

## THE EFFECTIVENESS OF INTERNATIONAL LAW IN “GREENING” THE ECONOMY

This panel was convened at 9:00 am, Saturday, April 12, by its moderator, Elizabeth Dowdeswell of the Council of Canadian Academies, who introduced the panelists: Rebecca Bratspies of the City University of New York School of Law; Dan Esty of Yale University; Markus Gehring of the University of Cambridge; and Kamal Hossain of Dr. Kamal Hossain & Associates.\*

### THE EFFECTIVENESS OF INTERNATIONAL LAW IN “GREENING” THE ECONOMY: CHALLENGES FOR THE DEVELOPED AND DEVELOPING WORLD

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The challenge facing the international community—that of furthering economic development while at the same time protecting the environment—has only grown more formidable since it was identified at the Rio Earth Summit in 1992. In the twenty years since then, sustainable development has been invoked by states to promote appropriate strategies and policies. The perception has grown that the implementation of such strategies and policies is being impeded by global power realities. This has resulted in the persistence of policies and practices that lead to ecological degradation and pollution, as well as industrial economic policies impeding sustainable development, social and economic equality, and gender justice.

According to some who point to the crisis of the Rio institutions (in particular the UN Framework Convention on Climate Change), sustainable development policies have had limited success. However, there have been positive contributions towards integrating environment and development. Under the Stockholm Declaration of 1972, states committed themselves to adopting an integrated and coordinated approach to their development planning and to ensuring that their development was compatible with the need to protect and improve the human environment. Twenty years later, the 160 participating states at the Rio Summit were able to adopt two soft-law documents—the Rio Declaration on Environment and Development and Agenda 21, both stressing the interconnectedness of environmental with social and economic concerns. The Rio Declaration recognized the rights to development (Principle 3) and poverty alleviation (Principle 5) as key aspects of sustainable development. There was a recognition in the Declaration that both developed and developing states were to adopt policies protecting the environment but that developed states were expected to change their patterns of consumption and production which had caused the majority of the environmental harm and which were compromising the ability of future generations to meet their needs.

It has rightly been observed that at the end of thirty years the legacy of Rio is one of unfinished business.<sup>1</sup> The Rio Declaration was expected to evolve towards an Earth Charter. The Secretary-General of the United Nations Conference on Environment and Development (UNCED), Maurice Strong, had hoped that the Earth Charter could be adopted at the fiftieth anniversary of the United Nations in 1995. As a result of a

\* Professors Bratspies, Esty, and Gehring did not submit remarks for the *Proceedings*.

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<sup>1</sup> KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY* 37 (2008).

worldwide campaign and the efforts of numerous civil society activists, but without direct input from states, the Earth Charter was launched at the Peace Palace in The Hague in 2000. It was expected that the Earth Charter would be the central document to guide the discussions at the 2002 World Summit on Sustainable Development. The draft Johannesburg Declaration had made a specific reference to the Charter and called for a commitment to its values and principles. The final draft, however, had this reference removed following last-minute objections, mainly from the United States.

Immediately preceding the Johannesburg Summit, the International Law Association adopted the New Delhi Declaration on the Principles of International Law Related to Sustainable Development (New Delhi Declaration), which enunciated seven principles:

- (1) the duty of states to ensure the sustainable use of natural resources;
- (2) the principle of equity and the eradication of poverty;
- (3) the principle of common but differentiated responsibilities;
- (4) the principle of the precautionary approach to human health, natural resources, and eco-systems;
- (5) the principle of public participation and access to information and justice;
- (6) the principle of good governance, and
- (7) the principle of integration and interrelationship, particularly in relation to human rights and social, economic, and environmental objectives.

The concept of sustainable development was recognized in 1997 by the International Court of Justice in the *Gabčíkovo-Nagymaros* case, and some argue that it could thus be considered to have become a part of customary international law. The ICJ did not accept Hungary's argument that it was entitled to withdraw from the treaty with Czechoslovakia on the ground that the proposed dam on the Danube would result in denying 80% of its water to Hungary. However, the Court linked sustainability concerns to international law and requested the parties to renegotiate the treaty. The Court's opinion includes the following statement:

It is clear that the project's impact upon and its implication for the environment are necessarily a key issue . . . Mankind has for economic and other reasons constantly interfered with nature. In the past this was often done without consideration of the effects on the environment. Owing to growing awareness of the risks to mankind—for present and future generations . . . new norms and standards have been developed and set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continued activities began in the past. This need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development.

In the background of the above developments the concept of a green economy is being presented as an innovative approach to meet the challenge of development while protecting the environment. In a preparatory document to the Rio+20 Conference, the UN Secretary-General stated the following:

The green economy approach seeks, in principle, to unite under a single banner the entire suite of economic policies and modes of economic analyses of relevance to

sustainable development. In practice, this covers a rather broad range of literature and analysis, often with somewhat different starting points.<sup>2</sup>

The question is raised whether the concept of the green economy is, like sustainable development, an oxymoron which intends to bundle different, partly contradictory, interests and strategies, while giving them a certain legitimacy and coherence.<sup>3</sup>

Recent studies have suggested that the economic and ecological crises can be overcome by fostering a green economy. A report published by the United Nations Environment Programme (UNEP) states:

The recent traction for a green economy concept has no doubt been aided by widespread disillusionment with our prevailing economic paradigm, a sense of fatigue emanating from the many concurrent crises and market failures experienced during the very first decade of the new millennium, including especially the financial and economic crisis of 2008. But at the same time, we have seen increasing evidence of a way forward, a new economic paradigm—one in which material wealth is not delivered perforce at the expense of growing environmental risks, ecological scarcities and social disparities.<sup>4</sup>

The effectiveness of international law in greening the economy may be assessed by reviewing the role of international law in protecting the environment, and in promoting sustainable development. In this sphere there is still no globally binding instrument setting out the rights and duties of states with respect to the environment or sustainable development, in contrast to international human rights law, international labor law, and international trade law. The absence of a foundational treaty in this sphere is significant. With the exception of obligations with respect to specific environmental problems such as climate change or biodiversity, environmental rights and obligations are not codified. Legal rules and principles which may be invoked in this sphere are derived from assessments of state practice, soft-law documents, court decisions, and general principles of law.

Soft-law declarations provide a prime source. These include the Stockholm Declaration (1972), the Rio Declaration (1992), the Earth Charter (2000), and the ILA’s New Delhi Declaration. The Earth Charter 2000 is an innovative instrument whose authority is rooted in several different sources. It is the product of extensive interdisciplinary global dialogue integrating insights from both science and ethics. It derives authority also from the fact that it is grounded in international law and the values and principles that the United Nations has identified. The Earth Charter also incorporates treaty law such as the UN Climate Change Convention, the UN Convention on Biodiversity, and the UN Convention on Desertification.

Climate scientists have concluded that the widespread burning of fossil fuels is releasing heat-trapping gases that are warming the planet. Last month top scientists met in Yokohama to discuss climate change. At the forefront of their agenda was the threat of rising sea levels by as much as three feet by 2100. At the Warsaw conference last November, it was noted that countries whose existence is threatened are among those producing the lowest levels of greenhouse gas emissions. A simulation study undertaken in the United States of the geopolitical consequences of a mass migration of climate refugees resulted in the following warning

<sup>2</sup> UN Secretary-General, Preparatory Committee for the United Nations Conference on Sustainable Development: Progress to date and remaining gaps in the implementation of the outcomes of the major summits in the area of sustainable development, as well as an analysis of the themes of the Conference, UN Doc. A/CONF.216/PC/2 (Apr. 1, 2010).

<sup>3</sup> Ulrich Brand, *Green Economy—The Next Oxymoron?*, 21 GAIA—ECOLOGICAL PERSPECTIVES FOR SCIENCE AND SOCIETY 28 (2012).

<sup>4</sup> UNEP, TOWARDS A GREEN ECONOMY: PATHWAYS TO SUSTAINABLE DEVELOPMENT AND POVERTY ERADICATION 14 (2011), [http://www.unep.org/greeneconomy/Portals/88/documents/ger/ger\\_final\\_dec\\_2011/Green%20Economy Report\\_Final\\_Dec2011.pdf](http://www.unep.org/greeneconomy/Portals/88/documents/ger/ger_final_dec_2011/Green%20Economy%20Report_Final_Dec2011.pdf).

by a Bangladesh expert: “By 2050, millions of displaced people will overwhelm not just our limited land and resources but our government, our institutions and our borders.”

The global crisis has led to questioning of the dominant paradigm of economic and social development and the recognition of the impossibility of maintaining market fundamentalism to justify a business-as-usual scenario and allowing unregulated markets to operate. It is rightly argued that proposals to promote a green economy demand effective regulatory frameworks. But the existing regulatory frameworks mainly promote unsustainable production and consumption practices. And the plea for an adequate regulatory framework seems blind about dominant power relations.<sup>5</sup>

Today, many who had opposed regulation, now agree to it, even if reluctantly.

Al Gore shared his sense of alarm eight years ago in his book, *An Inconvenient Truth: The Planetary Emergency of Global Warming and What We Can Do About It*. In his latest book, entitled *The Future*, he makes these insightful observations:

For many years the effort to achieve a global consensus on action to solve the climate crisis was bedevilled by the international fault lines between rich and poor nations, with poor countries insisting that the priority they placed on quickly replicating the economic development that had already occurred in wealthy countries meant that they could not afford to participate in a global effort to reduce global warming pollution. Proposed treaties routinely placed the first obligation on wealthy countries alone, leaving any requirement on developing nations to future round of negotiations.

Much has changed, however. The reality of the climate crisis has become much more apparent in developing nations as they experience harsh impacts and struggle to find the resources for disaster recovery and adaptation that are more readily available in developed countries. As a result many developing countries have now changed their tune and are now actively pushing the world community to take action even if it means that they too must shoulder part of the burden for responding.

What we need is a shift in our way of thinking and a rejection of the toxic illusions that have been so assiduously promoted and continually reinforced by opponents of action, principally large carbon polluters and their allies . . . the inter-connection of people all over the world by means of the internet created the potential for an unprecedented global effort to communicate clearly amongst ourselves about the challenge that now confronts us and the solutions that are now available.

Following its meeting in Yokohama two weeks ago, the UN Intergovernmental Panel on Climate Change held a news conference at which it warned in alarming terms of the threats posed by climate change:

Ice caps are melting, sea ice in the Arctic is collapsing, water supplies are coming under stress, heat waves and heavy rains are intensifying, coral reefs are dying and fish and many other creatures are migrating towards the Poles or in some cases going extinct.

The forthcoming World Summit presents an opportunity for international lawyers to make creative contributions towards making international law more effective in this vital area of global concern.

<sup>5</sup> Brand, *supra* note 3, at 30.