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## LECTURE

At the request of the Washington University School of Law and the Washington University Environmental Law Society, on September 14, 1992, Sir Geoffrey Palmer visited Washington University School of Law and delivered the following lecture.

Sir Geoffrey Palmer is the former Prime Minister, Attorney General, and Minister for the Environment of New Zealand. He received a bachelor's degree and a LL.B. from Victoria University of Wellington and received a J.D. from the University of Chicago. He is the author of numerous books and articles including *Environmental Politics: A Greenprint for New Zealand* and *Unbridled Power*. Palmer is currently a Professor of Law at Victoria University of Wellington and the Mason Ladd Distinguished Visiting Professor of Law at the University of Iowa.

## THE EARTH SUMMIT: WHAT WENT WRONG AT RIO?

SIR GEOFFREY PALMER\*

### I. INTRODUCTION

The events at Rio de Janeiro in June of 1992 are a worthy subject of inquiry. Within a brief compass it is possible only to provide a general perspective on a massive amount of material.

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\* P.C., K.C.M.G., A.C., was formerly Minister for the Environment and Prime Minister of New Zealand; 1991 Laureate, United Nations Environment Programme Global 500 Roll of Honor; Member, International Advisory Council, World Wide Fund for Nature. The author is grateful to his research assistant Christina King of the Class of 1993 College of Law, University of Iowa, for assistance with this article.

Two further caveats are necessary at the outset. Nothing here is attributable to the New Zealand government, which was good enough to make me an official delegate to the United Nations Conference on Environment and Development ("UNCED") at Rio.<sup>1</sup> These are my personal opinions. It is not my purpose to attack the international environmental policies of the United States or its performance at Rio. If one were inclined to do so, ample opportunity exists, but such is not the mission here.<sup>2</sup>

The subject is the question "What went wrong at Rio?" This inquiry assumes that something did go wrong, though it is not a self-evident proposition. Some believe the United Nations Conference on Environment and Development was a success.<sup>3</sup> To count the conference as a failure it would be necessary to demonstrate that it would have been better had it not taken place. It is clear, however, that a number of things were accomplished at Rio which will make a positive contribution to the state of the world's environment. To assess the achievements of such a comprehensive and complex set of diplomatic negotiations is not simple.

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1. I was not able to attend the whole Conference, which lasted two weeks. But I was able to attend the negotiations for a week at Rio Centro and speak at the Global Forum. At the invitation of the Oceans Institute of Canada, I delivered an address to the Oceans Day of the Global Forum on June 8, 1992 entitled *Towards a New Oceans Order* (on file with the *Washington University Law Quarterly*).

2. Indeed, the stance of the United States has been criticized by officials of the administration itself. William K. Reilly, the administrator of the U.S. Environmental Protection Agency ("EPA"), stated in a memorandum to all EPA employees:

Another key question, frankly, is why did the United States play such a low-key defensive game in preparing for Rio? We assigned a low priority to the negotiations of the biodiversity treaty, were slow to engage the climate issue, were last to commit our President to attend Rio. We put our delegation together late and we committed few resources. No doubt this contributed to the negative feelings toward the United States.

William K. Reilly, Memorandum to All EPA Employees: Reflections on the Earth Summit 4 (July 15, 1992) (on file with the *Washington University Law Quarterly*).

3. See, e.g., *Malaysian Foreign Minister Calls Rio Summit a Success*, AGENCE FRANCE PRESSE, June 17, 1992, available in LEXIS, Nexis Library, Currnt File (reporting that the meeting of 115 heads of state to discuss environmental issues in Rio was a success); Peter Samuel, *Green for Go in Rio's Afterglow*, WASH. TIMES, June 17, 1992, at G4 (discussing successes from environmentalists' point of view); Philip Shabecoff, *Earth Summit: After the Carnival in Rio—What?*, AM. POL. NETWORK GREENWIRE, June 18, 1992, available in LEXIS, Nexis Library, Currnt File (discussing successes and failures at Rio); *EC Tax Commissioner, Parliament Differ on Success of U.N. Earth Summit in Rio*, INT'L ENV. DAILY (BNA), July 22, 1992, available in LEXIS, Nexis Library, Current File (EC Commissioner's impressions of Rio's successes); *Rio Raised Environmental Commitment in United States, New Survey Finds*, INT'L ENV. DAILY (BNA), Aug. 6, 1992, available in LEXIS, Nexis Library, Currnt File (reporting that four out of five Americans' environmental consciousness was raised by Rio).

Overall, however, skepticism is prudent.<sup>4</sup>

More should have been achieved for the future of the environment. The big failure of Rio was a failure of political leadership, commitment and vision. Many opportunities were lost. Rio scores barely a passing grade, although it is possible that, in time, the achievement will blossom into meaningful environmental progress. How quickly and to what extent this may occur cannot now be predicted.

A great deal was promised for Rio, and perhaps it was not reasonable to expect that it could meet these expectations. The general rhetoric suggested that this was the Conference to save the world. Such statements were reinforced even as the Secretary-General Maurice Strong opened the Conference, stating that UNCED "will define the state of political will to save our planet."<sup>5</sup> Many of the speeches of the world leaders who addressed the Conference expressed rhetorical flourishes of a similar nature. Although the level of rhetoric had been high since 1989, actions did not match that rhetoric. In theory, the need for international environmental governance is supported strongly by many countries. But, when it comes to implementing the theory, the commitment is much weaker.

## II. JUDGING THE EARTH SUMMIT: WHAT STANDARD?

By what standard should the Earth Summit be judged? Only defining the appropriate standard to apply allows an answer to the question: What went wrong at Rio? Several tests can be used in this analysis. It may be helpful to consider some of them in the form of questions:

- (1) Did the Conference raise the consciousness of people around the world about the importance of global environmental issues?
- (2) Has UNCED produced an international consensus which will ensure a new approach to protecting the environment?
- (3) Did UNCED meet the goals that were set for it at the time of its conception?
- (4) Did the Conference agree on binding and specific measures

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4. See *The Earth Summit Debacle*, 22 *ECOLOGIST* 122 (1992). The *Ecologist* devoted its entire July/August 1992 issue to the question, "Whose common future?" The criticism of the entire Earth Summit enterprise is scathing, including the charge that the Summit was, in essence, a "deliberate evasion of the central issues." *Id.*

5. Maurice F. Strong, Statement by Maurice F. Strong, Secretary-General, United Nations Conference on Environment and Development at the Opening of the United Nations Conference on Environment and Development (June 3, 1992) (transcript available from UNCED).

which will make a significant contribution to halting environmental degradation and producing global security?

There is no doubt that the UNCED process substantially raised the level of environmental consciousness around the world. Leaders and governments were forced to focus on the environmental issues, set concrete environmental policies and defend those positions in extensive negotiations at the international level. Furthermore, the general public's awareness of environmental issues and the need for action was undoubtedly enhanced. There was a great deal of publicity surrounding Rio, and the Conference certainly resulted in an increase in educated awareness of pressing environmental issues.

The agreements at Rio contained a wide range of detailed issues. While many of the agreements did not rise to the level of binding international legal obligations, it is conceivable that the consensus reached will form the basis for new norms to emerge that will be followed in the future. A whole range of material now exists by which to measure the actions of governments and hold them accountable.

Yet Rio did not produce enough binding new principles of international environmental law sufficient to protect the environment against known threats or secure its future. Clearly, UNCED failed to meet the expectations established in the resolutions of the United Nations General Assembly which created it. Neither did the meeting change the essential quality of international environmental law which "lacks a centralised authority for creation and enforcement of law."<sup>6</sup> Nor did the Rio meeting establish institutions likely to be effective in producing a new approach to environmental problems. Rio did not elicit the one development that is essential to changing the condition of the global environment: "formal abandonment of the idea that the principle of individual state consent continues to represent a fundamental defining characteristic of the international legal system."<sup>7</sup> The necessary structural adjustments were not made at Rio—they were not even addressed.<sup>8</sup>

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6. Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, in 1991 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 35, 38 (1991).

7. Günther Handl, *Environment Security and Global Change: The Challenge to International Law*, in 1991 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 3, 33 (1991).

8. Chapter 39 of Agenda 21 "International Legal Institutions and Mechanisms" contains hardly anything of substance.

### III. THE ROAD TO RIO

What was the purpose of holding the unprecedented environmental jamboree for two weeks in June 1992 at Rio de Janeiro? It was the largest and most costly diplomatic gathering in the history of the entire world.<sup>9</sup> The purpose of Rio is set out in a lengthy 1989 General Assembly Resolution.<sup>10</sup> We must look back to 1972, to the Stockholm meeting,<sup>11</sup> to find the origins of Rio. Canadian diplomat and businessman Maurice Strong was the chairman at that meeting.<sup>12</sup> He was also Secretary-General of the 1992 UNCED conference.<sup>13</sup> In retrospect, the achievements at Stockholm seem quite considerable, although as Strong himself said at Rio, "the hopes ignited at Stockholm remain largely unfulfilled."<sup>14</sup> The Stockholm conference led to establishment of ministries for the environment all over the world, and it led to establishment of the United Nations Environment Programme ("UNEP").<sup>15</sup> The Stockholm Declaration attracted 103 affirmative votes, twelve abstentions and no negative votes.<sup>16</sup> In addition, the Stockholm meeting raised the world's

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9 In his closing address, Maurice Strong described UNCED as "the largest high-level inter-governmental conference ever held on our planet." Maurice F. Strong, Closing Statement at United Nations Conference on Environment and Development, Rio de Janeiro, Brazil 5 (June 14, 1992) (transcript available from UNCED). Heads of government from approximately 115 nations participated, in contrast to Stockholm, where only two heads of government were present. David Segal, *Strong's Wrongs: Rio's Two-Faced Impresario; Earth Summit Secretary General Maurice Strong*, NEW REPUBLIC, June 22, 1992, at 13. One UNEP official told me privately at Rio that he estimated the costs of holding UNCED, including money spent by governments' preparations, would total approximately half a billion dollars.

10. *United Nations Conference on Environment and Development*, G.A. Res. 44/228, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1990) [hereinafter 1989 Resolution]; *United Nations Conference on Environment and Development*, G.A. Res. 43/196, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1989) [hereinafter 1988 Resolution].

11. The Stockholm meeting was held exactly 20 years before the Rio conference. U.N. CONFERENCE ON THE HUMAN ENVIRONMENT at 3, U.N. Doc. A/CONF.48/14/Rev. 1, U.N. Sales No. E.73.11.A.14 (1973).

12. See Segal, *supra* note 9, at 13.

13. *Id.* See also Strong, *supra* note 5.

14. Strong, *supra* note 5, at 3.

15. Institutional and Financial Arrangements for International Environmental Co-operation, G.A. Res. 2997.27, U.N. GAOR Supp. No. 30, at 43, U.N. Doc. A/8730 (1972), reprinted in INTERNATIONAL ORGANIZATION AND INTEGRATION 460 (Louis Sohn ed., 1986). For a complete collection of official documents relating to UNEP, see UNEP, COMPENDIUM OF LEGISLATIVE AUTHORITY (1978) [hereinafter UNEP COMPENDIUM].

16. Stockholm Declaration of the U.N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14 (1972), 11 I.L.M. 1416 (1972) (adopted with no roll call vote recorded) [hereinafter Stockholm Declaration]; see also BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 691 (Burns H. Weston et al. eds., 2d ed. 1990).

level of consciousness about environmental issues.

One tell-tale sign of the lack of success at Rio compared with Stockholm involved the issue of whaling.<sup>17</sup> Rio did not secure an international commitment to ban whaling, whereas at Stockholm a ban on whaling had been agreed upon.<sup>18</sup> A resolution was passed at Stockholm calling for a moratorium on whaling,<sup>19</sup> which the International Whaling Commission later implemented.<sup>20</sup> Yet, in 1992, Rio was unable to secure the same degree of agreement on whaling even though an agreement on whaling should have been less controversial in 1992 than it had been in 1972.<sup>21</sup>

Fifteen years after the Stockholm meeting the significant report of the World Commission on Environment and Development, entitled *Our*

17. See *infra* notes 20-21.

18. Stockholm Declaration, *supra* note 16, at 1434.

19. The text of Resolution 33 reads: "It is recommended that Governments agree to strengthen the international whaling commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the international whaling commission and all Governments concerned for a 10-year moratorium on commercial whaling." *Id.*

20. The International Whaling Commission was created in 1946 to oversee commercial whaling practices. International Convention for the Regulation of Whaling, Dec. 2, 1946. *Entered into force*, Nov. 10, 1948; 62 Stat. 2, 1716, T.I.A.S. No. 1849, 4 Bevans 248, 161 U.N.T.S. 72. The Commission was responsible for implementing the resolution of the Stockholm Conference. Bill Mansfield, *Improved International Protection for Cetaceans: Proposed New Zealand Initiative at the UNCED Prepcom III*, Aug. 5, 1991, at 2 (Director-General of Conservation Briefing Paper to the New Zealand Minister of Conservation) (on file with the *Washington University Law Quarterly*).

21. At Prep Com III, New Zealand made an Intervention on Small Cetaceans in order to prompt action by the International Whaling Commission and the world community to make effective a moratorium on whaling and driftnet fishing. *Draft UNCED Intervention on Small Cetaceans*, 1991 (official statement of the New Zealand government on whaling and driftnet fishing to UNCED Prep Com III) (on file with the *Washington University Law Quarterly*). Yet Prep Com IV's Working Group II did not incorporate a ban on whaling into its statement of principles. *Protection of the Oceans and All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use, and Development of their Living Resources*, Preparatory Committee for the United Nations Conference on Environment and Development Working Group II, 4th Sess., Agenda Item 2, *passim*, U.N. Doc. A/CONF.151/PC/WG.II/L.16/Rev.1 (1992).

Following the UNCED Conference in Rio, the International Whaling Commission held its annual meeting in Glasgow, Scotland. This meeting erupted in controversy, as Norway, Iceland and Japan made clear their intentions to resume whaling in the near future. Alexander MacLeod, *World Whaling Body Shaken by Attempts to Resume the Hunt*, CHRISTIAN SCI. MONITOR, July 6, 1992, at 3. While the ban on whaling will be maintained for the next year, it appears unlikely that it will last beyond 1993. *Id.* See also NZ Minister Hails Maintenance of Whaling Ban, AGENCE FRANCE PRESSE, July 6, 1992, available in LEXIS, Nexis Library, Currnt File; *International Whaling Commission Draws Fire from Pro-Whaling Group*, INT'L ENVTL. DAILY (BNA), July 7, 1992, available in LEXIS, Nexis Library, Intenv File; *IWC Maintains Moratorium on Whaling: Rules Japan Cannot Hunt Minke Whales*, INT'L ENVTL. DAILY (BNA), July 8, 1992, available in LEXIS, Nexis Library, Intenv File.

*Common Future*, was released.<sup>22</sup> The report, issued in 1987—often called the Brundtland report after its chair, the Prime Minister of Norway—was a document of great importance to the international environmental movement.<sup>23</sup> The report linked economic and environmental issues in a way that the Stockholm declaration had failed to do.<sup>24</sup> It set forth a vision for the future: one based on sustainable development.<sup>25</sup> The report's vision was especially appealing because it argued that the world can have economic growth, eliminate poverty, and that it can be done in an environmentally sound and sustainable fashion.<sup>26</sup> To posit that it is possible to have economic growth within the limits of ecological integrity is an attractive prospect. This concept was the foundation for the Rio Declaration—the main statement of principle which emerged from UNCED.<sup>27</sup>

But is such sustainable development possible? There is substantial di-

22 WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987) [hereinafter BRUNDTLAND REPORT].

23. *Id.*

24. *Id.* at 67-91.

25. According to the Brundtland Commission, sustainable development requires:

- a political system that secures effective citizen participation in decision making;
- an economic system that is able to generate surpluses and technical knowledge on a self-reliant and sustained basis;
- a social system that provides for solutions for the tensions arising from disharmonious development;
- a production system that respects the obligation to preserve the ecological basis for development;
- a technological system that can search continuously for new solutions;
- an international system that fosters sustainable patterns of trade and finance; and,
- an administrative system that is flexible and has the capacity for self-correction.

*Id.* at 65.

26. The Commission wrote:

Humanity has the ability to make development sustainable—to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development does imply limits—not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth. The Commission believes that widespread poverty is no longer inevitable. Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfill their aspirations for a better life.

*Id.* at 8.

27. *The Rio Declaration on Environment and Development*, United Nations Conference of Environment and Development, Agenda Item 9, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter *Rio Declaration*]. See also William K. Stevens, *Earth Summit Finds the Years of Optimism Are a Fading Memory*, N.Y. TIMES, June 9, 1992, at C4 (analyzing the bases for Rio as traceable to Stockholm and to the Brundtland Report).

vergence of opinion about this possibility. The politics behind the principle, however, are good. It comprises a matrix that binds those who believe in the need to protect the environment with those who want economic growth and development. Also, it provides a framework under which both developed and developing countries can find common ground. The power of the concept begins to disintegrate, however, when one attempts to break it down into its constituent elements and make practical decisions to implement the idea. At that point, the starkness of the choices becomes evident and consensus is more difficult to attain. To some degree this explains the difficulty at Rio.

In any event, the Brundtland report produced an international impetus to the view that there is a need to take concerted global action on a number of issues. Thus, the United Nations began to debate possible actions to be taken to address environmental issues. In 1988 and 1989, the General Assembly passed a series of resolutions that set up the United Nations Conference on Environment and Development—the Earth Summit.<sup>28</sup> The main U.N. resolution is quite long, about six pages, including all the preambular paragraphs. The standards set forth in the resolution are one measure by which to judge the Earth Summit, because they set forth the program which the Earth Summit was supposed to address. In the preambular paragraphs, the 1989 resolution stated that nations are deeply concerned by the continuing deterioration of the environment and by the serious degradation of global life-support systems.<sup>29</sup> If such trends are allowed to continue, disruption of the global ecological balance could occur, which may jeopardize the life sustaining qualities of the Earth and lead to an ecological catastrophe.<sup>30</sup> The Brundtland report recognized that decisive, urgent, and global action is vital to protect the ecological balance of the Earth.<sup>31</sup> Indeed, after a series of other alarming preambular paragraphs in the 1989 resolution, the United Nations General Assembly went on to agree that

[T]he following environmental issues, which are not listed in any particular order of priority, are among those of major concern in maintaining the quality of the Earth's environment and especially in achieving environmentally sound and sustainable development in all countries:

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28. *See supra* note 10.

29. *See* 1989 Resolution, *supra* note 10, at 152.

30. *Id.*

31. *See* BRUNDTLAND REPORT, *supra* note 22, at 1-2.

- (a) Protection of the atmosphere by combating climate change, depletion of the ozone layer, and transboundary air pollution;
- (b) Protection of the quality and supply of fresh water resources;
- (c) Protection of the oceans and all kinds of seas, including enclosed and semi-enclosed seas, and of coastal areas and the protection, rational use and development of their living resources;
- (d) Protection and management of land resources by, *inter alia*, combating the deforestation, desertification and drought;
- (e) Conservation of biological diversity;
- (f) Environmentally sound management of biotechnology;
- (g) Environmentally sound management of wastes, particularly hazardous wastes, and of toxic chemicals, as well as prevention of illegal international traffic of toxic and dangerous products;
- (h) Improvement of the living and working environment of the poor in urban slums and rural areas through eradicating poverty . . . .<sup>32</sup>

This is certainly an ambitious agenda. Indeed, one of the major difficulties with Rio was that much was said about it in the planning stages, and expectations were raised which were hard to satisfy.<sup>33</sup> In fact, the agenda that was set was so fixed, wide, and embracing that it constituted a challenge that would not be met.<sup>34</sup>

32. See 1989 Resolution, *supra* note 10, at 153.

33. Rhetoric surrounding the development of Agenda 21 was filled with measures for action in economic and environmental development in coming years. Much was made of the Rio Conference's role in spurring global cooperation and sustainable development. Yet some analysts have concluded that national interests played a key role in defeating the broad policy ideals that were set forth before commencement of the conference. See Julia Preston & Eugene Robinson, *National Interests Preside at Rio: Rhetoric of Global Cooperation Does Not Suffuse Back Rooms*, WASH. POST, June 7, 1992, at A28.

34. Agenda 21 sets forth 40 chapters of concerns to be addressed by the UNCED Conference. These topics include: International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Policies (Chapter 2); Combating Poverty (Chapter 3); Changing Consumption Patterns (Chapter 4); Demographic Dynamics and Sustainability (Chapter 5); Protecting and Promoting Human Health (Chapter 6); Promoting Sustainable Human Settlement Development (Chapter 7); Integrating Environment and Development in Decision-Making (Chapter 8); Protection of the Atmosphere (Chapter 9); Integrated Approach to the Planning and Management of Land Resources (Chapter 10); Combating Deforestation (Chapter 11); Managing Fragile Ecosystems: Combating Decertification and Drought (Chapter 12); Managing Fragile Ecosystems: Sustainable Mountain Development (Chapter 13); Promoting Sustainable Agriculture and Rural Development (Chapter 14); Conservation of Biological Diversity (Chapter 15); Environmentally Sound Management of Biotechnology (Chapter 16); Protection of Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources (Chapter 17); Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources (Chapter 18); Environmentally Sound Management of Toxic Chemicals, Including

The techniques adopted to meet the challenge at Rio were inevitably the techniques of international diplomacy. For those who have not labored through a series of international meetings, those techniques merit a brief description. The tools of international diplomacy are cumbersome. They are based on consensus; there must be agreement to make effective policies possible. If 180 nations negotiate, 180 nations must agree. Issues are often discussed to the point of exhaustion, and there is frequently little progress toward policy development. Time is usually quite limited, and such international meetings are extremely difficult to conduct. It would probably be difficult to secure the agreement of 180 nations at an international diplomatic gathering that the earth is round, let alone what steps need to be taken to preserve it. Bruce Babbitt has correctly described the Rio proceedings as "a chaotic process more akin to a street brawl than a diplomatic meeting."<sup>35</sup>

So what happened, in order to manage the techniques of multilateral diplomacy effectively, at the UNCED meetings in Rio? Preparatory Committees were set up—or Prep Coms, as they are called in the United Nations vernacular.<sup>36</sup> Four Prep Coms were held at various times and

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Prevention of Illegal International Traffic in Toxic and Dangerous Products (Chapter 19); Environmentally Sound Management of Hazardous Wastes, Including Prevention of Illegal International Traffic in Hazardous Wastes (Chapter 20); Environmentally Sound Management of Solid Wastes and Sewage-Related Issues (Chapter 21); Safe and Environmentally Sound Management of Radioactive Wastes (Chapter 22); Strengthening the Role of Major Groups: Preamble (Chapter 23); Global Action for Women Towards Sustainable and Equitable Development (Chapter 24); Children and Youth in Sustainable Development (Chapter 25); Recognizing and Strengthening the Role of Indigenous People and their Communities (Chapter 26); Strengthening the Role of Non-Governmental Organizations: Partners for Sustainable Development (Chapter 27); Local Authorities: Initiatives in Support of Agenda 21 (Chapter 28); Strengthening the Role of Workers and their Trade Unions (Chapter 29); Strengthening the Role of Business and Industry (Chapter 30); Scientific and Technological Community (Chapter 31); Strengthening the Role of Farmers (Chapter 32); Means of Implementation: Financial Resources and Mechanisms (Chapter 33); Environmentally Sound Technology: Transfer, Cooperation and Capacity-Building (Chapter 34); Science for Sustainable Development (Chapter 35); Promoting Education, Public Awareness and Training (Chapter 36); National Mechanisms and International Cooperation for Capacity-Building in Developing Countries (Chapter 37); International Institutional Arrangements (Chapter 38); International Legal Instruments and Mechanisms (Chapter 39); Information for Decision-Making (Chapter 40). *Adoption of Agreements on Environment and Development: Agenda 21*, United Nations Conference on Environment and Development, Provisional Agenda Item 9, U.N. Doc. A/CONF.151/4 (Parts I-IV) (1992) [hereinafter *Agenda 21*]. Arguably, the range of topics may be unmanageably wide. Possibly, with closer attention to defining, the priorities could have been better achieved. On the other hand, serious environmental problems exist over a broad field and are often interrelated.

35. Bruce Babbitt, *After Rio*, WORLD MONITOR, June 1992, at 28, 30.

36. See 1989 Resolution, *supra* note 10, at 154. See also *Report of the Preparatory Committee*

places around the world.<sup>37</sup> These meetings are really negotiations about negotiations. They have all the same cumbersome impedimenta of multi-lateral diplomacy as negotiations conducted at the United Nations. Incredibly long-winded arguments, with a lot of language put in square brackets, are par for the course.<sup>38</sup> Representatives of many nations attended these preliminary meetings, where they thrashed through draft after draft of what was to be agreed upon at Rio. There was opportunity in the Prep Com meetings for nations to protect their own self-interests, and many nations did. Obviously, this occurs in many international negotiations. But when considering environmental issues, it is necessary for nations to lift their sights above their own immediate self-interests. Unfortunately, this did not happen much at Rio. For example, nations such as Saudi Arabia, which are well endowed with oil and do not wish international policies to restrict the use of that oil, will resist environmental policies that conflict with oil producing interests. Saudi Arabia in fact advanced arguments which were egregiously self-interested.<sup>39</sup> At Rio and in the associated negotiations, too many nations concentrated on their own self-interests without looking adequately at the collective interest of all nations—which is, after all, the heart of the global environmental problem.

#### IV. THE FRUITS OF RIO

The main outputs of UNCED were:

- The Rio Declaration—a short statement of principles revolving around sustainability;<sup>40</sup>
- Agenda 21—an enormous action plan of forty chapters comprising recommendations to governments;<sup>41</sup>
- A Declaration on Forests which had been intended as a hard law convention but could not be agreed upon;<sup>42</sup>

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*for the United Nations Conference on Environment and Development*, United Nations Conference on Environment and Development, 46th Sess., U.N. Doc. A/46/48 (1991).

37. The first two Prep Coms were held in New York and Nairobi, and the second two Prep Coms were held in Geneva, as mandated in the 1989 Resolution. See 1989 Resolution, *supra* note 10, at 154.

38. Square brackets mean: "we do not agree on this formulation, but we might agree later."

39. See *U.S. May Try to Derail the Rio Declaration: It Wants Language Changes in Action-Oriented Plans*, STAR TRIB., June 10, 1992, at 2A. "A proposal to reduce air pollution, urban smog, and acid rain was being blocked by Saudi Arabia, which fears a drop in oil revenues . . ." *Id.*

40. See *Rio Declaration*, *supra* note 27.

41. See *Agenda 21*, *supra* note 34.

42. Statement of Principles for a Global Consensus on the Management, Conservation, and

- A Convention on Biological Diversity;<sup>43</sup>
- A Framework Convention on Climate Change;<sup>44</sup>
- An agreement within the context of Agenda 21 to establish a Sustainable Development Commission to monitor the progress in implementing the Rio Declaration.<sup>45</sup>

The two conventions—the Rio Framework Convention on Climate Change and the Convention on Biological Diversity—comprised the only hard law output from Rio. Rio was unnecessary for their negotiation or their existence. Both of these measures were negotiated by separate processes, and the UNCED machinery was not used. The measures appear to have been attached to UNCED in order to give weighty appearance to the proceedings and to add symbolism. The UNCED machinery, in contrast, was concerned with the Rio Declaration, Agenda 21 and the Forestry Declaration. I will now briefly discuss each of these instruments.

#### A. *The Rio Declaration*

The leading document produced at the 1992 Rio Conference was the Rio Declaration.<sup>46</sup> The Rio Declaration, like many declarations concluded at massive international meetings, was not intended to be a convention containing enforceable treaty obligations. Nations usually prefer soft law documents; they like to agree to high-sounding resolutions of principle that do not actually require them to do anything very specific later.<sup>47</sup> The Rio Declaration is such a soft law agreement. Nevertheless,

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Sustainable Development of All Types of Forests, June 13, 1992, 31 I.L.M. 881 [hereinafter *Forest Principles*].

43. Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818 [hereinafter *Biodiversity Convention*].

44. Framework Convention on Global Climate Change, *opened for signature* June 5, 1992, 31 I.L.M. 849 [hereinafter *Climate Change Convention*].

45. *See Agenda 21*, *supra* note 34, at ch. 38.

46. *See Rio Declaration*, *supra* note 27.

47. *See generally* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989); *A Hard Look at Soft Law*, 82 ASIL PROC. 371 (1988); W. Riphagen, *From Soft Law to Jus Cogens and Back*, 17 VICTORIA U. WELLINGTON L. REV. 81 (1987); John Kin Gamble, Jr., *The 1982 United Nations Convention on the Law of the Sea as Soft Law*, 8 HOUSTON J. INT'L L. 37 (1985); Jonathan Carlson, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimensions of a Political Problem*, 70 IOWA L. REV. 1187 (1985); Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37 (1984); Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 A.J.I.L. 443 (1983).

the Rio Declaration contains a set of mission statements which would be of substantial benefit if adopted around the world.

The Rio Declaration is based on the principle of sustainable development.<sup>48</sup> Almost everything in the Rio Declaration points to the need to adopt sustainable development policies.<sup>49</sup> It does not, however, enunciate how to do this, nor does it explain the legal and policy content of sustainable development. Indeed, even having spent three years as Minister for the Environment in New Zealand, and having based an entire resource management law on sustainable development,<sup>50</sup> it is my view that the legal and policy ambiguities raised by the issue of sustainable development were not adequately discussed, much less resolved. For example, how does one balance the economic interests of future generations against the economic interests of present generations? How can one balance the question of ecological bottom lines against the question of communities' individual interests and jobs, and short-term economic advancement? These issues are difficult to resolve. Nations need more guidance on how to confront these issues than the high sounding principles contained in the Rio Declaration. Presumably, additional guidance is intended to come from the detailed action plan in Agenda 21, although it is doubtful that it does.

Principle One of the Rio Declaration states that: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life and harmony with nature."<sup>51</sup> Principle Three states: "The right to develop it must be fulfilled so as to equitably meet development and environmental needs of present and future generations."<sup>52</sup> "In order to achieve sustainable development," Principle Four states, "environmental protection shall constitute an integral part of the developmental process and cannot be considered in isolation from it."<sup>53</sup> Principle 5 continues: "All states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for

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48. See *Rio Declaration*, *supra* note 27, *passim*.

49. *Id.*

50. Resource Management Act. 1 N.Z. Stat. 69 (1991). This ambitious act has as its objective "to integrate the Laws relating to resource management and to set up a resource management system that promotes sustainable management of natural and physical resources." *Id.* The Act is 382 pages long and replaces some 75 statutes. It integrates existing laws for the management of land, water, and soil, coastal areas, and pollution control. It came into force on October 1, 1991.

51. See *Rio Declaration*, *supra* note 27, at 2.

52. *Id.* at 3.

53. *Id.*

sustainable development . . . .”<sup>54</sup> The Declaration adds in Principle 6: “The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.”<sup>55</sup> Principle Eight goes further: “To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote *appropriate* demographic policies.”<sup>56</sup> “Appropriate,” is a universal weasel word in international negotiations. Here it was a code for saying, “we do not wish to address the population problem.” Of all the issues critical to the future of the planet, the one most assiduously avoided at Rio was population control. Obviously, the carrying capacity of the planet is greatly affected by the amount of population that it supports.<sup>57</sup> Because many nations did not want to address the population issue, it was not addressed in a meaningful way.<sup>58</sup> It is true that proper consideration of the issue cannot be divorced from the question of levels of consumption. But where gains are made, high rates of population growth can eliminate them.

The question of sustainable development, as outlined in the Rio Declaration, owes much to the Brundtland Commission’s report.<sup>59</sup> How will the world attain sustainable development? The Rio Declaration states that sustainability is the driving force of international environmental policy.<sup>60</sup> It certainly attracted widespread support at Rio. But what does it mean? The Rio documents contain few answers to this question. The principle of sustainable development is no doubt important. But it is important to resolve the internal conceptual contradictions and not try to paper over them. Specificity and intellectual rigour cannot be indefinitely suspended from the analysis of its ingredients.<sup>61</sup>

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54. *Id.*

55. *Id.*

56. *Id.* at 5 (emphasis added).

57. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). See also WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* 146-47 (1977).

58. See *supra* note 34.

59. See BRUNDTLAND REPORT, *supra* note 22, at 43-66; see also Stevens, *supra* note 27, at C4.

60. See *Rio Declaration*, *supra* note 27, *passim*.

61. The most useful work I have seen on the subject is MICHAEL R. REDCLIFT, *SUSTAINABLE DEVELOPMENT: EXPLORING THE CONTRADICTIONS* (1987).

### B. *Agenda 21*

Agenda 21 contains forty chapters.<sup>62</sup> It is an action plan that sets out, under a large range of different headings, actions that nations should be taking to preserve the environment and to promote sustainable development.<sup>63</sup> Although not legally binding because it is only an action plan and agenda, it was negotiated by consensus.<sup>64</sup> In the course of time, aspects of it could ripen into norms of customary international law. Because it was negotiated by consensus, it tends to have quite a lot of gaps in it where nations could not agree.<sup>65</sup> The Agenda contains much hortatory language and quite a lot of mush.

One basic feature of Agenda 21 is that it is going to cost money—a lot of money. In the Rio process, there was a requirement to assess the financial costs of the recommended actions.<sup>66</sup> To mend our environmental ways worldwide and to implement all the elements in the forty chapters of Agenda 21, the Rio Action Plan,<sup>67</sup> the UNCED secretariat estimated that it would cost annually “\$600 billion, including about \$125 billion on grant or concessional terms from the international commu-

62. See *Agenda 21*, *supra* note 34, *passim*.

63. *Id.*

64. *Id.* at pmb., ¶ 1.3. “Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus and political commitment at the highest level on development and environment cooperation.” *Id.*

65. Examples of these gaps abound. Food and agricultural development, population and human resources, and energy are examples of issues UNCED inadequately addressed. See, e.g., BRUNDTLAND REPORT, *supra* note 22, *passim* (offering a host of topics for resolution by UNCED, few of which were addressed significantly by Agenda 21). See also Greenpeace International, Submission to the United Nations Conference on Environment and Development: A Document for Consideration by the Secretary-General in the Preparation for the Second Preparatory Committee of the UNCED, Mar.-Apr. 1991 (offering yet more topics that UNCED was unable to address adequately in Agenda 21) (on file with the *Washington University Law Quarterly*).

66. See *Agenda 21*, *supra* note 34, at pmb., ¶ 1.4.

The developmental and environmental objectives of Agenda 21 will require a substantial flow of new and additional financial resources to developing countries, in order to cover incremental costs for the actions they have to undertake to deal with global environmental problems and to accelerate sustainable development. Financial resources are also required for strengthening the capacity of international institutions for the implementation of Agenda 21. An indicative order of magnitude assessment of costs is included in each of the programme areas. This assessment will need to be examined and refined by the relevant implementing agencies and organizations.

*Id.*

67. Michael Weisskopf & Julia Preston, *U. N. Earth Summit Opens With Calls to Save Planet*, WASH. POST, June 4, 1992, at A20. Strong intended that more than half the money come from developed nations. *Id.*

nity."<sup>68</sup> Significant new funds were pledged at Rio; Japan and the EC, in particular, pledged new financial commitments, but nothing near the target of \$125 billion was achieved.<sup>69</sup> We are left in a frustrating situation: even if there is agreement on what needs to be done to combat environmental damage on an international scale, it appears it will not be funded. It was agreed, however, that there would be a restructuring of the Global Environmental Facility.<sup>70</sup>

### C. *The Declaration on Forests*

The third output of Rio was a Declaration on Forests.<sup>71</sup> Prior to the Rio Conference, there was hope for negotiation of a binding hard-law convention on forests, particularly tropical rainforests, which have a number of very important consequences in the environment both in the climate change and biodiversity areas. Nonetheless, the developing countries steadfastly refused to conclude such a broad forest agreement due to concerns about their development and economic growth.<sup>72</sup> Therefore, because it was impossible to negotiate binding commitments, only a declaration emerged. Useful as it is, it does not comprise a hard-law set of legal obligations to prevent continuation of massive deforestation practices, especially in the endangered rainforests. The negotiations on forestry at Rio were heavy, the focus of much disagreement and no little confrontation between North and South.

68. *Agenda 21*, *supra* note 34, at pmb1., ¶ 1.4.

69. *Id.* Germany pledged \$150 million. The U.S. pledged \$50 million, as well as \$25 million to aid developing countries to inventory energy uses, and \$150 million to help Third World nations preserve their forests. *Id.* In addition, Japan agreed to increase aid, which has been \$10 billion per year. William K. Stevens, *Bush Plan to Save Forests is Blocked by Poor Countries*, N.Y. TIMES, June 9, 1992, at A1.

70. *Agenda 21*, *supra* note 34, ch. 33, ¶ 33.16(iii).

71. See *Forest Principles*, *supra* note 42.

72. See Shabecoff, *supra* note 3. India and Malaysia were among the developing nations that refused to sign the forest agreement. *Id.* Both India and Malaysia have issued highly unfavorable reactions to the establishment of a comprehensive forest agreement.

Developing countries have argued that a distinction should be made between natural resources like the atmosphere, which clearly are shared by the whole world, and those like forests, which fall within national territories. "Trying to globalize forests is like saying oil is a global resource," argued Kamal Nath, India's Environment and Forests Minister . . . .

A key country opposing the proposed forests convention was Malaysia, which has one of the world's largest tropical forests and earns more than 40 percent of its income from timber sales . . . .

"By no stretch of the imagination are we going to keep our forests in custody for some other nation," said Ting Wen Lian, a member of the Malaysian delegation.

Preston & Robinson, *supra* note 33, at A28.

There emerged at Rio some venom between North and South.<sup>73</sup> In broad terms, the issue was whether the North was going to make available the technology and wealth transfers that were necessary for the South to conform to the new environmental standards, which they said the North was imposing on them. This disagreement led to some bitter exchanges. The divide between North and South seemed to intensify over the two years of the preparatory meetings. With the allegiances of the Cold War at an end, there was increased fluidity. The caucus of developing nations, known as the G-77, includes more than 125 countries. They made heavy demands, which had begun in earnest at the earlier negotiations of the instruments relating to the ozone layer.<sup>74</sup>

Sadly, these divisions were only papered over at Rio. No real resolution was attempted and no strategy emerged for resolving the issues. The United States offered no real initiatives, and for the most part the rest of the developed world was prepared to hide behind the American position. Developed nations said, of course, that they did not agree with the United States but, in fact, the American position provided them with shelter. Creative policy development necessary to bridge the gap will have to await another day.

#### D. *Convention on Climate Change*

The United States<sup>75</sup> signed the Climate Change Convention agreed upon at Rio.<sup>76</sup> The Convention was, however, substantially watered down at the insistence of the United States.<sup>77</sup> It contained no specific

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73. See Joel Achenbach, *At Summit, Dueling Hemispheres: North-South Rift Over Overpopulation*, WASH. POST, June 5, 1992, at C1; Paul Lewis, *Poor vs. Rich in Rio: If Development in Southern Hemisphere Is to Be 'Green', North May Have to Pay*, N.Y. TIMES, June 3, 1992, at A1. This conflict was evident in the refusal of Third World nations, especially India and Malaysia, to agree to Bush's forest plans. See *supra* note 72 and accompanying text.

74. The result was that India and China refused to ratify the relevant instrument unless increased funding was made available to assist compliance. The United States Congress passed legislation authorizing higher levels of funding to assist developing nations contingent upon ratifications of the instruments by India and China. Clean Air Act Amendments of 1990, 42 U.S.C.A. § 7671p(b) (West 1991).

75. *Framework Convention on Climate Change Signed*, 3 U.S. DEP'T ST. DISPATCH 462 (1992) (press release statement by President Bush).

76. See Climate Change Convention, *supra* note 44.

77. Michael Wines reported:

Last month, Mr. Bush successfully wielded a threat to boycott the Earth Summit to win concessions from most of the world's nations on a global warming treaty, eliminating language that would have required the United States to cap its emissions of carbon dioxide by 2000 at 1990 levels. The treaty now calls for "action plans" to reduce emissions of gases that are thought to promote global warming, but does not mandate reductions.

commitment regarding the level of emissions or future reduction of emissions.<sup>78</sup> Many nations were prepared to agree to specific targets, but the United States was not; therefore, no targets appear in the Convention.

Views on climate change differ, although they do not differ as much outside the United States. Nevertheless, the Climate Change Convention flunked the major test because there was no agreement on targets for reduction of emissions of greenhouse gas. Within the structure of the Climate Change Convention, the means exist however, to achieve such commitments by amending the Convention. Those amendments need not be the result of consensus.<sup>79</sup> Article 15 of the Climate Change Convention states: "Amendments to the convention shall be adopted at an ordinary session of the conference of the Parties."<sup>80</sup> The text of an amendment is to be communicated at least six months before the meeting.<sup>81</sup>

The parties shall make every effort to reach agreement on any proposed amendments to the Convention by consensus. If all efforts at consensus have been exhausted and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.<sup>82</sup>

This constitutes the beginning of international legislation on climate change. In the future, therefore, much may result from the Convention.

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Michael Wines, *Bush, Trying to Counter Criticism, Offers Plan to Save Earth's Forests*, N.Y. TIMES, June 2, 1992, at A4.

This insistence that the treaty be watered down stemmed, in part, from claims of scientific uncertainty about global warming, and the costs necessary to implement strict standards for carbon dioxide emissions and control of CFCs. See generally Ed Rubenstein, *Getting Hot in Rio: United Nations Conference on Development and Environment Column*, NAT'L REV., June 22, 1992, at 17. In fact, the Bush administration has been accused of using fear of lost jobs to justify refusal to adhere to stringent restrictions to stop global warming. See *Senator Says U.S. Undermined in Rio by Misguided Policies, Lack of Leadership*, INT'L ENVTL. DAILY (BNA), June 24, 1992, available in LEXIS, Nexis Library, Currnt File; *U.S. Policy on the Environment and Development*, 3 U.S. DEP'T ST. DISPATCH 3 (1992) [hereinafter *U.S. Policy*].

78. See Climate Change Convention, *supra* note 44, at 855-59. But see Jeremy Leggett, *Global Warming: The Scientific Evidence and Its Implications*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1992) (arguing that a climate change convention must contain protocols requiring deep cuts in greenhouse gas emissions if any positive progress toward eliminating global warming is to occur); David A. Wirth & Daniel A. Lashof, *Beyond Vienna and Montreal: A Global Framework Convention on Greenhouse Gases*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 79 (1992) (arguing that any global climate change treaty must include early and significant greenhouse gas reductions).

79. This is important because it creates a means to legislate measures to curb climate change in the future.

80. See Climate Change Convention, *supra* note 44, at 868.

81. *Id.*

82. *Id.*

Standards could be agreed to and imposed even when some nations do not agree. Levels of carbon dioxide emissions could thereby be curtailed. It will be necessary, however, to conduct many more extensive international negotiations before the problem is seriously addressed by the international community, much less resolved.<sup>83</sup>

### *E. Convention on Biodiversity*

A Convention on Biological Diversity was signed at Rio.<sup>84</sup> The United States chose not to sign this agreement because it feared problems with economic development in biotechnology and interference with United States patents.<sup>85</sup>

The Biodiversity Convention is important because a large proportion of all species of plants and animals live in tropical rainforests.<sup>86</sup> These forests are being destroyed at the rate of seventeen million hectares a year.<sup>87</sup> This poses a very serious challenge to the future of humanity. The magnitude of loss resulting from a decrease in biodiversity is not yet known, which is one of the essential problems of biodiversity. The Biodiversity Convention contains some useful provisions about identification and monitoring of these rainforest resources (Article 7),<sup>88</sup> about

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83. *Id.* For a detailed analysis of what will be required to produce an effective policy to combat global warming, see Symposium, *Confronting Global Warming*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1992).

84. See Biodiversity Convention, *supra* note 43.

85. President Bush explained his reasoning for refusing to sign the Biological Diversity Convention as follows:

Many governments and many individuals from the United States and other nations have pressed us to sign a treaty on what's called "biodiversity." . . . The treaty's intent is noble—to ensure protection of natural habitat for the world's plants and animal life.

The United States has better protection for species and habitat than any nation on earth. An[d] no one disagrees with the goal of the treaty, but the truth is, it contains provisions that have nothing—nothing—to do with biodiversity.

Take just one example. The private sector is proving it can help generate solutions to our environmental problem. The treaty includes provisions that discourage technological innovation, [and] treats them as common property even though they are developed at great cost by private companies and American workers. We know what will happen: Remove incentives and we'll see fewer of the technological advances that help protect our planet.

See *U.S. Policy*, *supra* note 77, at 3 (departure remarks of President Bush given at Andrews Air Force Base on June 11, 1992). See also Keith Schneider, *White House Snubs U.S. Envoy's Plea to Sign Rio Treaty*, N.Y. TIMES, June 5, 1992, at A6.

86. Hilary F. French, *After the Earth Summit: The Future of Environmental Governance*, 17 (Mar. 1992) (Worldwatch Paper No. 107).

87. *Id.*

88. See Biodiversity Convention, *supra* note 43, at 825.

their conservation (Articles 8-9),<sup>89</sup> about public education and awareness (Article 13),<sup>90</sup> about genetic resources (Article 15),<sup>91</sup> about technology transfer (Article 16),<sup>92</sup> and about financial resources in relation to deforestation as well as interesting suggestions for financial mechanisms (Articles 20-21).<sup>93</sup> The Biodiversity Convention will need quite a lot of extra work if it is ever going to have significant impact in halting the ever-increasing extinction of species around the world. It contains a number of technical problems, and it is hard to discern any workable overall strategy within it which will allow achievement of its purposes.

#### *F. Sustainable Development Commission*

The last output from Rio was a commitment to set up a Sustainable Development Commission,<sup>94</sup> which is intended to be a new international organization designed to monitor post-Rio developments. This may sound like progress, but it is unclear that it is. In the negotiations, there was a manifest failure to address the existing international institutions which relate to the global environment<sup>95</sup> and the problem of coordination between those institutions. Indeed, the necessary restructuring so often required in civil services at the domestic level seems to be more difficult to accomplish at the international level. Many senior international civil servants have an axe to grind, and they tend to grind remorselessly in their own interests. At Rio, some unkind people were saying that the Sustainability Commission was really designed to provide employment for the UNCED secretariat employees who otherwise faced unemployment after the end of the Rio conference.<sup>96</sup>

There are five key problems with the international machinery relating to the environment.<sup>97</sup> Methods of international negotiation in relation to the environment are so cumbersome that it is almost impossible to negotiate effectively. Also, it is hardly possible to obtain unanimous consent

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89. *Id.* at 825-26.

90. *Id.* at 827.

91. *Id.* at 828.

92. *Id.* at 829.

93. *Id.* at 830-31.

94. *See Agenda 21*, *supra* note 34, ch. 38, *passim*.

95. *Id.*

96. Some delegates with whom I conversed at Rio openly discussed this.

97. *See generally* Geoffrey Palmer, *New Ways to Make International Law*, 86 A.J.I.L. 259 (1992); Symposium, *The Role of International Law in Global Environmental Protection*, 42 WASH. U. J. URB. & CONTEMP. L. 3 (1992).

on large and contentious issues such as global warming. Once an international convention has been negotiated, it is impossible to coerce people into signing. Even if nations have ratified an international convention, often it cannot be enforced effectively. Finally, it is not possible to coordinate one international convention with another. More than 150 international environmental conventions have been negotiated in the last thirty or forty years.<sup>98</sup> Many of them contain overlapping provisions although they have all been negotiated by different means. The decisions made at Rio will not solve any of the five problems which exist with the machinery of international environmental law.

The objectives of the institutions Chapter of Agenda 21 are clear:<sup>99</sup>

- to ensure and review the implementation of Agenda 21 so as to achieve sustainable developments in all countries;
- to enhance the role and functioning of the U.N. system in the field of environment and development;
- to strengthen cooperation and coordination and avoid duplication.<sup>100</sup>

Chapter 38 of Agenda 21 states that the objectives are to be achieved through the existing machinery comprising the General Assembly, the Economic and Social Council, the specialized agencies, and the Commission on Sustainable Development.<sup>101</sup> At Rio it was decided that "specific organizational modalities for the work of this Commission will be determined by the General Assembly at its forty-seventh session."<sup>102</sup> The functions of the Commission are clear enough: to monitor the implementation of Agenda 21; to consider reports from governments on the implementation; and to review progress on implementation. At the same time, it was decided that UNEP should be strengthened. However, there was a complete failure to address the necessary task of institutional restructuring within the U.N. relating to the environmental functions of UNEP and other U.N. institutions. Unfortunately, we are likely to continue to limp along in much the same fashion as before—with lack of clear jurisdiction, waste, duplication, and the absence of coordination.

### G. Which paradigm?

The aftermath of Rio suggests three paradigmatic views of the global

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98. See UNEP COMPENDIUM, *supra* note 15.

99. *Agenda 21*, *supra* note 34, ch. 38.

100. *Id.*

101. *Id.*

102. *Id.*

environmental problem. The first view might be reasonably characterized as the *laissez-faire* approach. This approach suggests that, "by seeing technology, industry and free enterprise as the causes of environmental problems, we make these problems worse."<sup>103</sup> According to this conservative paradigm, new technology, individual inventiveness, and the market will develop appropriate mechanisms that will save us from disaster.<sup>104</sup> After all, capitalism is superior to everything else, and we can rest our future on it with confidence.

The second paradigm teaches that it is necessary to intervene in market decisions to protect the environment.<sup>105</sup> The principles of sustainable development provide a basis for this viewpoint.<sup>106</sup> Development must be analyzed in terms of its effects on ecology.<sup>107</sup> The long-term consequences for the planet's health, the atmosphere, the biosphere, the oceans, and all the other problems of the global commons which no nation can by itself control must be measured. So the sustainable development view, which the Rio Declaration promotes, advocates the attractive political vision that growth, economic development and ecological integrity can co-exist.<sup>108</sup> Within this rubric, the scope exists for free market environmentalism. There is also space for increased consumption. We can have our environmental cake and eat it too.

The third, more mournful view, is put forward by the deep eco-

103. James R. Dunn, *America the Beautiful: Accomplishments of Environmental Protection in the US*, NAT'L REV., July 6, 1992, at 34. See also Alan S. Blinder, *What Wasn't on the Rio Agenda? A Little Common Sense*, BUS. WK., June 29, 1992, at 16. "The notion that we must eliminate environmental hazards 'regardless of the cost' doesn't make economic sense. The only logical approach: compare costs and benefits and seek out the good deals." *Id.* For an excellent overview of the various environmental schools of thinking, see CHRISTOPHER MANES, *GREEN RAGE: RADICAL ENVIRONMENTALISM AND THE UNMAKING OF CIVILIZATION* (1990).

104. Murray L. Weidenbaum, *Leviathan in Rio: The UN Gearing Up For its Massive 'Earth Summit' in June*, NAT'L REV., Apr. 27, 1992, at 44.

105. See generally SENATOR AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992). See also BRUNDTLAND REPORT, *supra* note 22, at 67-91.

106. See also BRUNDTLAND REPORT, *supra* note 22, at 43-66, 76-91; Rio Declaration, *supra* note 27, *passim*.

107. See BRUNDTLAND REPORT, *supra* note 22, at 67-91.

Two conditions must be satisfied before international economic exchanges can become beneficial for all involved. The sustainability of ecosystems on which the global economy depends must be guaranteed. And the economic partners must be satisfied that the basis of exchange is equitable; relationships that are unequal and based on dominance of one kind or another are not a sound and durable basis for interdependence.

*Id.* at 67.

108. See Rio Declaration, *supra* note 27, *passim*.

gists.<sup>109</sup> The deep ecology view teaches that the present patterns of consumption of the world's resources cannot continue at current levels.<sup>110</sup> Unless they are changed, we are all doomed.<sup>111</sup>

For in Deep Ecology, the critical factor in this lemminglike march into environmental oblivion is the narrowness of the moral community the civilization complex recognizes. Because the majority tradition views the world in utilitarian terms and refuses to include as part of its ethical community the plant and animal communities which sustain it, there is no restraint, at least in the short term, on its destruction of the natural world. In the long run, of course, this myopic utilitarianism turns on itself by depleting the environment to the point that it can no longer be exploited as a storehouse of natural resources.<sup>112</sup>

There is a great deal more substance in the deep ecology view than most policymakers are prepared to admit. The view is one which can be seriously criticized because it fails to take into account the rational ability of people to assess the consequences of their own actions and take remedial steps to change their behavior. People can think.

In the practical world of political decision making, short-term considerations generally take priority over long-term solutions. Rio was infected with this pragmatic mode of political thinking. But unless political fixation with the immediate and the need for instant gratification is quickly curtailed, the deep ecology view will prevail by default. It is possible that deep ecology will prove to be valid anyway if the concept of sustainable development turns out to be unworkable.

The problem is clear: unless we are able to advance sustainable development rapidly and decisively, we will, in the end, fall victim to the remorseless logic of the deep ecology view. The available evidence shows that we cannot continue as we have, and it ought to persuade us that we must change. If we do not wholeheartedly embrace an aggressive stance to implementing sustainable development, then we are doomed. The carrying capacity of the planet is limited—the evidence of that is all around us.<sup>113</sup> Unless effective measures are adopted, we are in trouble.

From the time Rio's agenda and format were agreed to in 1989, there

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109. See, e.g., BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY: LIVING AS IF NATURE MATTERED* (1985); Arne Naess, *Deep Ecology and Ultimate Premises*, 18 *ECOLOGIST* 128 (1988). See also MANES, *supra* note 103, at 139-50.

110. See *supra* note 57 and accompanying text.

111. *Id.*

112. See MANES, *supra* note 103, at 141-42.

113. See *supra* note 57 and accompanying text.

were significant political changes in the world which influenced the outcome of Rio. The Western economies have slipped into a recession, and as a result, the environment is not as attractive an issue as it had been due to the costs associated with implementation of sustainable development policies. The fires of change burn less fiercely when jobs and economic growth are at stake. Thus, while the sustainability paradigm was chosen at Rio, it was not embraced with sufficient determination, rigor or commitment to ensure that it happens.

#### *H. Conclusion*

Twenty years after Stockholm, we are deeper in the mire and no closer to getting out. The biggest diplomatic gathering in the history of the world, which more world leaders attended than any international conference before,<sup>114</sup> did not summon up the collective political resolve necessary to deal with the global environmental challenge. Progress was, simply, insufficient, due to a general failure of political will.

Rio produced too little, too late. Certainly, Rio had the effect of raising peoples' awareness of the global environmental issues in a way about which we should be optimistic and hopeful. Changing of attitudes and education are vitally important in this field. In the end, however, action is required to address the problems. We have had plenty of rhetoric—the time for rhetoric is past. The time for binding international instruments that actually produce change has arrived.

Rio conjures up warm visions of exotic romance at Copacabana and Ipanema. The occasion was rich in symbolism; everyone wanted something to happen. Perhaps it was a start. But how many new dawns must we endure before real, substantive progress is achieved? There were insufficient accomplishments at Rio to make us confident about the future of the global environment.

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114. *See supra* note 9.