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Attaining Systems for Sustainability through Environmental Law

Nicholas A. Robinson

Five years have passed since the historic Earth Summit. Although significant progress has been made since Rio, much remains to be done. Poverty and environment degradation continue to affect the lives of millions of people in many parts of the world. Global warming, the loss of biological diversity, the spread of deserts, deforestation, the crisis in many of our cities remind us every day of the challenges which confront us. The unsustainable patterns of consumption and production continue to be the major cause of environmental degradation worldwide. This is therefore not an occasion for complacency or mindless celebration. It is, however, also not an occasion for hand-wringing. We should use the occasion to recall the spirit of Rio, renew our commitments, and to redouble our efforts to conserve nature and to achieve sustainable development.

With this declaration, German Chancellor Helmut Kohl, Brazilian President Henrique Cardoso, Singapore's Prime Minister Goh Chok Tong and South Africa's Deputy President Thabo M. Mbeki, together laid out a challenge for the "Rio Plus Five" Special Session of the United Nations General Assembly in New York June 23-27, 1997. These four nations also launched their own global initiative "to keep alive the spirit of Rio and to create the conditions for a viable future for a growing world population." U.N. GA Doc. A/S-1 9/23 (June 24, 1997). As part of their initiative, they endorsed the German proposal for a major international conference in 1999 on sustainable urban development to help mayors cope with the phenomenally rapid growth of cities.

By 2000, forty-four cities will pass the 5 million inhabitant mark, and six will surpass 15 million each—more than many nations. In 2000, one-half of the world's people, some 3 billion, will live in cities, most of which will have populations that far outstrip available infrastructure such as safe drinking water systems, effective sewage disposal and transportation. The conference will also initiate a campaign to target the period from 2000 to 2010 as the "Decade for the Sustainable Production and Use of Energy." Finally, to support tangibly their initiative, the four nations pledged to work for the rapid development of environmentally acceptable mass transit systems to address the burgeoning amount of automotive exhaust and conges-

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tion associated with urban transportation.

The vibrancy of this international policy initiative by these four nations stands in stark contrast to the stolid official results of the U.N. General Assembly Special Session itself. The Special Session was not able to launch any new programs to advance Agenda 21, the action plan adopted at the 1992 Earth Summit in Rio. The Clinton administration, like most national governments, deferred any decision on measures to cope with global warming until the December 1997 negotiations in Kyoto, Japan, on a new protocol for the Framework Convention on Climate Change. The United Nations Secretariat, already in the midst of down-sizing and reorganizing, was not in a position to encourage new undertakings, and although the nations agreed to name a dynamic new executive director for the U.N. Environmental Programme (UNEP), the announcement was not ready to be made during the U.N.'s Special Session. No decision could be reached on whether to prepare a treaty on managing the world's forests, so that issue was postponed to 1999. A draft political declaration on sustainable development implementation was scrapped when it proved impossible to bridge divisions of opinion among and between both the developing states and the developed nations. Not surprisingly, journalists rushed to proclaim the Special Session Summit a failure.

However, from the perspective of environmental law, this Special Session, including the new initiatives by these four nations and others by the World Bank, was a milestone on the path charted by Agenda 21. If one looks behind the smoke and mirrors of the Five Year Review Special Session, and the media hype accompanying that event, there is substantial evidence of measurable progress toward the objective of "sustainable development." This evidence is found not in the deliberations of international meetings, but in the accretion of domestic environmental law-making within nations worldwide.

Environmental law is the fastest growing field of law in the world today. It is emerging in each region, and takes on characteristics familiar within each nation. Agenda 21's paradigm of sustainability calls on nations to adopt strategies for maintaining the reproductive health of sustainable biological resources, restoring and maintaining air and water quality, minimizing waste,

and making efficient use of electricity and energy sources. At the core of sustainability is the mandate that the intensity of short-term exploitation of natural resources be tempered by anticipating and accommodating the needs that future generations will have for those same resources. This common sense principle is, however, in many nations still undefined operationally and unattained. It is a goal with many obstacles blocking its realization.

A major obstacle was evident in the Rio Plus Five deliberations in June. While prescriptions for necessary new sustainable development policies are better understood than ever, most nations have left in place the agencies and jurisdictions that preside over the old policies. Unfortunately, these institutional players are both committed to defending "turf" and are wedded to "business as usual," so there is little institutional reform. The U.N. World Commission on Environment and Development, chaired by Norway's Prime Minister Gro Harlem Bruntlund, had identified this challenge in its report that paved the way for the 1992 Rio Earth Summit:

The next few decades are crucial for the future of humanity. Pressures on the planet are unprecedented and are accelerating at rates and scales new to human experience. . . . Each area of change represents a formidable challenge in its own right, but the fundamental challenge stems from their systemic character. They lock together environment and development, once thought separate; they lock together 'sectors,' such as industry and agriculture; they lock countries together as the effects of national policies and action spill over national borders. Separate policies and institutions can no longer cope effectively with these interlocked issues. Nor can nations, acting unilaterally. . . . The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must.

WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT,
OUR COMMON FUTURE 310 (1987).

Although Rio Plus Five demonstrated institutional stagnation at the international level, signs of progress are budding locally. Through the enactment of new environmental statutes in many nations, through increasingly active administrative and judicial enforcement of these systems, and through the establishment of innovative economic incentives and disincentives, policies and institutions responsible for attaining sustainability are evolving. These reforms become evident when a lawyer provides environmental due diligence services for a client acquiring or selling a factory abroad. The lawyer can access many environmental

statutes through the Internet, and guidance is available through new treatises such as *Comparative Environmental Law & Regulation* (1996).

The patterns are evident. Not only are environmental ministries and agencies working in all nations, but they are becoming operational at the local level. The laws they administer typically require environmental impact analysis (EIA) for new projects, and often make EIA an ongoing obligation as a condition of an operating

permit. Thus, as a facility expands or when it renews its operating licenses, it must update its EIA and take such measures to minimize any adverse environmental impacts as may be disclosed by the new studies. Environmental statutes set requirements for waste treatment to contain pollution within defined limits. Nations, especially those in the "tiger" economies of South East Asia, are promoting voluntary environmental management systems such as the ISO 14000 series of the International Standards Organization.

Multilateral environmental agreements (MEAs), such as the Montreal Protocol and other agree-

ments under the Vienna Convention on the Protection of the Stratospheric Ozone Layer or the Convention on Biological Diversity, provide common "rules of the road" for national legislatures shaping their environmental laws. Where gaps remain in the framework of international public law for the environment, the draft *Convention on Environment and Development*, with commentary prepared by the Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources (IUCN), proposes solutions. Launched during the General Assembly's Congress on Public International Law during the fiftieth anniversary of the United Nations, this draft is already being drawn upon in various treaty negotiations.

Some Asian states have expressly restructured their ministerial and administrative law regimes to design new systems that integrate economics and the environment with the public and private sectors. New Zealand's natural resources and environmental laws have been entirely redesigned, shifting the responsibility for implementation to the private sector, and reducing government personnel by some 40 percent. Fiji is also now deliberating on the adoption of a new framework law fully integrating environment and resource management. Singapore has enhanced its use of economic instruments to ensure a sustainable economy by undertaking to implement a 100 percent increase in water rates over the next four years; the rate increases

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will induce more efficient use of water and raise public funds to expand that nation's sources of water. The People's Republic of China has prepared a domestic version of Agenda 21 to guide its rapid economic growth and has a timetable for preparing legislation contemplated under the plan. Indonesia for a decade has made a course in environmental law required in all state law schools. Specialized courts for environmental cases have been at work for fifteen years in Australia and for three years in Mauritius.

Similarly, Meso-America gives evidence of vibrancy in developing new environmental legislation. Every state from Panama to Mexico has established a national environmental law center, and these nations are increasingly elaborating a pattern of one single, national "framework" law within which to establish integrated environmental and resource policies and practices across all sectors of the economy and society. Mexico also collaborates with Canada and the United States in shaping a common approach to environmental law administration through The Commission on Environmental Cooperation (CEC), under the terms of the Environmental Side Agreement for the North American Free Trade

Agreement (NAFTA). In fact, Mexico has adopted an environmental auditing system more comprehensive than ISO 14000, which will obtain official recognition in the United States and Canada. The program not only provides information on compliance, but also mandates a contract between the government and companies requiring full compliance under a negotiated action plan and timetable. In April 1997, the first clean industry certificates were awarded by Mexico to eighty companies.

In Europe, the European Union continues to elaborate its environmental legal system and to influence the patterns of legislation in Central Europe. States like the Czech Republic are keen to become members of the EU, and have been patterning their environmental laws to meet the criteria in the EU's environmental directives. In the former Soviet Union, despite the depressed economy and weak central governments, attention to environmental law is a priority. The State Duma in Russia has enacted a nationwide statute on "ecological expertise," a Russian version of environment impact statements. The IUCN is undertaking to establish an Ecological Law Institute in Moscow to provide expert environmental legal services throughout the Russian-speaking regions.

This survey could continue to highlight numerous innovations in South America, such as the MERCOSUR (South American Free Trade Zone) environmental nego-

tiations, in Africa where South Africa's environmental laws are evolving rapidly in response to the economic development of the post-Apartheid era, or elsewhere. Suffice it to say, there is a great deal of new environmental law being promulgated in all parts of the world.

Where administrative systems remain somewhat problematic, as in South Asia, the courts have been called upon for effective enforcement of environmental statutes. The supreme courts of Bangladesh, India, Nepal and Pakistan have each construed their constitutions to contain a right to life which entails the right to

have pollution abated. The courts have broadened the definition of "aggrievement" to give standing to plaintiffs who would enforce the environmental statutes. Courts in India have issued injunctions to require that air pollution damaging the Taj Mahal be eliminated with the offending companies relocating workers and jobs so as not to exacerbate unemployment. Similar injunctions enforcing water pollution laws against polluting industries have been issued. Earlier this year, India's supreme court also held that the public trust doctrine was a part of the common law in India, and could be judicially enforced. Recognizing the govern-

ment as trustee for the water resources of India will give priority to needed shifts in budgetary and administrative resources to meet the trusteeship responsibilities for the integrity of and access to India's freshwater resources.

In early July, the first judicial conference ever held of the supreme courts and high courts of Bangladesh, Bhutan, India, The Maldives, Nepal, Pakistan and Sri Lanka convened in Colombo, Sri Lanka. The South Asian Co-operative Environmental Programme convened the conference, which has undertaken to regularly exchange decisions and experience. The judiciary's use of structural injunctions to strengthen the compliance systems is contributing to the strengthening of environmental law administration throughout South Asia.

In the Philippines, the supreme court has issued a major decision delineating the fundamental duties of the government. *Oposa v. Factoran, in his capacity as Secretary of the Department of Environment and Natural Resources*, G.R. No. 101083 (July 30, 1993), dealt with a complaint alleging that the loss of most of the virgin forests of the Philippines to logging breached a duty of the government to preserve the remnants on the grounds that the government was trustee for the whole people of the nation, including its children and future generations. Distressed that his children would

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never know the rich forests that he knew as a child, Antonio Oposa, a lawyer and environmental law professor, brought suit on behalf of his minor children as the plaintiffs. The court granted standing and ruled for the plaintiff in *Oposa v. Factoran*, 33 I.L.M. 173, 187 (Phil. Sup. Ct. July 30, 1993):

The complaint focuses on one specific fundamental legal right—the right to a balanced and healthy ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article 11 of the 1987 Constitution explicitly provides: 'The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.' This right unites with the right to health which is provided for in the preceding section of the same article: . . . §. 15 'The State shall protect and promote the right to health of the people and instill health consciousness among them.' While the right to a balanced and healthful ecology is to

be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of mankind . . . The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.

The result of the *Oposa* case has been a program by the government to inventory the remnant old growth forest and restrict logging from those areas.

These environment law building activities bode well for sustainability. The framework of a new para-

digm of law cannot be built in the proverbial "day." It was similarly unrealistic for journalists and politicians to expect great strides out of the U.N. General Assembly Special Session for Rio Plus Five. The strides must be measured on the ground, in the context of actual law-making, law-implanting, and law implementing. Just as the environmental threats to Earth's natural systems result from the accumulations of many small acts and mistakes, so too global environmental protection can be realized only if each jurisdiction adopts an environmental ethic integrating the ecological, economic and social dimensions.

Agenda 21 is having the desired result of orienting nations to adopt policies and laws treating the shared environmental systems of Earth as a common resource that needs to be maintained by a common stewardship. This stewardship cannot be forced from some international or even national authority. It must be understood and embraced as the "enlightened self-interest" that it truly is. Perhaps the observation of the supreme court of Minnesota in *County of Freeborn v Bryson*, 243 N.W.2d 316, 322 (Minn. 1976), following the teachings of Aldo Leopold, gives the best example of a jurisdiction orienting itself to serve this shared responsibility:

To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative relief, a swamp or marsh is a thing of

beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a spring soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It is quiet and peaceful—the most ancient of cathedrals—antedating the oldest manmade structures. More than that, it acts as nature's sponge holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve.

"A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows: 'All ethics so far evolved rest upon a single premise that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for). The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land. In short, a land ethic changes the role of homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.'"

Environmental law is rapidly becoming a foundation for sustainability, both of the economy and the society in nations worldwide. The foundation is built incrementally. Its development may be difficult to perceive, but it is as real as it is gradual. Out of its growth the intersectoral new paradigm called for by both *Our Common Future* and Agenda 21 is being born.

