

Kaleidoscope

International Environmental Law After Rio

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In terms of diplomatic history, the UN Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, from 3 to 14 June 1992 was unique. It was undoubtedly the largest United Nations conference ever organized, with more than 30,000 participants from 176 countries, including 103 heads of state or government assembled for the concluding 'Earth Summit'.¹ Whether UNCED was also the beginning of a 'New International Ecological Order'² remains to be seen. At the very least, the Rio Conference marked, in the words of Indonesia's Minister of Population and Environment,³ 'a loss of innocence': henceforth no government can plead ignorance to the challenges that we face as a planet. As the Secretary General of the Conference had already pointed out at the opening of the preparatory process in March 1990, these challenges have now reached the level of global security risks,⁴ an assessment confirmed by post-Rio appraisals.⁵

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1 Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), UN Doc. A/CONF.151/26/Rev.1, Vols. I-II (1993); directory of registered participants in H.J. Keller (ed.), *Who is Who at the Earth Summit, Rio de Janeiro 1992* (1992) 481.

2 Pronk, 'A New International Ecological Order', 14 *Internationale Spectator* (1991) 728.

3 Salim, 'Foreword', in D. Runnalls & A. Cosbey (eds), *Trade and Sustainable Development* (1992) 3.

4 M.F. Strong, *Statement to the Organizational Session of the Preparatory Committee* (1990). See Sand, 'International Law on the Agenda of the United Nations Conference on Environment and Development: Towards Global Environmental Security?', 60 *Nordic J. Int'l L.* (1991) 5, and 2 *Yb. Int'l Env. L.* (1991) 425.

5 See Strong, 'Beyond Rio: Prospects and Portents', 4 *Colorado J. Int'l Env. L. & Pol'y* (1993) 21, 29; Speth, 'A Post Rio Compact', *Foreign Policy*, No. 88 (1992) 145. The outcome of UNCED has been analysed in a large number of studies, most of which tend to declare the conference a qualified success; e.g., see Haas, Levy and Parson, 'Appraising the Earth Summit: How Should We Judge UNCED's Success?', 34 *Environment*, No. 8 (1992) 6-15, 26-36; R.N. Gardner, *Negotiating Survival: Four Priorities after Rio* (1992), 96; S.P. Johnson, 'Did We Really Save the Earth at Rio?', 1 *Europe. Env. L. Rev.* (1992) 81-85; Brock, 'Nord-Süd Kontroversen in der internationalen Umweltpolitik: Von der taktischen Verknüpfung zur Integration von Umwelt und Entwicklung?', *Hessische Stiftung Friedens- und Konflikt-Forschung-Report 7/1992* (1992) 39; Asian-African Legal Consultative Committee, *United Nations Conference on Environment and Development: Outcome and the Follow-up, AALCC/UNGA/92/2* (October 1992) 131; D. Freestone, *The Road from Rio: International Environmental Law after the Earth Summit* (inaugural lecture, October 1992, University of Hull Press 1993), 34.

The present analysis will deal with the outcome of the UNCED Conference in the field of international law and institutions.⁶ It does not purport to cover the full range of the UNCED agenda, as defined by the broad conference mandate of UN General Assembly Resolution 44/228.⁷ What is worth noting at the outset, however, is a major paradigm shift at Rio, from international 'environmental law' to a new (and yet to be defined) 'law of sustainable development'.⁸

I. The UNCED Instruments

The Rio Conference may be seen as another incremental step in the evolution of international sources of law in this rapidly growing field. These sources are well-documented in the *Register of International Treaties and Other Agreements in the Field of the Environment* and are regularly updated by the United Nations Environment Programme (UNEP),⁹ and in a wide range of official and unofficial collections of relevant texts.¹⁰ The direct impact of UNCED on

- 6 Working Group III on legal, institutional and other related matters was established by the UNCED Preparatory Committee (hereafter referred to as PrepCom) at its second session in March 1991, with terms of reference specified in PrepCom decision 2/3, UN Doc. A/46/48, Vol. I, 28, text in 2 *Yb. Int'l Env. L.* (1991) 426. Negotiations in the Working Group were mainly conducted in open-ended sub-groups moderated by diplomats from India, Malaysia, Norway, and the Philippines. After the end of the fourth PrepCom session in New York (March-April 1992), a few remaining issues were resolved in the Main Committee at the Rio Conference, through contact groups led by Egyptian Ambassador El-Arabi and Malaysian Ambassador Razali. A summary account of the day-to-day proceedings of the Preparatory Committee (including Working Group III) and the Rio Conference is available in the *Earth Summit Bulletin* issued during the sessions by the International Institute for Sustainable Development. See also Tinker, 'Institutional Developments: The United Nations Conference on Environment and Development', 2 *Yb. Int'l Env. L.* (1991) 68; Adede, 'International Environmental Law from Stockholm to Rio: An Overview of Past Lessons and Future Challenges', 22 *Env. Pol'y & L.* (1992) 88; Yost, 'Rio and the Road Beyond', 11 *Environmental Law* No. 4 (1992) 1, a quarterly newsletter of the American Bar Association Standing Committee on Environmental Law; ABA Standing Committee on Environmental Law, *The Role of Law in the 1992 United Nations Conference on Environment and Development* (1992).
- 7 Resolution 44/228 of 22 December 1989; see also Resolutions 45/211 of 21 December 1990; 46/168 of 19 December 1991; and 46/468 of 13 April 1992.
- 8 The shift was deliberately made in Working Group III, at the fourth session of the UNCED Preparatory Committee (New York, March 1992), following a proposal by the Brazilian delegate; see Sand, 'UNCED and the Development of International Environmental Law', 8 *J. Nat. Res. & Env. L.* (1993, forthcoming). On the legal connotation of the concept, see Handl, 'Environmental Security and Global Change: The Challenge to International Law' 1 *Yb. Int'l Environmental Law* (1990) 3, 24-28; Sanwal, 'Sustainable Development, the Rio Declaration and Multilateral Cooperation', 4 *Colo. J. Int'l Env. L. & Pol'y* (1993) 45; H. Mann, 'Sustainable Development', 3 *Yb. Int'l Env. L.* (1992, forthcoming); Foundation for International Environmental Law and Development, *Sustainable Development: The Challenge to International Law* (1993).
- 9 The 1991 edition of the Register (UNEP/GC.16/Inf.4, currently under revision for the 1993 Governing Council session) contains information on 152 multilateral treaties.
- 10 Including the UNEP Reference Series 3, A. C. Kiss (ed.), *Selected Multilateral Treaties in the Field of the Environment* Vol. 1 (1983) 525; I. Rummel-Bulska & S. Osafo (eds), *Selected Multilateral Treaties in the Field of Environment* Vol. 2 (1991) 527; W.E. Burhenne & O. Seidel (eds), *International Environmental Law: Multilateral Treaties* (1974-1992); B. Ruster & B. Simma (eds), *International Protection of the Environment: Treaties and Related Documents* (1975-1983), updated since 1989 by 3 loose-leaf volumes; M.R. Molitor (ed.), *International Environmental Law: Primary Materials* (1991)

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this ongoing evolutionary process was best illustrated by a UNEP-sponsored meeting of Senior Government Officials Expert in Environmental Law, which was held in Rio de Janeiro from October 30 to November 2, 1991.¹¹ It was convened with a mandate to revise the long-term *Montevideo Programme for the Development and Periodic Review of Environmental Law* which was originally formulated in 1981.¹² The 1991 meeting reached an impasse because most of the delegates refused to take any programmatic decisions on this subject prior to the 1992 'Earth Summit'. One of the reasons for this refusal was the overridingly broader mandate of the Rio Conference for both environmental *and* developmental matters, and the perceived role of UNCED as charting the course of future international law-making with a wider scope. In the end, UNEP had to convene a resumed session in Nairobi, in September 1992, in order to finalize its revision of the Montevideo Programme on the basis of the UNCED outcomes.¹³

A. New Framework Conventions

It has become habitual to categorize international environmental provisions in terms of 'hard law' and 'soft law', depending on whether or not they meet formal treaty criteria.¹⁴ By this yardstick, the normative products of UNCED – the 'Rio Instruments'¹⁵ – are readily identified. On the one hand, the United Nations Framework Convention on Climate Change (hereafter referred to as the Climate Change Convention) and the Convention on Biological Diversity (hereafter referred to as the Biodiversity Convention) were both prepared by parallel intergovernmental negotiating committees and opened for signature at Rio as formal multilateral treaties. On the other hand, the Rio Declaration on Environment and Development (consisting of 27 principles) and the separate set of 15 Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, were both

571; E.B. Weiss, P.C. Szasz & D.B. Magraw (eds), *International Environmental Law: Basic Instruments and References* (1992) 749; H. Hohmann (ed.), *Basic Documents of International Environmental Law* (1992) 1850.

- 11 See the report of the meeting, UNEP/Env.Law/2/3 (1991); Rummel-Bulska, 'United Nations Environment Programme (UNEP)', 2 *Yb. Int'l Env. L.* (1991) 382.
- 12 UNEP/GC.10/5/Add.2, Annex, Ch.II (1981), adopted by UNEP Governing Council Decision 10/21 on 31 May, 1982, and endorsed by UN General Assembly Resolution 37/217; see Sand, 'Environmental Law in the United Nations Environment Programme', in R.J. Dupuy (ed.), *The Future of the International Law of the Environment* (1985) 51; Peterson, 'The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law', 5 *Am. U. J. Int'l L. & Pol'y* (1990) 351, 364.
- 13 See the Report of the meeting entitled 'Programme for the Development and Periodic Review of Environmental Law', UNEP/Env.Law/2-2/L.2 (1992), Annex I (hereafter referred to as the UNEP Programme).
- 14 See Dupuy, 'Soft Law and the International Law of the Environment', 12 *Mich. J. Int'l L.* (1991) 420; Handl, *supra* note 8, at 7-8; and generally Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 138 *Int'l & Comp.L.Q.* (1989) 850; Chodosh, 'Neither Treaty nor Custom: The Emergence of Declaratory International Law', 26 *Texas Int'l L. J.* (1991) 87.
- 15 Texts in 31 *ILM* (1992) 814-887; 22 *Env. Pol'y & L.* (1992) 251, 268; S. Johnson (ed.), *The Earth Summit* (1991) 576; and G.C. Garaguso & S. Marchisio (eds), *Rio 1992: Vertice per la Terra* (1993). For rectification of the Climate Change Convention, see UN Depositary Notification C.N.429.1992. Treaties-7 (19 February 1993). On the negotiations leading up to the Rio Conference, see Goldman, Hajost, 'Global Climate', 2 *Yb. Int'l Env.L.* (1991) 111; de Klemm, 'Nature Conservation: Biological Diversity and Natural Areas', 2 *Yb. Int'l Env.L.* (1991) 201; and Biggs, 'Latin American Perspectives on UNCED', 2 *Yb. Int'l Env. L.* (1991) 431. See generally *supra* note 6.

adopted by the Conference and subsequently endorsed by the United Nations General Assembly, but merely as declaratory and exhortatory acts.¹⁶

In practical terms, the distinction is somewhat less clear-cut. The conventions will, of course, become legally binding only three months after they obtain the necessary minimum number of ratifications; with the Climate Change Convention having scored 31 of 50 and the Biodiversity Convention 23 of 30 ratifications so far, that may not happen until 1994.¹⁷ Any substantive analysis of the two conventions will have to concede that – except for institutional provisions – the obligations they impose on contracting parties for the time being are largely aspirational, and hence may appear no less ‘soft’ than those formulated in the two declaratory instruments.¹⁸ This is at least partly due to the fact that both conventions make use of the ‘framework approach’ that has become a favourite technique of international environmental law-making: rather than attempting to codify a sectoral regime once and for all, they start out by defining its normative scope in very general language, to be specified only later in a dynamic sequence of subsequent ‘protocols’.¹⁹

It is worth recalling that this framework technique made its first appearance in environmental treaty drafting in 1974, when the Spanish delegation proposed a ‘convenio-marco’ with separate protocols to protect the marine environment of the Mediterranean.²⁰ After its adoption in the 1976 Barcelona Convention and its protocols,²¹ the technique was applied and further developed by UNEP in a series of agreements for other regional seas,²² wildlife conservation²³ and protection of the ozone layer.²⁴ Other examples include the UN/ECE Conventions on Long-range Transboundary Air Pollution²⁵ and on the Protection and Use of Transboundary Watercourses and International Lakes.²⁶ Both the Climate Change Convention (Article 17) and the Biodiversity Convention (Article 28) anticipate the future development of protocols along these lines, which allow for the progressive specification of commitments among those parties ready and able to move ahead.

The Rio conventions are thus essential building blocks for a future climate and biodiversity regime; ‘intermediate agreements’ open to adjustment and supplementary

16 UNGA Resolution 47/190 of 22 December 1992, endorsing the principles proclaimed (para. 2) and urging governments and organizations to take the necessary action for follow-up (para. 4).

17 As of 12 July 1993. See the criteria for entry into force of the Climate Change Convention (Art. 23) and the Biodiversity Convention (Art. 36).

18 E.g., compare the principles of the Rio Declaration and those proclaimed in Art. 3 of the Climate Change Convention, which overlap and actually influenced each other during the parallel drafting process.

19 Handl, *supra* note 8, at 5-7; Gehring, ‘International Environmental Regimes: Dynamic Sectoral Legal Systems’, 1 *Yb. Int’l Env. L.* (1990) 35.

20 The Spanish proposal was put forward at the Third Diplomatic Conference of Mediterranean States on the Law of the Sea (Athens, March 1974); see J.A. de Yturriaga (ed.), *La actual revisión del Derecho del Mar: una perspectiva española*, Vol. II/2 (1974) 521. The equivalent French term ‘convention-cadre’ has also been used by the Council of Europe, in the *European Outline Convention on Transfrontier Cooperation Between Territorial Communities or Authorities* (Madrid, 21 May 1980), 20 ILM (1981) 315.

21 15 ILM (1976) 290, 19 ILM (1980) 869.

22 See the agreement pertaining to Kuwait of 1978, Abidjan 1981, Lima 1981, Jeddah 1982, Cartagena 1983, Nairobi 1985, and the 1986 Noumea Conventions and their respective protocols, texts in P.H. Sand, *Marine Environment Law in the United Nations Environment Programme* (1988).

23 The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, 19 ILM (1980) 15, and its supplementary agreements for protected species.

24 The 1985 Vienna Convention and its 1987 Montreal Protocol, 26 ILM (1987) 1529, 1550.

25 18 ILM (1979) 1442; and the protocols in 24 ILM (1985) 484, 27 ILM (1988) 707, 28 ILM (1989) 214, 31 ILM (1992) 573.

26 Signed at Helsinki (March 17, 1992), text in 3 *Yb. Int’l Env. L.* (1992).

regulation as required.²⁷ Unlike the 1982 UN Convention on the Law of the Sea,²⁸ (hereafter referred to as UNCLOS) however, they are not genuine global codifications. The oceans regime that emerged from UNCLOS III may be defined as a self-contained new international order for the marine sector, allocating rights and responsibilities of States over the available ocean space, and affirming a comprehensive resource-oriented approach that embraces all potential uses and users of the resource. By contrast, the 1992 UN Framework Convention on Climate Change is *not* a 'Convention on the Law of the Air', as some had pretended it should be, at least until the Ottawa meeting in 1989.²⁹ It does not even attempt to define or allocate sovereign rights over airspace, the vertical delimitation of which will continue to fuel legal debates in the UN Committee on the Peaceful Uses of Outer Space. The mandate of the Intergovernmental Negotiating Committee³⁰ was limited to protection against global warming risks, and to the specific uses and misuses of the atmosphere affecting this issue; the mandate did not extend to a global regime of the atmosphere. Similarly, even a generous reading of the Convention on Biological Diversity will not elevate it to a global regime for the Earth's living resources. The crucial questions of intellectual property rights and of safety against the risks of biotechnology were deferred for future cooperation and possible protocols,³¹ although even the prospect of international regulation in this field was initially unacceptable to at least one country.³²

B. The Rio Declaration

Even the hard fought compromise text of the Rio Declaration has been ranked as 'intermediate' by as competent a commentator as Maurice Strong, when he suggested in his closing statement to the Conference that the Declaration 'must continue to evolve towards what many of us hope will be an Earth Charter that could be finally sanctioned on the 50th anniversary of the United Nations in 1995'.³³ As it stands, the Declaration represents a delicate balance of policy goals supported by developed and developing countries, reflected mainly in two sets of key principles without which the compromise would have collapsed. They are, on the one hand, public participation, the 'precautionary approach' and the 'polluter pays' maxim (principles 10, 15 and

27 See Gehring, *supra* note 19, and Mathews, 'Redefining Security', 68 *Foreign Aff.* (1989) 162, 176. See also Barratt-Brown, Hajost, Sterne, 'A Forum for Action on Global Warming: The UN Framework Convention on Climate Change', 4 *Colo. J. Int'l Env. L. & Pol'y* (1993) 103.

28 Signed at Montego Bay, 10 December 1982; 21 ILM (1982) 1261.

29 Protection of the Atmosphere: Statement of the International Meeting of Legal and Policy Experts, Ottawa, February 1989; Bruce, 'Law of the Air: A Conceptual Outline', 18 *Env. Pol'y & L.* (1988) 5.

30 UN General Assembly Resolutions 45/212 of 21 December 1990; 46/169 of 19 December 1991; and 47/195 of 23 December 1992.

31 Arts. 16(5) and 19(3) of the Convention on Biological Diversity; Miller, Barber, 'Biodiversity After the Earth Summit: Prospects for the Convention on Biodiversity', *Network '92*, No. 18 (1992) 5; and Burhenne, 'Biodiversity: The Legal Aspects', 22 *Env. Pol'y & L.* (1992) 324.

32 See the US declaration made at the UNEP Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity (Nairobi, 22 May 1992), 31 ILM (1992) 848; Chandler, 'The Biodiversity Convention: Selected Issues of Interest to the International Lawyer', 4 *Colo. J. Int'l Env. L. & Pol'y* (1993) 140.

33 M.F. Strong, 'Statement to the Plenary on 14 June 1992', 22 *Env. Pol'y & L.* (1992) 243. See Mann, 'The Rio Declaration', *ASIL Proceedings* (1992) 405. The author provides an appraisal of the PrepCom negotiations, reflecting the disappointment of a number of participants over the 'missed historic opportunity' for an Earth Charter. Indirectly, para. 39.5 of *Agenda 21* acknowledges unfinished business in this regard, by reserving the option of future 'examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development, as provided by General Assembly resolution 44/228.'

16) which are considered to be essential by the developed countries. On the other hand, the developing countries insisted that the key principles include the 'right to development', poverty alleviation and the recognition of 'common but differentiated responsibilities' (principles 3, 5 and 7).³⁴ While the Declaration's preamble reaffirms the 1972 Stockholm Declaration on the Human Environment³⁵ in its entirety, principle 2 actually modifies the wording of principle 21 of the Stockholm text by adding the words 'and developmental' to the assertion of national environmental policies for resource exploitation. The nuance is perhaps less significant in substance than in the process of law-making, given that resource use is inherently 'developmental'.³⁶ Further, principle 21 of the Stockholm Declaration is widely considered as having become a rule of customary international law.³⁷ Even though the Rio Declaration could hardly be deemed to have brought about an 'instant amendment' of customary law, the UNCED experience highlights the need to clarify processes of change and adjustment for 'hard' and 'soft' rules alike.

The very success of soft law instruments in guiding the evolution of contemporary international law in this field has also produced a backlash: governments have become wary of attempts at formulating reciprocal principles even when couched in non-mandatory terms, being well aware that 'soft' declarations or recommendations have a tendency to harden over time, and return to haunt their authors.³⁸ Therefore, there is clearly a tactical desire to guard against legal connotations being attributed to the terms used (as illustrated by the US statement of interpretation after the Rio Declaration was adopted)³⁹ or to prevent the eventual 'legalization' of pre-legal terms (as illustrated by the US position on 'concepts or principles significant for the future of environmental law' during the UNEP follow-up meeting in September 1992).⁴⁰

- 34 The compromise wording of the controversial third sentence of principle 7 was actually based on a statement of the OECD Ministerial Meeting on Environment and Development, Paris, 3 December 1991; 2 *Yb. Int'l Env. L.* (1991) 529. The US delegation, while joining consensus on the Declaration at Rio, submitted an interpretative statement expressing reservations on principles 3, 7, 12 and 23, see UNCED Doc. A/CONF.151/26, Vol. IV, para.16.
- 35 11 *ILM* (1972) 1416; see Sohn, 'The Stockholm Declaration on the Human Environment', 14 *Harv. Int'l L. J.* (1973) 423.
- 36 Contrary to a common misconception, the Stockholm Declaration was not limited to 'environmental' concerns and did address development issues, especially in principles 8 and 11; see Sohn, *supra* note 35, at 464-466 and 469.
- 37 E.g., see A. Kiss & D. Shelton, *International Environmental Law* (1991) 106-107; N. Fitzwanga, *The 1972 United Nations Declaration on the Human Environment and Its Juridical Frontiers: Dissertative Treatise on International Environmental Law* (1991); and Mann, *supra* note 33, at 410.
- 38 For pertinent examples see T.M. Franck & E. Weisband, *Word Politics: Verbal Strategy Among the Superpowers* (1971).
- 39 *Supra* note 34. For a more positive view, see Kovar, 'A Short Guide to the Rio Declaration', 4 *Colo. J. Int'l Env. L. & Pol'y* (1993) 119.
- 40 Report, *supra* note 13, paras. 22 and 23. In view of strong opposition mainly from the US delegation, a proposed list of concepts and principles for further development was deleted from the draft UNEP programme document and merely reproduced in the body of the meeting report, as follows: 'precautionary approach, polluter-pays principle, common concern of mankind, inter-generational equity, new and equitable global partnership, common but differentiated responsibility, public participation, and market-based approaches.'

C. Other Developments

Similar tactical concerns explain the curious warning label 'non-legally binding' which was affixed to the Rio Forest Principles.⁴¹ Originally envisaged as the blueprint for a binding treaty,⁴² 'elements for a global consensus' are all that remained after extensive and often acrimonious negotiations within and outside the UNCED Preparatory Committee. The process was marked by strong resistance from Third World timber-producing countries against mandatory multilateral regulation in this field. One basic reason for their resistance was the perceived threat to sovereignty from a treaty regime, in view of unabashed proposals from developed countries for global intervention by UN 'green helmets' in pursuit of an alleged *droit d'ingérence écologique*,⁴³ or more subtle calls for the international community to assume its

joint responsibility for areas whose ecological significance far surpasses that of the countries in which they are situated geographically: the Amazon region, the Himalayas, Antarctica, certain seas, and areas constituting part of the 'common heritage of mankind'.⁴⁴

Not unpredictably, the reaction of the Amazon region's military commander, Brazilian General Sotero Vaz, is also on record: 'I will tell you, and tell you clearly: if those *babacas* try to come here, we will hit them like guerrillas.'⁴⁵

The deadlock resulting from this confrontation of extreme views prevented agreement even on the question of future treaty negotiations, save for consideration of 'the need for and the feasibility of all kinds of appropriate internationally agreed arrangements to promote international cooperation' on forestry.⁴⁶ Paradoxically, therefore, the elaborate set of forest principles produced by the Rio Conference represents less substantial progress than the single paragraph

41 Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, UNCED Doc. A/CONF.151/26/Rev.1, Vol. I, Annex III, 480. On the earlier negotiations see Cameron, 'Forests', 2 *Yb. Int'l Env. L.* (1991) 213; Obdrzalek, 'Tropical Deforestation and International Environmental Negotiation: An Illustration of the North-South Confrontation', in L.E. Susskind, E.J. Dolin & J.W. Breslin (eds), *International Environmental Treaty Making* (1992) 103. See also *infra* note 76.

42 E.g., see the proposal for an *International Convention on Conservation and Development of Forests* submitted in the Food and Agriculture Organization of the United Nations (FAO) Committee on Forestry in September 1990 (COFO-90/3/a), and eventually deferred to UNCED in the 99th FAO Council Session in June 1991 (FAO Doc. CL99/PV/14); see also the proposal for a *World Forest Agreement/Convention*, by the Global Legislators' Organization for a Balanced Environment (GLOBE) in January 1991. A Japanese proposal for an *International Charter for the World's Forests* was submitted in the International Tropical Timber Organization in 1991. Further intergovernmental initiatives, led by Sweden, are currently under consideration.

43 See Cans, 'L'ingérence écologique', *Le Monde*, 28 November 1991, 8; Cans, 'L'ingérence verte: assistance ou intervention?', *Les Cahiers du Futur: Environnement-Développement* No. 2 (1992) 12; Kulke, 'Grenzenlose Einmischung', *Natur* No. 12 (1991) 34. But see also De Lemos, 'Amazonia: In Defense of Brazil's Sovereignty', 14 *Fletcher Forum of World Affairs* (1990) 301.

44 Pronk, *supra* note 2, at 729-730. Mr Jan Pronk, Netherlands Minister for Development Cooperation, was one of the chief negotiators at the Rio Conference and subsequently co-chaired the UN Secretary General's high-level advisory panel on UNCED follow-up; see UN Press Release SG/A/503 of 12 August 1992.

45 Interview with E. Ribeiro on 28 August 1991, translation in *Crosscurrents: An Independent NGO Newspaper for UNCED* No. 10 (1991), 12.

46 Agenda 21, Para. 11.12(e). See Yost, *supra* note 6, at 5-6. The final text of Agenda 21 is reproduced in the report of the Rio Conference, *supra* note 1, as Annex II, in Vol. I, 471.

(namely paragraph 12.40) of its Agenda 21 calling for a new Convention to Combat Desertification, to be finalized by 1994 – which has since inspired a UN General Assembly resolution which put the process in motion.⁴⁷

By the same token, several new 'conference diplomacy' initiatives launched under the oceans chapter of Agenda 21 (concerning small island States, straddling fish stocks, and land-based marine pollution)⁴⁸ may well turn out to have more tangible – albeit deferred – legal outcomes than some of the provisions ostensibly calling for the development of further international law.⁴⁹

In a few instances, the Rio Conference chose to delegate specific legal topics to future action in other competent fora: e.g., in the International Atomic Energy Agency with regard to preparation of a nuclear safety convention,⁵⁰ and in the Sixth Committee of the UN General Assembly with regard to environmental protection in times of armed conflict.⁵¹ The conference thereby deliberately side-stepped the wider issue of 'ecological crimes' as originally raised in the UNCED Preparatory Committee.⁵² As regards the issue of potential conflicts between environment and trade law, the Rio Conference was unable to move beyond the *status quo* reflected in identical terms in both chapter 2 and chapter 39 of Agenda 21, which were taken verbatim from the earlier Cartagena Commitment of the UN Conference on Trade and

- 47 UNGA Resolution 47/188 of 22 December 1992, establishing an intergovernmental negotiating committee for the elaboration of an international convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa. The first meetings were held in New York on 25–29 January and in Nairobi, 24 May to 3 June 1993; for a summary of the proceedings of the organizational session see International Institute for Sustainable Development, 4 *Earth Negotiations Bulletin* No. 1 (1993) 1.
- 48 See Agenda 21, Paras. 17.26, 17.49 and 17.130, followed by UNGA Resolutions 47/189 and 47/192, which decided to convene a global conference on the sustainable development of small developing island States (Barbados, April 1994) and a conference on straddling and highly migratory fish stocks (New York, July 1993), respectively. The 1992 UNEP Programme for the Development and Periodic Review of Environmental Law, *supra* note 13, calls on the UNEP Governing Council to convene another conference on the protection of the marine environment from land-based activities.
- 49 Such as principle 13 of the Rio Declaration, with regard to liability and compensation for transboundary harm. The Declaration's call for cooperation 'in an expeditious and more determined manner' conveys a certain amount of frustration with the lack of progress in this field in spite of exhortations in principle 22 of the Stockholm Declaration. Contrary to earlier expectations – e.g. Hafner, 'Civil Liability and Other Forms of Transnational Accountability', 2 *Yb. Int'l Env. L.* (1991) 91, 98 – the relevant chapters of Agenda 21 make no provision for follow-up on this topic. However, the 1992 UNEP Programme for the Development and Periodic Review of Environmental Law, *supra* note 13, includes 'legal and administrative mechanisms for the prevention and redress of pollution and other environmental damage' 4.
- 50 Agenda 21, Para. 39.7. See Pelzer, 'Nuclear Energy', 2 *Yb. Int'l Env. L.* (1991) 150, 153–154.
- 51 Agenda 21, Para. 39.6, stipulating that the specific competence and role of the *International Committee of the Red Cross (ICRC)* are to be taken into account. However, in its report to the General Assembly (A/47/328, July 1992) the ICRC emphasized the need for better compliance with existing international rules in this field, rather than the development of new instruments as advocated by others; e.g., see G. Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Times of Armed Conflict* (1992).
- 52 This point was introduced by the EC delegation, and was prompted by a joint declaration of the Russian and German Environment Ministers (Moscow, 3 June 1991) calling for 'international condemnation of crimes against the environment', and for inclusion of the topic in the UNCED agenda. After further debate of the issue in the UN General Assembly and at PrepCom 4, the Main Committee of the Rio Conference eventually decided to follow proposals by the USA and several developing countries and restricted the scope of para. 39.6 in Agenda 21 to times of armed conflict.

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Development (UNCTAD).⁵³ Attempts to include this issue in the future work plan of UNEP at the Nairobi meeting which was held in September 1992, met with solid opposition from both the USA and a number of developing countries. The 'environment versus trade' issue had to be deferred,⁵⁴ and as a result no decision was taken concerning what forum should elaborate the UNCTAD based 'principles and rules' on trade and environment which was mentioned in Agenda 21. Therefore, *de facto* or *faute de mieux*, responsibility for these principles rests with the 'Group on Environmental Measures and International Trade' of the General Agreement on Tariffs and Trade (GATT).⁵⁵ With regard to international trade in certain hazardous chemicals, however, Agenda 21 did make some progress towards a global instrument to make mandatory the principle of 'prior informed consent' of importing countries by the year 2000.⁵⁶ In light of current follow-up action under UNEP auspices, recommendations to this effect are expected to go to the UNEP Governing Council at its 1995 session.⁵⁷

Reference should also be made to the 'alternative treaties' prepared at Rio by the *International NGO Forum*, in the context of the parallel independent sector 'Global Forum '92' which was attended by more than 8000 non-governmental groups and organizations.⁵⁸ The 'alternative treaties' were not intended as legally binding instruments, nor as a substitute for the important simultaneous input of NGOs to the official UNCED process and other ongoing efforts at international environmental law-making.⁵⁹ They served mainly as a focus of civic interaction between NGOs in the joint articulation of goals and action plans. Significantly, though, instead of delivering final texts as conference products, the Forum decided to turn them into 'open documents' for continuous development through electronic networking.⁶⁰ The preference, here

53 UNCTAD, 8th session Cartagena, February 1992, text in 22 *Env. Pol'y & L.* (1992) 134, reproduced in Paras 2.22(i) and 39.3(d) of Agenda 21.

54 See the report of the meeting, *supra* note 13, Para. 24 and annex II; 'environment and trade' was, however, retained as one of the topics for future consideration among 'additional subjects'.

55 The Group held seven meetings in Geneva during 1992, dealing with (1) trade provisions in existing multilateral environmental agreements, (2) multilateral transparency of national environmental regulations likely to have trade effects, and (3) trade effects of new packaging and labelling requirements aimed at protecting the environment. For background see Weiss, 'GATT', 2 *Yb. Int'l Env. L.* (1991) 346, 351-352.

56 Para. 19.38 of Agenda 21 calls for 'possible mandatory application through legally binding instruments' to implement the prior informed consent procedure (PIC) as contained in UNEP's amended *London Guidelines for the Exchange of Information on Chemicals in International Trade* (1987/1989) and the FAO International Code of Conduct on the Distribution and Use of Pesticides (1985/1989).

57 The recommendations of the UNEP *Ad Hoc* Working Group of Experts on the Implementation of the Amended London Guidelines (third session, Geneva, January 1993) envisage the establishment of a task force 'to consider modalities for a legally binding instrument for the mandatory application of the PIC procedure', in order to report to the Governing Council at its next session. See Sand, 'Environmental Law: When Does it Make Sense to Negotiate International Agreements?', panel comments, *ASIL Proceedings* (1993, forthcoming).

58 Padbury, 'NGOs Sign Alternative Treaties at the '92 Global Forum', *Network '92* No. 18 (1992) 17; F. Marcelli, 'Il Forum globale delle ONG', in G.C. Garaguso and S. Marchisio (eds.), *supra* note 15, at 71-89. See also Parson, Haas & Levy, 'A Summary of the Major Documents Signed at the Earth Summit and the Global Forum', 34 *Environment* No. 8 (1992) 12, 35-36; and The United Nations Non-Governmental Liaison Service, 'NGO Treaties', *E & D File*, Vol. II, No. 1 (1992).

59 E.g., the Draft Covenant on Environmental Conservation and Sustainable Use of Natural Resources prepared by an *ad hoc* NGO working group of experts under the aegis of the Commission on Environmental Law of the World Conservation Union; Draft 5 (1992). See also *infra* note 62.

60 The computer conference on which the 46 draft 'treaties' are available is managed by a Uruguay-based communications network (NGONet), with follow-up promoted by regional focal points; list in *Network* No. 20 (1992) 14.

again, was for an open-ended process of institutional learning, in close parallel to what Jessica Mathews has called the new 'fluid' model of environmental regimes⁶¹ that best describes the outcome of the Rio Conference.

II. Post-UNCED Institutions

The UNCED preparatory process also generated high hopes for global institutional reform, which was indicated by a wide array of bold new proposals for restructuring the United Nations system to cope with the environment/development *problematique*, and for generally improving the established patterns of international decision-making and governance.⁶² As illustrated by the UNCED Secretariat's compilation of submissions from governments, intergovernmental and non-governmental organizations,⁶³ the spectrum ranged from ambitious visions of world government (including a global environmental legislature, an Ecological Security Council, and an international environment tribunal) to new methods of standard-setting, enforcement and dispute prevention.

As negotiations during PrepCom 3 and PrepCom 4 began to focus on arrangements for UNCED follow-up, it soon became clear that there was no majority support for radical innovations, let alone utopia. The recommendations for institutions and law-making that finally emerged (mainly under chapters 38 and 39 of Agenda 21), which were eventually confirmed and specified by the UN General Assembly and the Secretary General in December 1992,⁶⁴ were of more modest dimensions:

- at the intergovernmental level, a new 53-member ECOSOC *Commission on Sustainable Development*, mainly to carry out public audits of the performance of governments and international organizations in their implementation and financing of Agenda 21;
- at the secretariat level, a new UN *Department for Policy Coordination and Sustainable Development* headed by an Undersecretary-General at New York headquarters, and an *Inter-Agency Committee on Sustainable Development* under the existing UN Administrative Committee on Coordination; and

61 Mathews, *supra* note 27, at 176.

62 Among the numerous pre-Rio appraisals see P.S. Thacher, *Background to Institutional Options for Management of the Global Environment and Commons* (1991); J. MacNeill, P. Winsemius & T. Yakushiji, *Beyond Interdependence* (1991); Falk, 'Toward a World Order Respectful of the Global Ecosystem', 19 *Boston College Env. Affairs L. Rev.* (1992) 711; French, 'After the Earth Summit: The Future of Environmental Governance', *Worldwatch Paper* No. 107 (1992); L.A. Kimball, *Forging International Agreement: Strengthening Intergovernmental Institutions for Environment and Development* (1992); Palmer, 'New Ways to Make Environmental Law', 86 *AJIL* (1992) 259; Palmer, 'An International Regime for Environmental Protection', 42 *Wash. U. J. Urban & Contemp. L.* (1992) 5, and comments by Miller, Gelfand & Tarlock, 86 *AJIL* (1992) 21; see also the NGO 'Hague Recommendations' summarized in S. Bilderbeck (ed.), *Biodiversity and International Law: The Effectiveness of International Environmental Law* (1992) 124-156.

63 Institutional Proposals, UNCED Doc. A/CONF.151/PC/102 (1992).

64 Report of the UN Secretary-General on institutional arrangements to follow up UNCED, UN Doc. A/47/593 and Add.1 (1992); UN Press Releases SG/A/516 and SG/A/520 of 4 December 1992; and UN General Assembly Resolution 47/191 of 22 December 1992, text in 32 *ILM* (1993) 236. See also Kimball, 'Toward Global Environmental Management: The Institutional Setting', 3 *Yb. Int'l Env. L.* (1992) 18; 'General Assembly Creates CSD', *Network* No. 21 (1992) at 1,4. For a summary account of the UN General Assembly negotiations see the *Earth Negotiations Bulletin*, Vol. 3, Nos. 1-3 (1992) and Vol. 5, No. 1 (1993).

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- at the expert level, a *High-level Advisory Board* of eminent persons, reporting to the Secretary General and through him to the Commission.

In addition to these UN bodies, UNCED witnessed the emergence of two further institutions likely to have a major impact also on the future development of international environmental law:

- A restructured *Global Environment Facility* (GEF),⁶⁵ already designated to operate the 'financial mechanisms' of the two Rio Conventions on an interim (and possibly permanent) basis, and expected to serve as a funding channel also for other components of Agenda 21, including future legal instruments such as the proposed 1994 Desertification Convention. Restructuring of the GEF (under the auspices of the World Bank, in cooperation with UNDP and UNEP) for the post-1993 period following its current three-year pilot phase was already initiated by a GEF Participants' Meeting in April 1992,⁶⁶ endorsed by Agenda 21 (paragraph 33.14), and is now under intergovernmental negotiation.
- An independent, non-governmental *Earth Council* has been established with headquarters in San José (Costa Rica).⁶⁷ One of the declared objectives of the Council is to become a focal point for NGO cooperation in UNCED follow-up; some have already compared its potential 'watchdog' role to that of Amnesty International.⁶⁸ Together with other non-governmental bodies established during UNCED preparations and continuing in operation (such as the Geneva-based *Business Council for Sustainable Development*),⁶⁹ the Earth Council illustrates the widening scope of NGO participation in the post-Rio period.

Among other new actors scheduled to make their debut on the global scene during that period are the Conferences of Parties to the two Rio conventions. The potential for 'inter-treaty conflicts' in this field is growing, not only *vis-à-vis* existing trade-driven agreements,⁷⁰ but also between different environmental instruments and their governing bodies competing for normative

65 Texts in 30 ILM (1991) 1735; on the establishment of the GEF see Ofose-Amaah, Di Leva & Osterwoldt, 'World Bank', 2 *Yb. Int'l Env. L.* (1991) 403, 407; Center for International Environmental Law-US, 'Multilateral Lending Activities: Development Assistance and Sustainable Development', 2 *Yb. Int'l Env. L.* (1991) 233, 235-237; Shihata, 'The World Bank and the Environment: A Legal Perspective', 16 *Maryland J. Int'l L. & Trade* (1992) 1, 31; Ricupero, 'Chronicle of a Negotiation: The Financial Chapter of Agenda 21 at the Earth Summit', 4 *Colo. J. Int'l Env. L. & Pol'y* (1993) 81.

66 See *Global Environment Facility: The Pilot Phase and Beyond*, GEF Working Paper No. 1, (1992); and GEF, Report by the Chairman to the December 1992 Participants' Meeting (November 1992) at 23-26.

67 Joint Press Release by Costa Rican President Rafael Angel Calderón and Maurice Strong, San José, 3 September 1992; and Earth Council News Release, Washington/DC, 8 October 8 1992. See also Agenda 21, Para. 38.45.

68 Haas, Levy & Parsons, *supra* note 5, at 31.

69 See S. Schmidheiny, *Changing Course: A Global Business Perspective on Development and the Environment* (1992); 'The Business Council for Sustainable Development: Phase Two?', *Network* No. 21 (1992) 12. Following the Rio Conference, the *International Chamber of Commerce* (ICC) established a 'World Industry Council for the Environment' (headquartered in Paris), absorbing the former ICC International Environmental Bureau.

70 See Agenda 21, Para. 39.3(g); see also *supra* note 55 and Cameron & Robinson, 'The Use of Trade Provisions in International Environmental Agreements and their Compatibility with the GATT', 2 *Yb. Int'l Env. L.* (1991) 3; Beacham, 'International Trade and the Environment: Implications of the General Agreement on Tariffs and Trade for the Future of Environmental Protection Efforts', 3 *Co. J. Int'l Env. L. & Pol'y* (1992) 655; and Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict?', 49 *Washington & Lee Law Review* (1992) 1227.

authority.⁷¹ While UNCED brought no basic changes in the mechanisms of international law-making or dispute resolution, it focussed attention on the implementation and 'effectiveness' of existing environmental conventions,⁷² including the need for progress reports to the new Commission from the Conferences of Parties.⁷³ Another significant shift of emphasis prominently reflected in chapters 8 and 39 of Agenda 21 is the recognition of imbalances in treaty-making and treaty operation that had placed developing countries at a disadvantage in practice and therefore need to be redressed by remedial measures, including assistance, training and financial support in the course of treaty negotiation and implementation.⁷⁴

The Rio Conference may have succeeded in averting – or at least postponing – a North-South showdown, the head-on confrontation between developed and developing countries which many had predicted.⁷⁵ What it could not avoid or defer was a trend towards further polarization, manifested not only in the constant balancing (based on parity or alternation) of 'Northern' and 'Southern' positions, on everything from meeting venues and committee chairmen to agenda priorities,⁷⁶ but also in a distinct new bipolar pattern of negotiating and decision-making procedures. As an illustration, when the drafting group for the Rio Declaration reached an impasse during PrepCom 4, the negotiators desperately called for a meeting room more conducive to consensus than the usual UN conference halls which are either auditorium-shaped or symmetrically arranged for delegations opposing each other. The only room with a perfect round table, and the one ultimately selected for that reason, was Conference Room 8. When delegations arrived, however, the 'Group of 77' immediately insisted that exactly one half of the circle be occupied by representatives of developing countries, while all other delegations were to sit along the other half, with the chairman (alternating for each session between North and South) seated at the intersection.⁷⁷ The configuration of symmetric semicircles prevailed throughout the series of night sessions which followed, until the group ran into terminal deadlock, ultimately to be salvaged by direct intervention of PrepCom chairman Tommy Koh.⁷⁸

71 E.g., according to the principles for restructuring the GEF, as agreed in April 1992, *supra* note 66, an intergovernmental Participants' Assembly is to 'direct the utilization of GEF funds'. Yet, when the Climate Change and Biodiversity Conventions designated the GEF to operate their interim 'financial mechanism', they also provided that it shall function 'under the guidance' (Art. 11, Climate Change Convention) or 'under the authority and guidance' (Art. 21, Biodiversity Convention) of the respective intergovernmental Conferences of the Parties to these conventions.

72 See Agenda 21, Para. 39.8, and the 1992 UNEP Programme, *supra* note 13; see also UNCED Doc. A/CONF.151/PC/103 (January 1992); P.H. Sand (ed.), *The Effectiveness of International Environmental Agreements* (1992) 539.

73 UNGA Resolution 47/191, *supra* note 64, Para. 3(h); see generally Sachariew, 'Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms', 2 *Yb. Int'l Env. L.* (1991) 31; Ausubel & Victor, 'Verification of International Environmental Agreements', 17 *Annual Rev. Energy Environ.* (1992) 1.

74 Agenda 21, Paras. 8.15, 8.22, 39.1(c) and 39.9; see also the examples of imbalance given in UNCED Doc. A/CONF.151/PC/103, *supra* note 72, Paras. 12-16.

75 See the remarks by Biggs, 'Issues Relating to the 1992 Brazil Conference on the Environment', *ASIL Proceedings* (1992) 401, emphasizing the spirit of cooperation that prevailed in PrepCom debates. See also Speth and Brock, *supra* note 5.

76 In a typical, though unsuccessful move in the Rio Main Committee negotiations, the European Community tried to trade off 'Northern' agreement for a future Desertification Convention, *supra* note 47, against 'Southern' agreement to a Forest Convention.

77 The delegates of the Russian Federation and other former 'Eastern' countries grudgingly accepted to be seated with the 'Northern' semicircle. The delegate of the Vatican (who had a major stake in the negotiations because of the population issue in principle 8) chose to sit at the other intersection, across from the chairman, where North also met South.

78 See the summary account by Mann, *supra* note 33, at 408.

The 'semicircles syndrome' appears to have become symptomatic of contemporary multilateral negotiations. In the environmental context, the model most frequently cited now is the Executive Committee of the Montreal Protocol's Multilateral Fund, established on an interim basis at the 1990 London conference⁷⁹ and reconfirmed as a permanent institution at the 1992 Copenhagen conference.⁸⁰ The Committee consists of seven representatives of developing countries and seven from 'other' countries, with the chairmanship alternating annually between both groups. Although there are earlier examples of bipolar systems of governance – e.g., the balance of producing and consuming countries established in international commodity agreements, such as the 1983 International Tropical Timber Agreement⁸¹ – the Montreal Protocol was first in drawing the line explicitly between developing countries and others,⁸² corresponding to what Gus Speth has called the new North-South 'axis of world affairs' confirmed by the Earth Summit.⁸³

The closest analogy to this bipolar regime is of course the ritual balance formerly maintained in East-West relations, most typically reflected in the governance system of multilateral agreements under the auspices of the UN Economic Commission for Europe.⁸⁴ The major difference, however, is that the post-Rio North-South semicircles are mutually exclusive and allow no third segment, no neutral or 'non-aligned' group. While countries may *de facto* 'graduate' from the status of developing countries,⁸⁵ or may in turn drop below the ominous \$4,000 threshold of annual *per capita* income, there is no non-alignment option here: poverty rarely is a matter of choice. *Tertium non datur.*

79 Amendments to Art. 10 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, para. 5, and Appendix II to Decision II/8 of the London Conference; text in 30 ILM (1991) 537 and UNEP, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer* (1991) 98-99.

80 Fourth meeting of the Conference of the Parties to the Montreal Protocol (Copenhagen, 23-26 November 1992), Decision IV/17.

81 Art. 10 of the Agreement allocates equal numbers of votes to producing and consuming members; text in UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Vol. 2, *supra* note 10, at 274.

82 The status of 'Parties operating under Para. 1 of Art. 5' (which in turn requires 'developing country' status, i.e. a Southern list) is determined by the Conference of the Parties, normally on the basis of a country's entitlement to UN technical assistance; see Decision I/12 (E) of the First Meeting of the Conference of the Parties (Helsinki, 1989), and Decision IV/7 of the Fourth Meeting (Copenhagen, 1992). The 1992 Climate Change Convention carried the differentiation process a step further by annexing a Northern list ('developed country Parties and other Parties') to the treaty text.

83 *Supra* note 5, 146.

84 The UN/ECE model, which included elaborate, though mostly unwritten, 'caucus' rules, has actually been suggested as a model for global environmental governance; see Chossudovsky, "East-West" *Diplomacy for Environment in the United Nations* (1988); E.M. Chossudovsky, 'The High-level Meeting within the Framework of the ECE on the Protection of the Environment: A New Model for 'East-West' Co-operation Through Conference Diplomacy?', in M.A. Boisard & E.M. Chossudovsky (eds.), *The United Nations System at Geneva: Scope and Practices of Multilateral Diplomacy and Co-operation* (1992) 355-349.

85 In the World Bank, when a borrowing member country reaches a certain level of per capita GNP (\$4,000 at 1989 value, i.e. currently \$4,465), a review is made to phase out and ultimately end Bank lending. Attainment of the GNP threshold does not, however, automatically terminate a country's entitlement status. The same formula applies to the Global Environment Facility, *supra* note 65.