁹ See United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [138].

¹⁵⁰ *Ibid* [4]. See also [138] and [141].

The *New Delhi Declaration* emphasizes the significance of good governance principles for the development of international law of sustainable development.¹⁵¹ This declaration stresses the importance of respect for all of the principles in the *Rio Declaration*, and the necessity for implementation of corporate social responsibility and socially responsible investment.¹⁵² States, international organizations and non-state actors should adopt good governance principles to ensure that they have democratic governance and accountability.¹⁵³ Therefore companies as well as states and international organizations have responsibilities to operate according to principles of good governance in order to make progress towards sustainable development.

There are a number of different views that prevail about how good governance may be interpreted and applied. One of the UN organizations, the United Nations Development Programme (UNDP) has set out some principles (or guidelines) for good governance to assist organizations to make responsible decisions.¹⁵⁴ These may apply not only to organisations in government, but also to other organizations in the private sector (such as business and companies) and to civil society organizations including trade unions and non-governmental organizations (NGOs). According to the UNDP policy document, *Good Governance and Sustainable Human Development*:

Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based upon broad consensus in society and that the voices of the poorest and most vulnerable are heard in the decision-making over the allocation of development resources.¹⁵⁵

The main principles of good governance could be summarized as including the following:

- participation in the decision-making process,
- the rule of law in a fair legal system,
- transparency of information available to all involved,
- responsiveness to stakeholders needs,
- consensus orientation based on what is best for society in the long term
- equity so that all groups are included

¹⁵¹ *New Delhi Declaration*, above n 66, [7].

¹⁵² *Ibid* [6.3].

¹⁵³ *Ibid* [6.2].

¹⁵⁴ United Nations Development Programme, *Good Governance and Sustainable Human Development (Good Governance)* (January 1997) <[http:// mirror.undp.org/magnet/policy](http://mirror.undp.org/magnet/policy)>.

¹⁵⁵ *Ibid* 3.

- effectiveness and efficiency so that resources are used in the best way to meet the needs of present and future generations and to protect the environment,
- accountability where states, the private sector and organizations in civil society are accountable for their decisions.¹⁵⁶

It has to be remembered that the UNDP is focused on sustainable human development so that choices are made available to all people and particularly the poor and vulnerable. This is a human centred approach to governance where the concerns of humans are at the forefront of these governance principles. It is arguable that the intrinsic value of the environment could be given a greater priority in this decision-making process. Even though these guidelines focus on an anthropocentric approach, they are useful to assist states and other private sector entities and civil sector organizations to engage in better decision making, rule-making processes and implementation of decisions. There is also an emphasis on the accountability of these organisations to the public, and other stakeholders, for decisions that are made with a view to the long term consequences. The application of the common concern of humankind to sustainable development indicates that state governments should begin to take cooperative action to achieve this objective. However, it is not only states but also companies, business and industry in the private sector, as well as associations in the civil sector, which need to make effective decisions on environmental issues when managing their affairs. The advantage of the emphasis on governance in the UNDP principles is that it covers all sectors of society that participate in the community and so it assists with progress towards achieving the objective of sustainable development.

Ultimately, it may be more effective to improve the good governance of sustainable development institutions in order to achieve more positive progress towards the achievement of sustainable development objectives. One option is to consider proposals to reform of key international institutions such as UN Commission on Sustainable Development (CSD), the institution that is responsible for the promotion of sustainable development at the international level.

¹⁵⁶ Ibid; see Marion Bastos Lima 'Biofuel Governance and International Legal Principles: Is it Equitable and Sustainable?' (2009) 10 *Melbourne Journal of International Law* 470, 477.

V SUSTAINABLE DEVELOPMENT INSTITUTIONS – PROPOSALS FOR REFORM

A *Commission on Sustainable Development*

The WSSD *POI* envisaged that there would be a system of international cooperation amongst the international community including the role of the United Nations General Assembly (UN GA), the United Nations Economic and Social Council (ECOSOC) and the CSD. These organisations would also be involved with other related institutions including the Global Environment Facility and the World Trade Organization (WTO).¹⁵⁷ In addition, UN GA is expected to promote sustainable development in UN activities.

ECOSOC has the role of coordinating the system wide integration of economic, social and environmental facets of UN programs and policies furthering sustainable development. The *POI* also indicated that the CSD would continue to be the main United Nations organization responsible for considering sustainable development issues and surveying implementation at all levels including partnerships that may involve governments and international organisations.¹⁵⁸ The CSD has fifty-three members for a three year term and its key functions are:

- Reviewing progress on the implementation of commitments in *Agenda 21* and the *Rio Declaration*
- Further developing policy guidelines post the *Plan of Implementation*
- Promoting partnerships for sustainable development¹⁵⁹

The current program for the CSD is based upon seven two-year cycles focusing on selected issues. In 2010-2011 these are transport, chemicals, waste management, mining and sustainable consumption and production patterns.¹⁶⁰ The WSSD *POI* indicates that the role of CSD should be strengthened to include monitoring progress of the implementation of *Agenda 21*, and supporting the coordination of implementation and

¹⁵⁷ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [151]. See Cordonier Segger and Khalfan, above n 2, 233.

¹⁵⁸ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [145].

¹⁵⁹ Economic and Social Committee, Division for Sustainable Development, 'Mandate' (2009) <http://www.un.org/esa/dsd/csd/csd_mandate.shtml>. This paragraph is a summary of the role of the CSD.

¹⁶⁰ Economic and Social Committee, Division for Sustainable Development, 'Multi-Year Programme of Work' (2009) <http://www.un.org/esa/dsd/csd/csd_multyearprogwork.shtml>.

partnerships.¹⁶¹ So the CSD should promote actions that foster implementation and the development of partnerships concerning governments, international organisations and stakeholders.¹⁶²

The WSSD *Plan of Implementation* discusses the roles of regional commissions to improve cooperation on sustainable development and to support the implementation of regional strategies and action plans.¹⁶³ States have the responsibility of providing institutional frameworks for sustainable development and authorities and mechanisms necessary to implement and enforce appropriate laws at the national level.¹⁶⁴ All countries should support government institutions and ensure that there is justice, transparency and accountability in the judicial system.¹⁶⁵ In addition they should encourage public participation and provide access to information about legislation, regulation and policies on sustainable development.¹⁶⁶

The CSD could review the action by states on sustainable development, and this review would include the assessment of the effectiveness of multilateral environmental agreements. Birnie, Boyle and Redgwell consider that the CSD should review the *Desertification Convention*¹⁶⁷ and the *Biological Diversity Convention*.¹⁶⁸ So the CSD would work cooperatively with UNEP to monitor and report on global progress towards sustainable development. There would be advantages of integrating methods of data collection so that many different bodies collecting environmental information could cooperate and coordinate information to alleviate cost and effort particularly for developing countries. State governments could provide a method of information exchange to allow other governments to adopt similar institutions, methods and forms of regulation that are likely to be successful.¹⁶⁹ Another possibility is the development of a non-compliance committee on sustainable development where the public and NGOs may refer complaints similar to the operation of the *Convention on Access to*

¹⁶¹ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_Plan_impl.pdf> [145].

¹⁶² *Ibid* [146].

¹⁶³ *Ibid* [159].

¹⁶⁴ *Ibid* [162].

¹⁶⁵ *Ibid* [163].

¹⁶⁶ *Ibid* [164].

¹⁶⁷ Birnie, Boyle and Redgwell, above n 2, 694.

¹⁶⁸ *Ibid* 649.

¹⁶⁹ Dernbach, above n 36, 135.

*Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.*¹⁷⁰

It is apparent that the wide-ranging responsibilities of the CSD are too broad to enable it to effectively implement all of the sustainable development objectives.¹⁷¹ Birnie, Boyle and Redgwell have recommended that the CSD could, in the future, be allocated special functions so that this body can determine whether a specific development is sustainable and require governments to account for their actions. If the CSD is required to make state governments accountable for achieving sustainable developments objectives, this could lead to a clearer delineation of sustainable development, and the standards and targets for determining whether agreed objectives are likely to be achieved.¹⁷² Eventually, the CSD could have additional powers and resources to enable it to determine whether states are accountable for their actions where governments have failed to meet sustainable development objectives. However it would be more useful to focus on improving compliance by states with international environmental agreements in order to prevent further environmental degradation from occurring, and this option will be considered in the next section.

B *Non-Compliance Procedures*

Non-compliance procedures encourage states to meet their commitments, and may be applied to ‘soft-law’ non-binding international agreements¹⁷³ including the *Rio Declaration* and *Agenda 21*. These two agreements do not have compliance schemes however there are provisions in *Agenda 21* and the *WSSD POI* that provide guidance on implementation.¹⁷⁴ According to Birnie, Boyle and Redgwell:

The fundamental assumption is that when governments voluntarily undertake commitments they normally intend to comply. Non-compliance procedures thus operate on the understanding that it is better to assist and encourage than to penalize them for failing. The treaty parties will usually seek to shape consensus on the issue in the dispute, and the process is intended to reinforce the stability, transparency and legitimacy of the regime as a whole.¹⁷⁵

¹⁷⁰ *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus)*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

¹⁷¹ See Dernbach, above n 36, 113.

¹⁷² See Birnie, Boyle and Redgwell, above n 2, 125.

¹⁷³ Birnie, Boyle and Redgwell, above n 2, 245.

¹⁷⁴ *Agenda 21*, above n 39, chapters 33–40 especially ch 39; United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [81]–[136].

¹⁷⁵ Birnie, Boyle and Redgwell, above n 2, 246.

Sustainable development agreements are concerned with the integration of social, environmental and economic law so the focus has been on seeking compliance with international agreements.¹⁷⁶ Reporting, monitoring, peer review and on-site inspection are procedures that can be adopted to encourage states to maintain compliance with international agreements on sustainable development.¹⁷⁷ Usually, a reporting agency is established by each state government to carry out monitoring functions, and this encourages the public to be aware of the sustainability issue. The steps that are generally taken to improve compliance by monitoring are set out by Nakhjavani as follows:

- the designation of a reporting agency within each national government, raising ‘domestic bureaucratic conscience’;
- formal and informal dialogue between national reporting agencies and international monitoring agencies, promoting a common understanding of norms within a regime, and can quickly identify difficulties faced by nations in implementing their obligations;
- the publicity or threat of publicity of State non-compliance — the ‘discipline of shame’ and
- preventative inspections (which have been extensively used in the context of environmental protection).¹⁷⁸

If states eventually comply with these soft-law agreements based upon an expectation that the conduct is a matter of obligation, these commitments may have the potential to develop over time into customary international law.¹⁷⁹

In addition to soft-law agreements, there are a number of treaties and conventions that govern environmental problems that have monitoring requirements.¹⁸⁰ However the accuracy of the reporting will depend upon the degree of care taken by the agency, and the past performance of states has indicated that for many of them the reporting has been inadequate.¹⁸¹ An exchange of information could take place where states that have a successful reporting record could allow other states access to their methods. More effective auditing of the reports could also be introduced.

¹⁷⁶ Salim Nakhjavani, ‘Sustainable Development Compliance-Building’ in Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law Principles, Practices and Prospects* (Oxford University Press, 2004) 251.

¹⁷⁷ Winfried Lang, ‘How to Manage Sustainable Development’ in Konrad Ginther, Eric Denters and Paul de Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff, 1995) 103.

¹⁷⁸ Nakhjavani, above n 176, 252.

¹⁷⁹ *Ibid* 252.

¹⁸⁰ For example, *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992).

¹⁸¹ Birnie, Boyle and Redgwell, above n 2, 243.

A key advantage of adopting non-compliance procedures is that it is preferable to engage in preventative action to stop environmental harm from taking place, rather than seeking a remedy after the harm has occurred. This is particularly so in cases where the damage may be irreversible. There are other approaches that may apply to encourage compliance with sustainable development agreements by governments and other major groups. These include the development of education programs to inform business and industry, as well as to instruct those who have been responsible for environmental damage. Additional assistance could be provided to developing countries where environmental damage is occurring as, for example, where one state could agree to provide financial assistance to another government to clean up pollution.¹⁸² NGOs and other interested groups may monitor progress by the international community on sustainable development, and may draw the attention of the public to environmental concerns. The international media may also publicise the failure by state governments and business enterprises to prevent environmental damage and this may lead to widespread public disapproval,¹⁸³ as well as to other action such as trade embargos with that state or to a boycott of products manufactured by that state.¹⁸⁴ Another possibility is that the World Bank or the Global Environmental Facility may hold back money from state governments to encourage their compliance with international environmental agreements.¹⁸⁵

C Future Proposals

There are two key proposals for future reform of international environmental governance. One is to strengthen the role of UNEP, and the other is to establish a World Environmental Organisation (WEO). These suggestions will be discussed in the following sections.

1 UNEP

The work of UNEP has been criticized as fragmented and inadequate to provide support for complex global environmental programs, including action to implement sustainable development,¹⁸⁶ to prevent climate change and to protect biological resources. Recently, some major organizational changes have been introduced to attempt to improve the

¹⁸² Ronald Mitchell, 'Compliance Theory: An Overview' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan Publications, 1996) 3, 14.

¹⁸³ See Nakhjavani, above n 176, 252.

¹⁸⁴ See Catherine Giraud, 'French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision' (1996) 1 *Asia Pacific Journal of Environmental Law* 125, 133.

¹⁸⁵ Birnie, Boyle and Redgwell, above n 2, 246.

¹⁸⁶ Peter Haas, Norichika Kanie and Craig Murphy, 'Conclusion: Institutional design and Institutional Reform for Sustainable Development' in Norichika Kanie and Peter Haas (eds), *Emerging Forces in Environmental Governance* (United Nations University Press, 2004) 263, 270–1.

environmental governance role of UNEP. First, the Environmental Management Group (EMG) was established as a UN coordination organization to promote interagency cooperation, and its membership includes the secretariats of major multilateral environmental agreements. Secondly, the Global Ministerial Environment Forum (GMEF) provides a forum for national environmental ministers to consider cooperative action however this forum has been criticized as being too large to be an effective governing council.¹⁸⁷

At the second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance Rome, *The Belgrade Process* paper suggested the following changes be introduced:

Improving system-wide planning and evaluation, for example through UNEP:

- Reviewing the role and functions of the Environment Management Group (EMG) and its position in the UN system;
- Examining practical ways for the design and implementation of a system-wide policy orientation, a system-wide strategy and a results-based planning framework for the environmental component of sustainable development; and
- Expanding the Environment Fund to further catalyse work with other agencies; and
- Assessing the system-wide implementation of environmental policies.¹⁸⁸

Further reforms have also been anticipated, it is possible that UNEP could become a specialized UN agency or that it may eventually develop as part of a WEO.¹⁸⁹ The benefits of establishing a WEO are that it could determine distinct policies for the implementation of sustainable development and coordinate the work of the many different secretariats of multilateral environmental conventions.

2 *World Environment Organisation*

A world environmental organization has been proposed as a possible solution to the lack of coordination between the secretariats of the multilateral environmental agreements. *The Belgrade Process* indicated

¹⁸⁷ Steve Charnovitz, 'A World Environment Organization' in W Bradnee Chambers and Jessica Green (eds), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*, (United Nations University Press, 2005) 93, 107–8.

¹⁸⁸ Second Meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, '*The Belgrade Process*' – Developing a Set of Options for Improving International Environmental Governance' (26-29 October 2009) <www.unep.org/environmentalgovernance/LinkClick.asp?fileticket=2G652f8U%3&tabid=2227&language=en-US> 4 ('*The Belgrade Process*').

¹⁸⁹ See *ibid* 17.

that a WEO could organise more effective policies between governments, treaties and organisations in order to reduce difficulties and inconsistencies.¹⁹⁰ One of the advantages of rationalizing the administrative functions of the multilateral environmental agreements is that more resources could be directed towards implementation actions.¹⁹¹ Some developing states find it difficult to comply with the requirements of participation in a number of multilateral environmental agreements, and other UN agencies, due to the complexity of the international environmental governance system and the costs involved.¹⁹² If the WEO is provided with adequate funding and resources, it could promote capacity-building in developing countries and determine clear environmental standards.¹⁹³ The main objective of the WEO should be to facilitate state compliance with international environmental treaties and agreements as these measures will protect the environment for the benefit of the international community.

A number of proposals have been suggested in *The Belgrade Process*, including that a WEO could introduce systems to improve compliance, monitoring and accountability. The development of a system of review could involve either peer reviews or reviews by independent experts¹⁹⁴ and representatives from civil society (such as NGOs). Another suggestion is that a policy review mechanism similar to that of the WTO, or an experts review system comparable to that found in the human rights area could be established.¹⁹⁵ Finally a dispute settlement mechanism could be negotiated on a similar basis to the WTO General Council which may refer matters that cannot be resolved to a dispute settlement panel.¹⁹⁶

These proposals for reform may not be adopted in the near future (or possibly not at all) as their enactment will depend upon the degree to which states are willing to negotiate their development. States may choose not to support these reforms on the basis that these changes could threaten their territorial sovereignty on environmental issues and may require large amounts of additional funding. Mori has argued that states

¹⁹⁰ Ibid 10.

¹⁹¹ Ibid.

¹⁹² Ibid 13:

Incoherence and complexity in the international environmental governance system can lead to high transaction costs and in some instances this could discourage developing country participation in the system, giving rise to questions on whether the system of international environmental governance provides coherent support to countries and better enables them to meet their environment and development objectives, in particular in the case of developing countries.

¹⁹³ Frank Biermann, 'The Case for a World Environment Organization' (2000) 42(9) *Environment*, 22, 24.

¹⁹⁴ *The Belgrade Process*, above n 188, 9.

¹⁹⁵ Ibid 10.

¹⁹⁶ Ibid.

should not solely govern a WEO,¹⁹⁷ rather a broader representation of members of civil society could be included in the governing body in order to promote effective action to protect the Earth's environment. If the members of the governing council are all state governments, the environmental protection of areas of the global commons could be at risk of political compromise as state governments seek to further their own interests rather than those of the international community.

A final option could be the consideration of a global sustainable development organization that would include both development and environment programs and the relevant UN organizations that deal with these areas. However, this option is unlikely to occur in the future because the sustainable development programs cover so many diverse organisations, including the UNDP, WTO and the World Bank, and there is likely to be a lack of political support for this initiative.¹⁹⁸

VI CONCLUSION

Together with reforms to the CSD, it is also necessary to further progress the international law of sustainable development in other key areas. There should be more clearly defined standards for sustainable development, and these may be differentiated to accommodate the special circumstances and level of development of individual states. Research could be carried out into the effectiveness of EIAs and SEAs to determine whether they are assisting countries to meet their sustainable development objectives. Given the continuing pressure on the Earth's natural resources, there may be some advantages for the future development of an international agreement with clear specific provisions on EIA (and/or SEA) procedures that would be obligatory for all states ratifying this agreement.

Some of the obstacles that could impede the further progress of sustainable development include the flow on effects from the global financial crisis and possible limitations of funding available to further sustainable development programs. Other impediments include insecurity, poverty, discrimination and inequality within and between

¹⁹⁷ Satoko Mori, 'Institutionalization of NGO Involvement in Policy Functions for Global Environmental Governance' in Norichika Kanie and Peter Haas (eds), *Emerging Forces in Environmental Governance* (United Nations University Press, 2004) 157, 157.

¹⁹⁸ Charnovitz, above n 187, 113–114.

communities.¹⁹⁹ Severe cutbacks in living standards may lead to political instability because of violent protests by those affected.²⁰⁰

Generally, further education is required, along with incentives for change, in order to encourage an alteration in behaviour of all sectors of society including government, business and individuals. Mandatory reporting on the development of natural resources, and the rate at which these resources are being used, would be useful for an effective assessment of the impact of companies and business on the global environment. It is possible to audit these reports and to provide a uniform framework so that the reports are conducted on a similar basis and can be collated to determine overall assessments of the rate of exploitation of natural resources. Some companies and business are beginning to adopt appropriate codes of conduct for corporate social responsibility. In the future, the office holders of these organizations could be accountable for ensuring that environmental protection practices are carried out within their organizations. Increasingly, institutional investors are incorporating environmental, social and governance provisions into their investment decisions and also into their contracts.²⁰¹ These changes could lead to a closer alignment of companies and business with the concept of sustainable development. Presently, inadequate measures exist for effective implementation and enforcement of existing international agreements on sustainable development. There is an urgent need to establish specific standards and achievable targets in order to achieve this objective.²⁰² It is questionable how far present laws extend at a national level to cover all of the areas in sustainable development action plans. Eventually states could be encouraged to introduce appropriate law and regulation within the domestic jurisdiction to correspond with targets on sustainable development that may be initiated in the future by international institutions.

By highlighting the severe rate of deterioration of natural resources occurring on a global basis through the international media, these warnings could encourage states (cooperating in accordance with the common concern of humankind concept) to take more effective action to achieve sustainable development. The governance issues and major

¹⁹⁹ United Nations World Summit on Sustainable Development, *Plan of Implementation* (2002) <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> [47].

²⁰⁰ 'Europe may escape its debt disaster ... and pigs might fly', *Business, The Sydney Morning Herald Weekend Edition* (Sydney) 15–16 January 2011, 8.

²⁰¹ UNEP, 'Greening the World's Multi-Trillion Dollar Investments gets Asset Managers' and Legal Backing: UNEP-Supported Report Says Ignoring Environment, Social and Governance Issues May Open Door to Court Cases' (14 July 2009) United Nations Environment Programme <<http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=593&ArticleID=6247&J=en>>.

²⁰² Dernbach, above n 36, 136.

reforms (such as the establishment of a WEO) are likely to be at the forefront of discussions in the lead up to a possible special event to note the anniversary in 2012 of the WSSD (10 years) *Rio Declaration* (20 years), *Brundtland Report* (25 years) and the *Stockholm Declaration* (40 years).²⁰³

Many of the objectives set out in the programs for action on sustainable development could be viewed as aspirations rather than concrete goals. In fact some may argue that the progress achieved to date could be categorized as empty rhetoric. However these sustainable development agreements are not simply bombast, but rather commitments to realise a change in behaviour so that human beings can live sustainably within the limits of the environment whilst continuing to maintain respect for the human rights of the individual. If there is adequate support by the international community to implement changes to environmental governance, and to determine appropriate targets and standards for sustainable development, it is more likely that these goals may be achieved. According to Goodland and Daly:

The transitions to environmental sustainability will inevitably occur. However, whether nations will have the wisdom and foresight to plan for an orderly and equitable transition to environmental sustainability, rather than allowing biophysical limits to dictate the timing and course of the transition, remains in doubt.²⁰⁴

²⁰³ *The Belgrade Process*, above n 188, 4.

²⁰⁴ Goodland and Daly, 'Environmental Sustainability: Universal and Non-negotiable, Ecological Applications' in Hunter, Salzman and Zaelke (eds) above n 6, 154, 159.