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The 2012 United Nations Conference on Sustainable Development and the Future of International Environmental Protection

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Abstract

This opinion piece addresses concerns about the suitability of the continuing use of sustainable development as a concept around which to organize international environmental protection. Despite advances made in international environmental law over the last 40 years, progress in abating global greenhouse gas continues to be slow, and predictions about global average temperature increases remain disturbing. The upcoming GEO5 publication based on the United Nations Environment Programme's Global Environmental Outlook data portal reveals that prospects for improvements in global environmental standards are grim. Some of the challenges facing the advancement of international environmental law can be largely attributed to inefficiencies associated with treaty congestion; however, there is a more fundamental reason why international environmental law remains ineffective. There has been little, if any, progress because we have been focusing solely on the concept of sustainable development for the last quarter century. It is clear that 'sustainable development' has become too malleable a theory to serve its vital purpose. Consequently, it needs to be replaced with a straightforward title for the environmental movement. The international community needs to reconsider its approach in dealing with today's pressing environmental concerns.

1. Introduction

This opinion piece addresses concerns about the suitability of the continuing use of sustainable development as a concept around which to organize international environmental protection. Despite advances made in international environmental law over the last 40 years, the vast majority of today's environmental indicators continue to show mostly unabated environmental decline and remain disturbing. For instance, the upcoming GEO5 publication based on the United Nations Environment Programme's Global Environmental Outlook data portal¹ reveals that prospects for improvements in global environmental standards are grim.

Some of the challenges facing the advancement of international environmental law can be largely attributed to inefficiencies associated with treaty congestion; however, there is a more fundamental reason why international environmental law remains ineffective. There has been little, if any, progress because a misshapen concept of sustainable development has been the organizing principle for international environmental law for the last quarter century. It is clear that 'sustainable development' has too often prioritized environmentally

¹ See <http://geodata.grid.unep.ch/>.

harmful action ahead of protection. Consequently, the international community needs to reconsider its approach in dealing with today's pressing environmental concerns. The time has come to return to *environmental protection* as the focus for international environmental law.

2. Forty Years of Development in International Environmental Law

The rapid growth in international environmental conventions over the last thirty years of the twentieth century is striking. The 1972 Stockholm Conference on the Human Environment was the world's first major diplomatic dialogue dedicated to addressing global environmental concerns, and since then few issues have blossomed on the global scene with as much unplanned fecundity. Fittingly, in 1971, John Lawrence Hargrove posed the question, "[H]ow much international law-making is required" to protect the global environment? (Hargrove, 1971). No one knew. By the late-1990s, it was estimated that over 1000 different international environmental legal instruments—both hard and soft—and 139 major international environmental treaties were in existence (UNEP, 1989). Between 1972 and 1992 alone, more than 50 multilateral treaties solely concerning the protection of marine environments were established (Adede, 1992).

It became apparent that the increasing number of treaties and areas of international environmental concern would pose several distinct challenges. These challenges were neatly encapsulated in an influential critique of contemporary international environmental law by Edith Brown Weiss. Brown Weiss identifies that the surfeit of international environmental law could constitute too much of a good thing and result in negative outcomes. (Weiss, 1993). In particular, she points out two problems arising from this body of international environmental law. First, the large number of new treaties might overwhelm the capacity of the international system and of the individual states to implement and monitor a plethora of new obligations. Consequently, the excess of regulation would prove ineffective in ameliorating the environmental problems addressed. Second, Weiss emphasizes that a large and uncoordinated body of laws will result in inconsistent obligations, overlapping norms, gaps in coverage, and outright duplication.

Accounting for 'treaty congestion' does not inevitably involve slowing down necessary norm creation; however, states must act now to make international environmental law more manageable and efficient (Weiss, 1993).

3. Taking Issue with Rio+20

Twenty years ago in Rio, regulatory and public attitudes towards the United Nations Conference on Environment and Development (UNCED) were optimistic. Governments were committed to negotiating a firm legal agenda and to establishing international cooperation. This is evident in the successful adoption of the Convention on Biological Diversity and the Framework Convention on Climate Change. Alongside these legal developments, the international community's commitment to sustainable development escalated. *Agenda 21* and its 40 Chapters were adopted as a roadmap and a new institution

was created to supervise implementation: the Commission on Sustainable Development. Importantly, civil society successfully fought for recognition and the right to participate to a degree in both these UNCED developments as well as environmental decision-making more broadly.

Next year's environmental meeting of the decade, the United Nations Conference on Sustainable Development—popularly known as Rio+20—promises to end in disappointment. The problem, however, does not stem from an absence of participation from civil society. Quite the contrary, the biggest issue facing Rio+20 is the lack leadership from governments driving any sort of *environmental* agenda. Governments are simply not interested in creating new international environmental law that appears necessary or even in reforming and improving the law we already have. Without this sort of leadership by states, no amount of civil society participation can bring improvements, because only states can make international law and create governance structures.

By design, the only work product expected to come out of Rio+20 is a non-legal statement of political aspiration, or in other words, a Rio+20 Declaration on Sustainable Development. Commendably, the whole world was invited to provide input to the Declaration – what has been called the “zero draft.” This invitation went out to governments, international organisations, NGOs, business associations, and individuals. A total of 646 submissions were received. Of that, only 75 countries out of the 194 invited could muster the interest to make any sort of contribution to the zero draft.² States seem to lack interest in using Rio+20 to advance legal protection for the global environment. Indeed, it was recently reported in *The Guardian* that the environmental meeting of the decade was of such low priority that it had to be rescheduled to accommodate celebrations for Queen Elizabeth's diamond jubilee (Gersman, 2011).

While we might like to think that Rio+20 will be a major international environmental gathering of world leaders, the truth is that it will not. First, it has not been designated a Summit. The General Assembly is only requiring that it be held “at the highest possible level,” and even if it does attain Summit status, global environmental problems will not be its central concern (UN G.A. Resolution 64/236, 2009). The General Assembly has limited the conference's objective to securing “renewed political commitment for sustainable development” and its focus to two themes: “a green economy in the context of sustainable development and poverty eradication” and “the institutional framework for sustainable development.” In neither objective nor focus, then, has the global *environment* been explicitly mentioned, much less given prominence. One might ask what difference a word makes. I suggest very much.

4. Stunting International *Environmental* Policy

Over the last 40 years there has been a discernible shift away from a specific *environmental* emphasis in international environmental policy, which of course informs international environmental law, to detrimental effect. The international community today apparently wears its environmental concern on its sleeve, but it is in fact mostly a pretense – a pretense that is driven by an almost wholesale embrace of the concept of sustainable development, around which the

² See <http://www.uncsd2012.org/rio20/index.php?menu=115>.

international community has organized environmental protection. The most recent manifestation in the lead up to Rio+20 is the green economy, but underneath it all is the misplaced faith (or wish) that continued economic growth will drive effective protection of the global environment.

The full name of the event to take place in Rio de Janeiro in 2012 is the *United Nations Conference on Sustainable Development* (UNCSD) (UN G.A. Resolution 64/236, 2009). Ten Years ago in Johannesburg it was called the *World Summit for Sustainable Development*. Not even in name has the environment been featured in these two most recent global gatherings, but it was not always so. Both the original “Earth” Summit in Rio 20 years ago and the 1972 Stockholm Conference were truly environmental conferences not only in name, but also in their outlook, agendas, and outputs.

This is not to say that there was no recognition in 1972 that the environmental problems of developing countries were different in kind and prominently included under-development;³ or that the conference in Rio in 1992 did not account for the idea of sustainable development popularized by the World Commission on Environment and Development in its well-known Report, *Our Common Future* (World Commission on Environment and Development, 1987). However, it was generally recognized at the time that those “who planned [these Conferences] certainly had foremost in mind the . . . the spiritual qualities of our relation to the earth [and] *the ecological health of our planet*” (Ward et al, 1972).

This concern over the continuing deterioration of the state of the world’s environment⁴ largely disappeared in the years following the 1992 Rio Conference. Instead, we find ourselves today preoccupied with green *growth*, in a global green *economy*, in which environmental protection is to be *integrated* in a “*balanced*” way with economic growth and social development, and this shift has been insidious for the international environmental agenda. In order to think about what we might constructively do about this situation, we must first understand what has happened.

In 1987, the World Commission on Environment and Development issued *Our Common Future*. The Report laudably defined the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” The report also stressed the need to get a handle on unsustainable patterns of consumption and production with the more affluent reducing the amount consumed.

The Report, however, did much more than this. For a start, it highlighted with striking certainty that “inequality is the planet’s main ‘environmental’ problem.” Inequality is, of course, a disturbing and persistent problem and most certainly deserves to be addressed in its own right as a matter of priority. However, it is much less clear that it is our main *environmental* problem.

More disturbingly, when *Our Common Future* was presented to the Governing Council of the United Nations Environment Programme by the Commission’s Chair, Gro Harlem Brundtland, she asserted that the idea of

³ See *Development and Environment, Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment, Founex, Switzerland, June 4-12, 1971* (Mouton, Paris & The Hague, 1972)

⁴ As reflected in the General Assembly Resolutions convening the 1972 Conference on the Human Environment, GA Res 2398 (XXIII)(3 Dec 1968) and the 1992 Conference on Environment and Development, GA Res 44/228 (22 Dec 1989).

sustainable development was really a “new concept for economic growth.” It did not take long for many with free market, free trade and capitalist agendas to seize this notion and recast their ambitions for unbridled economic growth in the “green language” of sustainable development. The first step was to equate sustainable development with sustainable economic growth. Then, losing all pretense, *sustained economic* growth (unlimited in any way) apparently became the way to achieve sustainable development.

In 1989, this subversion of sustainable development found its way into the General Assembly Resolution during the 1992 Rio Conference. While the Resolution redundantly defined the objective of the conference as the promotion of “sustainable and environmentally sound development in all countries,” it also affirmed the importance of economic growth (UN G.A. Resolution 44/228, 1989). In particular, it stressed “the importance of a supportive international economic environment that would result in sustained economic growth... in all countries.”

Then, twenty years ago in Rio, at least three additional developments took place that crucially shaped the scope of the discussion.

First of all, unlike Stockholm in 1972, the ecological tenor of the 1992 conference in Rio was downgraded. Instead of recognizing human beings as part of nature, Principle 1 of the Rio Declaration anthropocentrically declares “human beings are at the centre of concerns for sustainable development.” Those who had hopes for an Earth Charter in Rio not only failed in that respect but moreover saw nature and planet Earth placed in the shadows of the economic concerns of sustainable development.

Second, by 1992, the Brazilian delegate on Working Group III of the Preparatory Committee of the Conference had successfully persuaded all the delegates to substitute the term “international environmental law,” an established field, with the new term “international law in the field of sustainable development” throughout all of the conference documents. It was reported that following his success, the Brazilian delegate flashed a mischievous look and said, “[t]hat will keep you lawyers busy well into the 21st Century” (Sand, 1993).

Third, this change in name had weighty implications: it constituted a change from the discourse of international environmental law, with a focus on environmental protection, to rhetoric bound up with international law in the field of sustainable development, with a focus on economic growth. As Marc Pallemmaerts presciently saw back in 1992, international environmental law became diminished and subordinated to economic growth and social development under what has become known as the principle of integration. The principle of integration reduces environmental imperatives to just one factor (along with economic and social desires) to be weighed in decision-making (Pallemmaerts, 1993). The problem, of course, is that the environment usually comes out on the losing end.

The so-called meeting of the decade in Johannesburg in 2002 amounted to a rather anemic gathering where all specific focus on environmental protection faded. Instead of the robust international environmental law output of Rio in 1992, the 2002 conference saw no such progress. Even the political declaration produced in Johannesburg was a disappointment when compared to the strong ecological nature of the declaration in Stockholm and with the World Charter for Nature adopted by the UN General Assembly in 1982.

The same trajectory proceeds apace today. Instead of policies to support the global environment through modifications of our own economic activities,

we find documents like the United Nations Environment Programme's 4th *Global Environmental Outlook* turning the idea of using the economy to support environmental protection inside out like a glove. The 4th UNEP *Outlook* is subtitled *Environment for Development* and states that "society has the capacity to make a difference in the way the environment is used to underpin [economic] development . . ." This formulation clearly renders the environment a mere instrument of development and the green economy. In this way, environmental degradation is seen as a spoiler of development rather than an undesirable result in itself. This economic view of sustainable development is evident in many documents now circulating around Rio+20. Two examples will suffice.

First, the General Assembly in convening Rio+20 "reaffirmed" the environment as subservient to the economy by emphasizing that "the protection and management of the natural resource base of economic and social development... is an overarching objective and essential requirement of sustainable development" (UN G.A. Resolution 64/236, 2009).

Second, last December, the Secretary-General reported on the objectives and themes of the conference, putting forward a formulation of Sustainable Development that "emphasizes... strong economic performance [and] rests on integration and a *balanced* consideration of social, economic and environmental goals and objectives..."⁵ In the same report, the Secretary-General highlights that any transition to a green economy requires "public policies to avoid negative effects on economic growth."

All of this is far removed from the objective of global environmental protection as an important end in itself. This objective needs to become the primary focus of international environmental diplomacy, international environmental policy, and international environmental law. How to accomplish this, though, is far from clear and will be a struggle regardless of the approach.

5. Bringing the Environment to the Fore Again through New International Environmental Law-making

One approach may be an ambitious new international environmental law-making push – lawmaking to govern the fundamental drivers of our destructive impact on the global environment. The detrimental impact that we have on the Earth is largely a function of population, affluence or consumption, and technology – reflected in Paul Ehrlich and John Holdren's famous $I=PxAxT$ formula – so it makes sense to finally start the difficult and delicate task of negotiating international legal cooperation in these realms (Ehrlich and Holdren, 1972). To do so requires that leaders confront head on what we are doing to the global environment instead of tinkering around the edges under the guise of promoting a green economy.

I cannot prove that law-making efforts in these realms will pay dividends. However, what we are doing now – using sustainable development as our pole star – is not working. There are good people invested in the concept of sustainable development with a genuine belief that at least certain aspects

⁵ Objectives and themes of the United Nations Conference on Sustainable Development, Report of the Secretary-General, U.N. Doc. A/CONF.216/PC/7 (22 Dec 2010), at para 4.

promote a healthy environment: indeed, I used to be one of them. However, as I always tell my students on the first day of the course in international environmental law, we must always be attuned to the effectiveness of our efforts to protect the Planet. If I look out my window or study environmental indicators, it is clear that 25 years of sustainable development has done little to improve global environmental conditions.

6. Conclusion

So this is the situation: we are about six months away from the decade's world premier "environmental" gathering and the major theme capturing our attention is the green economy, instead of the health of the planet. It is no doubt too late now to alter the focus of Rio+20. Indeed, at the very first meeting of the Bureau of the Preparatory Process for the conference, bureau members clearly rejected the need for states to revisit the objective and focus of the Conference.

Clearly, though, we can do something. We can tell the vested interests the truth that sustainable development, as currently twisted, insulates and protects. We can also start thinking today about what lies after 2012 so that by 2022 we can truly have a 50th Golden anniversary of true planetary concern in the spirit of Stockholm. In the meantime we should work on improving the effectiveness of what we have.

I raised the question earlier – "what's in a word"? – in relation to the absence of the word "environment" in the focus for the upcoming UN Conference on Sustainable Development. I suggest almost everything. As Philip Allott eloquently sums it up:

Our words make our worlds. To choose our words is to choose a form of life. To choose our words is to choose a world. . . . To change our words is to change a form of life and a world. . . . To make a new word or to alter the meaning of an old word is to make possible new realities. (Allott, 1990)

We have lost our way on the international protection of our shared global environment because we let our words be changed to that of something else. We must change our words so that we once again insist on more effective legal limits to preserve "This Endangered Planet" (Falk, 1971).

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