

# Some Reflections on 'the Future We Want': Is the 'Sustainable Development' Paradigm as a Guarantor of Ecological Security under Serious Threat?

Luther Rangreji\*

*The Rio+20 Declaration on the "Future We Want", is a political document that conveys the aspirations of the international community and provides a blueprint for a programmatic action to ensure sustainable development for the future. The six sections which the "Future we Want" focusses are: a shared common vision; renewing political commitment; green economy; institutional framework for strengthening sustainable development; framework for action; and means of implementation. For reasons of felicity the paper is divided into the following sections: (i) the general conceptual framework of sustainable development; (ii) Right to Development and eradication of poverty; (iii) Role of Green economy in guaranteeing sustainable development; (iv) Financial resources and transfer of technology; (v) Roadmap for the Future of sustainable development. The paper will endeavour to investigate the 'sustainability of sustainable development paradigm' based on two critical themes, namely: (a) whether the paradigm of 'sustainable development' that guarantees ecological security is under a serious threat, as was evident from the attitudes of developed countries at the Rio+20 Conference; and (b) possible solutions, based on the principles of common but differentiated responsibilities (CBDR) and equity which are imperative to sustain and further strengthen the existing international legal order by consolidation of principles of 'solidarity' and international cooperation among all countries, to be able to achieve sustainable development for preservation of planet Earth and future generations.*

**Keywords:** sustainable development, Rio declaration, international environmental law

*"I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and yourself melt away."*

*- One of the last notes left behind by Gandhi in 1948, expressing his deepest social thought.*

(Mahatma Gandhi [Last Phase, Vol. II (1958), P. 65])

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\* Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi.

## **I. Background**

Any study of sustainable development should begin by understanding that we live in one world whose future only we can decide. In this human centric world with unequal strengths of States and human failings, India's Father of the Nation Mahatma Gandhi provides the talisman to work for the betterment of society. The same is true of the international society too.

The Future We Want document is organized into six broad sections: Our Common Vision; Renewing political commitment; Green economy in the context of sustainable development; and poverty eradication; Institutional framework for sustainable development; Framework for action and follow-up; and Means of Implementation. These sections were negotiated for more than two years within the United Nations and also at the Pre-Summit of Rio+20 largely because of the keenness of the Brazilian government that wanted a text for world leaders to take home.

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tion of principles of 'solidarity' and international cooperation among all countries, to be able to achieve sustainable development for preservation of planet Earth and future generations.

The term 'ecological security' may attract different meanings depending upon the field you are looking at. Traditionally it involves efforts by man to balance his interactions with his environment to guarantee that his surroundings including life and health, and basic elements of survival such as water, food security, air quality and green environment are not impaired. 'Ecological security' can also be viewed as protecting and preserving the integrity of the environment in times of war and other human induced disasters as earthquakes, tsunamis, acid rain, climate change and other global transboundary calamities.<sup>1</sup> In the generic sense, it may also involve continuous human effort to maintain balance between his needs and those of the environment. Although the paper does not touch security matters, it cannot be denied that the peace and comfort with which man and lower animals ecological peace with which

## **II. Concept of Sustainable Development and its moorings**

Before we look at the principle of sustainable development, it is important to understand the importance of principles of international law in general, and those of international environmental law, in particular. The study of "the international law of environment" will reveal rudimentary elements found in the general principles of international law. These principles such as the principle of "no harm"<sup>2</sup>, customary international law offer few illustrations, which have upheld the environmental integrity of general principles of law. Unlike treaties and international customs, which reflect State practice and *opinio juris*, some general principles do not need to show such evidence as a proof of binding legal obligation. These general principles of international law play a facilitative role in strengthening relations among States on the

<sup>1</sup> Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi.

See Jon Barnett, *The Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era*. London, 2001, p.2.

<sup>2</sup> See generally, L.D. Guruswamy, *Legal Control of Land-based Sea Pollution*, (London, 1982).

basis of good faith,<sup>3</sup> the principle of respect for other's right or *sic utere jure tuo ut alienum non laedas*,<sup>4</sup> principle of good neighbourliness<sup>5</sup> and universal guardian or custodianship of natural resources.

Though 'sustainable development' is a term of recent import post the 1992 UNCED Conference, the rudiments of this concept can be found in a large number of principles of international law, treaties and judgements of international courts and tribunals. In the late nineteenth century in the Pacific Seal Arbitration Case, the United States relied on the public trust argument, that we hold the earth in trust for future generations.<sup>6</sup> In fact two of the oldest treaties, the 1946 International Whaling Convention<sup>7</sup> and 1968 African Convention on the Conservation of Nature and Natural Resources speak of a need to preserve natural resources and use them sustainably for future generations.<sup>8</sup> Similarly, a

<sup>3</sup> As was held by the ICJ in the *Nuclear Test Cases*, 1974, ICJ Reports that "... the of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by a unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

No State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

<sup>4</sup> In the *Trail Smelter Arbitration* (USA v. Canada), *United Nations Register on International Arbitral Awards* (UNRIAA) vol.3, (1938/1941), at pages p.1907 and 1965, the Tribunal held "No State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".

<sup>5</sup> *Lake Lannoux Arbitration* (France v. Spain) *International Law Reports* (1957), at p.119

<sup>6</sup> Cited in Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law*, (1992), p.206

<sup>7</sup> The former in two preambular paragraphs provides "...Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" and also "Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress"

<sup>8</sup> Similarly, three preamble paragraphs of the African Natural Resources Convention



customary prescription to exercise freedoms of the high Seas with due or 'reasonable regard to the interest of other States was recognized by the 1958 Geneva Convention on the High Seas.<sup>9</sup>

The first international conference on environment namely the United Nations Conference on Human Environment (UNCHE), held in Stockholm, in 1972, too indirectly spoke of a connect between environment and development. Principle 2 of the Stockholm Declaration adopted at the end of the UNCHE stated that "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate." Furthermore, Principle 5 of the Stockholm Declaration stated that "The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind". Principles 2 and 5 clearly reflect the understanding of the international community that resources of planet Earth should be used rationally and for the benefit of all States big and small. The principles read together reflect an essential principle of equity—both, 'intra-generational and inter-generational'<sup>10</sup> so that "such natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems" are protected and utilized for the benefit of present and future generations. The state practice developed from 1972-1992 shows adoption a large number of treaties wherein many of these principles are reflected.

This remit to preserve the natural environment for present and future provide for the need to use natural resources in a sustainable manner. The Convention provides "Conscious of the dangers which threaten some of these irreplaceable assets", and "Accepting that the utilization of the natural resources must aim at satisfying the needs of man according to the carrying capacity of the environment"; and "Desirous of undertaking individual and joint action for the conservation, utilization and development of these assets by establishing and maintaining their rational utilization for the present and future welfare of mankind."

<sup>9</sup> Article 2 provides "....These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

<sup>10</sup> See generally, Edith Brown Weiss, *Intergenerational Equity, Entry*, in 5 Max Planck Encyclopaedia of Public International Law 287-294 (Rüdiger Wolfrum ed., Oxford, 2012)

ture generations was concretized in more stronger and anthropocentric terms by the term 'sustainable development'. The term "sustainable development" was coined by the World Commission on Sustainable Development in its seminal published work *Our Common Future*.<sup>11</sup> It is best understood as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs". It has viewed as a visionary paradigm for development which essentially calls for a "convergence between the three pillars of economic development, social equity, and environmental protection."<sup>12</sup> The principle has been appreciated by many, but has also been criticised as it conveys different remits when seen from the viewpoint of a development economist, a lawyer or a sociologist. Be that as it may, it is commonly understood to incorporate three main strands.

The first is a commitment to equity and fairness, in that priority should be given to the improving the conditions of the world's poorest and decisions should account for the rights of future generations. The second is a long-term view that emphasizes the precautionary principle, i.e., "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (*Rio Declaration on Environment and development*, Principle 15). Third, sustainable development embodies integration, and understanding and acting on the complex interconnections that exist between the environment, economy, and society. This is not a balancing act or a playing of one issue off against the other, but recognizing the interdependent nature of these three pillars.<sup>13</sup> The issue of fairness and equity, application of the precautionary approach and the balancing of environmental protection and developmental concerns, for the purpose of this article as reflected in the principle of common but differentiated responsibilities.

<sup>11</sup> *Our Common Future*...

<sup>12</sup> Background Paper titled "Sustainable Development: From Brundtland to Rio 2012" prepared John Drexhage and Deborah Murphy, International Institute for Sustainable Development (IISD) for consideration by the High Level Panel on Global Sustainability at its first meeting, 19 September 2010, United Nations Headquarters, New York, p.2

<sup>13</sup> *Ibid*, p.3

**A. The Principle of common but differentiated responsibilities (CBDR)**

The principle of common but differentiated responsibilities (CBDR) as enunciated in Principle 7 of the Rio Declaration is titled "State Cooperation to Protect Ecosystem" states:

"States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

This definition which many believe to have been recognized as a part of customary law<sup>14</sup> is the fulcrum, on which the sustainable development paradigm rests. The definition is important for various reasons. One, it is an acknowledgement of the fact that the Earth's ecosystem has been degraded and it is every State's duty to protect and restore it to its earlier self, based on the principle of *restitutio in integrum*. Two, which is a very significant acknowledgement, is the fact that the present state of degradation of the Earth's ecosystem is largely because of the unsustainable livelihoods and contributions of the developed countries. Three, because of this degradation it is common concern of all States to restore the degraded ecosystem, but this concern has to be operationalized in a 'differentiated' set of obligations or duties. And four, having fixed or attributed responsibility on the developed States, it is their duty to provide technological and financial resources to developing and poorer States to meet the incremental costs incurred in pursuing sustainable development.

To any developing country scholar, the principle of common but differentiated responsibilities is the cornerstone, upon which, to build an argument that we live in an unequal world wherein it is a historical fact industrial revolution reached the developing countries, a good two cen-

<sup>14</sup> See Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 RECIEL 120 (2000); *The Common but Differentiated Responsibility in Multilateral Environmental Agreements*, Hague, 2009.

turies years after it had emanated from the Western world. The major contributors to the destruction of the planet's available carbon space, without prejudice to the needs of the people of these countries, in the atmosphere are the richer nations of the world.<sup>15</sup>

The principle of CBDR has its genesis in different fields of international law, especially the logic that developing countries should be provided preferential treatment because of their socio-economic conditions. In the field of international law and international environmental law in particular, the common concerns of mankind are reflected in a number of multilateral environmental treaties.<sup>16</sup> What started from Ambassador Arvid Pardo's speech in the General Assembly of the United Nations in 1967<sup>17</sup> calling for a common heritage of mankind has now been manifest in many different forms<sup>18</sup>. This principle which is now incorporated in the United Nations Convention on the Law of the Sea reflects a compromise between the permanent sovereignty over natural

<sup>15</sup> Henry Shue, "Subsistence Emissions and Luxury Emissions", *Law and Policy*, vol.15, 1993, pp.39-60.

<sup>16</sup> Chief among these include the United Nations Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev. 1 (1992); United Nations Framework Convention on Climate Change 31 ILM 849 (1992).

United Nations Convention on Biological Diversity 1760 UNTS 79 (1992); United Nations Convention on the Law of the Sea 1833 UNTS 3 (1982); Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3 (1987); The Large Combustion Plant Directive, 88/609/EEC. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes 2001 UNTS 187 (1991); Treaty on European Union 1759 UNTS 3 (1992).

<sup>17</sup> Arvid Pardo, "Ocean Space and Mankind", *Third World Quarterly*, vol.6 (3), 1984, pp. 559-572

<sup>18</sup> The Outer Space Treaty recognizes "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes"; The Moon Treaty, 1979 provides that the "exploration and use of the moon shall be the province of all mankind" and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. The United Nations Framework Convention on Climate Change, 1992 "acknowledges that change in the Earth's climate and its adverse effects are a common concern of humankind"; The United Nations Convention on Combating Desertification, 1994 states that "human beings in affected or threatened areas are at the centre of concerns to combat desertification"; The Convention on Biological Diversity 1992 states "affirming that the conservation of biological diversity is a common concern of humankind".





resources and the freedom to undertake deep seabed mining.<sup>19</sup>

The principle as it stands today is a watered down concept because of being constantly under threat because of its potent remit that the developed world owes a moral and legal obligation to the developing countries and lesser developed ones to share in their burdens of achieving sustainable development. The next part of the paper would reveal how the principle CBDR is diluted in terms of the right to development, transfer of financial resources and technologies and the new concept or approach of green economy.

### **B. Right to Development**

The struggle for development and freedom are part of the history of the law of nations especially those under colonial yoke and their fight for equality and justice after suffering poverty, subjugation and underdevelopment.<sup>20</sup> Sustainable development has come to occupy a permanent place in the field of international law and relations. We cannot run away from this amorphous and ubiquitous principle, how much ever we may try. Its omnipresence is reflected not only in scholarly literature but also school textbooks, national development policies, private sector industry manuals and brochures and even religious literature. The paradigm has been twisted and upturned but has not been destroyed as there is universal recognition that it's the only principle by which the Earth and our future children and grandchildren will survive.

But this principle is no magical wand that can simply change the world. Every state needs to change its attitude towards its neighbours. We require shedding ways opulent living and undertaking sustainable patterns of living. This seems to be the main objective of the Rio+20 Conference which in paragraph 4 provides "We recognize that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development".

But who is to be made responsible or accountable for the present state of the environment. The developing countries many who were col-

<sup>19</sup> See R.R.Churchill and Vaughan Lowe, *The Law of the Sea*, Manchester, 2009.

<sup>20</sup> Mohammad Bedjauoui, *New International Economic Order*, UNESCO, Paris, 1963

onized by European countries are still struggling with socio-economic problems such eradication of poverty, combating malnutrition and disease and illiteracy. Poverty eradication is the biggest challenge and this challenge can be met only when you provide food, shelter and clothing to millions living below the poverty line in developing and poorer countries.

It is this context, Mrs Indira Gandhi, former Prime Minister of India while addressing the UN Conference of Human Environment, held in Stockholm, 1972 had stated:

"Many of the advanced countries of today have reached their present affluence by their domination over other races and countries, the exploitation of their own natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice. The stirrings of demands for the political rights of citizens, and the economic rights of the toiler came after considerable advance had been made. The riches and the labour of the colonized countries played no small part in the industrialization and prosperity of the West. Now, as we struggle to create a better life for our people, it is in vastly different circumstances, for obviously in today's eagle-eyed watchfulness we cannot indulge in such practices even for a worthwhile purpose. We are bound by our own ideals. We owe allegiance to the principles of the rights of workers and the norms enshrined in the charters of international organizations. Above all we are answerable to the millions of politically awakened citizens in our countries. All these make progress costlier and more complicated".<sup>21</sup>

How can there be a disconnect between the concept of sustainable development and the right of every free country to decide its path to development. Needs of development would be of primary concern as Mrs. Gandhi's statement above indicates. Stressing the same point, paragraph 1 of the proclamation of the Stockholm Declaration declares "In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum

<sup>21</sup> Speech titled "Man and Environment" was delivered at the Plenary Session of United Nations Conference on Human Environment Stockholm 14th June, 1972, [www.unlibrary-nairobi.org/PDFs/Only\\_one\\_earth.pdf](http://www.unlibrary-nairobi.org/PDFs/Only_one_earth.pdf)

levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development".

Such a right was clearly recognized by the Stockholm Declaration which in Principle 3 titled 'The Right to development' states that "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Further, Principle 5 on 'Eradication of Poverty' provides "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world".

### **III. Financial resources and transfer of technology**

Intricately related to the right to development is the right to seek financial resources and transfer of sound and benign environmental technologies. Recognizing this need the Rio Declaration in the latter part of Principle 7 provides "The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the *technologies* and *financial resources* they command".

To quote Mrs Indira Gandhi again, she stated at the Stockholm Conference that "Pollution is not a technical problem. The fault lies not in science and technology as such but in the sense of values of the contemporary world which ignores the rights of others and is oblivious of the longer perspective".<sup>22</sup> Principle 7 of the Rio Declaration addresses similar concerns that more than science, the value which the international community attaches to harness it for the benefit of all is

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<sup>22</sup> Ibid.

important; something similar to the Atoms for Peace movement that called for harnessing atoms for peaceful uses for the benefit of entire mankind.

#### **IV. Transfer of technology**

The history transfer of technology (TOT) a very dear issue to the developing countries and must be understood in a historical context. When in the late sixties, several colonized states gained independence in the late sixties they found that the international law that governed them when they were colonized governed them, was the free when they achieved freedom. It was then that a political strategy was devised in the General Assembly of the United Nations demanding a New International Economic Order (NIEO). This concept was propagated by a group of non-aligned countries who created a movement called the Non-Aligned Movement (NAM). Within the United Nations system NAM countries gathered around under the name of Group of 77 or in short (G-77 countries), to which China preferred to be called as G-77 and China. This group called for a re-orientation of the international economic order wherein developing countries played an active role in distribution of global resources. Developing countries raised a demand for "just, equal and adequate compensation" on account of nationalization or expropriation of national property as a genuine compensation for the losses they suffered on account of colonization. Similarly, developing countries which produced some of the major raw commodities such as sugar, tin, rubber, timber and other mineral resources, called for the creation of an international organization that looked into their demands of fair terms for international trade and development. This as many would know lead to the establishment of the United Nations Conference on Trade and Development (UNCTAD). Under the auspices of the UNCTAD many developing found a voice to air their concerns on transfer of technology and financial resources. Many international commodity agreements, such as the International Tin Council, International Rubber Organization and others were created under the auspices of the UNCTAD.

Thus the United Nations General Assembly Resolution 3202 (S-VI) on the Declaration on the Establishment of a New International



Economic Order, requires respect for the principle of "giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies".<sup>23</sup> Likewise, the United Nations General Assembly Resolution 3281 (XXIX), the Charter on the Economic Rights and Duties of States, provides in Article 13(4) that "All States should co-operate in research with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology, taking fully into account the interests of the developing countries".<sup>24</sup>

It was on the basis of these General Assembly resolutions that the UNCTAD took up the task of formulating the draft Code of Conduct on transfer of technology (TOT). This TOT Code, negotiated between 1976 and 1985, provided a high benchmark for model provisions espousing a "regulatory" approach to technology transfer. However, as is well-known developed countries wedded to a market based approach preferred a market based approach to access of technology transfer.<sup>25</sup>

This preference to have market based IPR loaded (TOT) is witnessed in the climate change and biodiversity negotiations too. The developed world has traditionally had these two weapons to fight the poor and weaker nations of the South.

<sup>23</sup> (UNCTAD, 1996a, vol. I, p. 50)

<sup>24</sup> (UNCTAD, 1996a, vol. I, p. 64)

<sup>25</sup> UNCTAD, *Transfer of Technology*, 2001, Geneva, at p.63. Articles 7 and 8 of the TRIPS Agreement provide that the protection of IPRs should contribute to the promotion of technological innovation, and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. This policy is further developed in Article 66 (2) of the TRIPS Agreement whereby "[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base". This is to be reinforced through an obligation, under Article 67, for developed country members to provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least developed country members in order to facilitate the implementation of the TRIPS Agreement

is good to look at development from a green angle, but why have you to look at the economy too from a green angle? Sustainable development by its very definition involves the 'greening' of the development process. This in turn would entail that countries have to give priority to environmental and developmental concerns in their national policies. When countries address this concern in their development, what is the merit in greening the economy? How can you green the economy with only environmental ministers attending the Rio+20 Conference and not Finance Ministers!

Precisely for these reasons developing countries fiercely rallied to decry this design by a few richer nations to look at economy of countries, much on a market based approach rather than the country wise developmental perspectives. Such approaches reminds one of colonialist tendencies and one is reminded what Dr. Mahathir Mohammad, the former PM of Malaysia had to say about the difficult forestry negotiations owing to the strong views on tropical timber producing countries. He had said "If it is in the interests of the rich that we do not cut down our trees then they must compensate us for the loss of income"<sup>26</sup>. If countries are to lose their sovereign equality to decide their developmental policies, then they must be compensated by means of increased ODA, new and additional financial resources and benign technologies. But alas, it has been seen earlier the developed countries are also against giving any sort of primacy to the principle of CBDR.

At the Rio+20 Conference, the green economy came under severe attack from developing and lesser developed countries. It was viewed by many as a sell-out to the multinational corporations of the world and also as disguised neo-colonialism resurgence after of failure of developed countries to undertake binding obligations under various international treaties. In the build-up to the Rio+20 Conference India's Environment Minister while addressing Indian business leaders at the CII Conference on the topic 'Building a Green Economy' on said "that the role of the government was to design fiscal policy and set standards.... Rely on your capabilities to trigger a change. The more freedom from

<sup>26</sup> Speech by the prime minister of Malaysia, Dato' Seri Dr Mahathir bin Mohammad at the official opening of the Second Ministerial Conference of Developing Countries on Environment and Development, Kuala Lumpur, on Monday, 27 April 1992.

government procedures, the better-off you'll be".<sup>27</sup> Continuing in the same vein, India firmly rejected unilateral measures and trade barriers under the guise of Green Economy.<sup>28</sup> The main thrust of some countries argument was that attempts were being made to impose developmental models of some states and this was simply unacceptable. There cannot be a single path of economic progress and there must be a healthy respect to have 'Unity in Diversity', wherein all countries must be allowed to follow their own developmental path as long as they work single-mindedly towards achieving sustainable development.

The title of this theme of the Rio+20 Conference was "Green Economy in the Context of Sustainable Development and Poverty Eradication. In the third round of informal negotiations held in New York from 26 May to 2 June, the G-77 made clear in its approach that it considers the subject of 'green economy', to be the 'policies' related to 'green economy' that represent one of many approaches to achieving sustainable development and the objective of the Conference, poverty eradication. The Group also insisted that 'green economy policies' should be guided by existing principles of sustainable development and reflect the need for the provision of the means of implementation by developed countries.<sup>29</sup>

In fact paragraph 56 of the Rio+20 Conference text exactly provides for such an understanding when it states "We affirm that there are different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development in its three dimensions which is our overarching goal". It further reads "In this regard, we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules".

Be that as it may, few can dispute if "green economy" is viewed as one of the tools to achieve sustainable development. But it is submitted that the concept itself suffers from some internal contradictions. First,

<sup>27</sup> Economic Times, New Delhi, 4 June 2012.

<sup>28</sup> Economic Times, 21 June 2012.

<sup>29</sup> Alex Rafalowicz "No agreement and deep division on 'green economy'", Third World Network, 6 June 2012.

the conceptual level-why is it a tool? Developing countries were of the view that a green economy can only be viewed as 'policy guidance' or at best an approach. Eradication of poverty, as we know essentially involves creation of new jobs, decrease inflationary tendencies, maintain food security, providing assistance to the weaker sections etc.-all of which involve using public monies for developmental programmes for the weak. When a government is undertaking these tasks, many a times it may not be possible to reserve funds for the protection and preservation of the environment. As has been seen before, the greatest stumbling block to sustainable development remains poverty. No country can take pride in keep its people poor. Poverty is not only a shame a curse and every elected government devises programmes for eradicating poverty as an overriding priority. The Section on 'Shared Vision' in a similar vein states that "Eradication of poverty is greatest global challenge facing the world today and an indispensable requirement for sustainable development".

Paragraph 58 on the Section on "Green Economy" provides numerous checks on the exercise of green economy policies. Chief among these checks, are that such policies should: "...be consistent with international law; respect each country's national sovereignty over their natural resources, taking into account its national circumstances, objectives, responsibilities, priorities and policy space with regard to the three dimensions of sustainable development; effectively avoid unwarranted conditionalities on official development assistance and finance; not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country and ensure that environmental measures addressing transboundary or global environmental problems, as far as possible, are based on international consensus; promote sustainable consumption and production patterns; and continue efforts to strive for inclusive, equitable development approaches to overcome poverty and inequality".

Perusals of these checks show that none of them are new or too prescriptive, as such. In such a scenario what is real value or contribution of a green economy approach. If it was to sensitize the international community to the need to undertake development plans bearing in mind environmental concerns then the purpose has already been achieved at



the Rio+20 Conference.

What then is this magic called 'green economy'? It can at best only be a policy imperative to coax developing and lesser developed States to provide greater stress on conservation measures than on development measures? Or is it a multinational corporations' driven initiative who largely believe they have much to gain if poorer countries can buy cleaner technologies from them? Or is it a plain ineffective policy measure of the United Nations Environmental Programme (UNEP) to lay out a larger canvas for its expanded activities, once it is established as a full-fledged environmental organization. These are some of the questions one may have to ask before undertaking any serious future debate on the topic.

## **VI. Means of implementation**

A grandiose architecture is required for implementing sustainable development goals (SDGs) which will be negotiated and applied in the post 2015. That will remain a real challenge for the high level inter-governmental forum which is mandated to accomplish this task within the auspices of the United Nations General Assembly. These goals will require huge resources and an equally huge infrastructure in the form of a re-invigorated and full-fledged UNEP.<sup>30</sup> A new strengthened UNEP will surely be welcomed by the international community, especially by Europe, but not sure by the United States.<sup>31</sup>

The real key challenge of Rio+20 Conference document on the "Future We Want" is converting the international community actions or SDGs at the regional, national and local levels. As discussed earlier the importance of the Rio Declaration was that countries wholeheartedly welcomed its remit and applied the same at the domestic level in their national policies and frameworks. The success stories that emerge are many, but the real value lies in creating the necessary environment to adopt national policies and action plans. Will states show the same resolve and determination to put agree to "new and additional financial

<sup>30</sup> See generally UNEP's *Way Forward: Environmental Law and Sustainable Development*, UNEP, Nairobi, 1995

<sup>31</sup> Bharat Desai, *Institutionalizing International Environmental Law*, New York 2004, pp.221ff.

resources" for the cause of the developing world? If they do, where will the money come from? It is against this backdrop, that Section VI of the Rio+20 document will have to be analysed.

The essence of UNCED was the underlying theme of equity which was reflected not only as principle, but also as an operational and substantive imperative. The Right to Development adopted by the General Assembly is a reflection of the same. The imperative that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" has been completely lost. Instead paragraph 252 of the document states that "We reaffirm that developing countries need additional resources for sustainable development". The same paragraph further adds "We recognize the need for significant mobilization of resources from a variety of sources and effective use of financing, in order to promote sustainable development". Two key issues stand compromised by paragraph 252-One, the threshold of assistance; and two, the mandatory linkages between financial resources and transfer of technology. As regards the first- the phrase "new and additional" has been replaced by a mere 'recognition' that extra, over and above what developed countries provide as ODA, is needed by developing countries and poorer nations. With respect to the second, the obligation or acknowledgement under Principle 7 of the Rio Declaration stands diluted.

On the issue of finance, the principle of CBDR stands further eroded by calling for mobilization of resources 'from a variety of sources' combined with effective use of the financing provided. Paragraph 253 of the Rio+20 document states that "We call on all countries to prioritize sustainable development in the allocation of resources in accordance with national priorities and needs, and we recognize the crucial importance of enhancing *financial support from all sources* for sustainable development for all countries, in particular developing countries. The same paragraph further adds "New partnerships and innovative sources of financing can play a role in complementing sources of financing for sustainable development". As was said earlier no country can fault a call for mainstreaming of sustainable development priorities in the national and local development plans, but what is crucial is where do you get the finances for undertaking that extra effort to undertake sustainable development measures? Paragraph 253 has undone what has been

achieved by years of negotiation of the CBDR principle in treaties such as the Vienna Convention/Montreal Protocol Regime on the Ozone Depleting Substances, UN Convention on Climate Change, the Convention on Biological Diversity and the UN Convention on Combating Desertification. It has shaken the edifice on which the entire principle of CBDR is built. By agreeing to say that financial support/financing for sustainable development measures, should come from 'all sources' the Rio+20 text has provided a major victory to the developed country parties. Let us see look at least four clear grounds why it's a victory for developed countries and deeper loss for the developing world.

One, the developed countries have buried once and for all, the historic role they have played in degrading the Earth's environment. Most treaties recognise that developed countries carry a larger burden to lead by example and undertake obligations in good faith because they have been degrading the environment from times when the majority of the Asian-African countries were suffering colonization. This historic burden of the developed world is reflected in the preamble of the UNFCCC which states "Noting that the largest share of *historical* and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and developing needs". The preamble clearly acknowledges that the current state of affairs is largely because the developed countries owe a moral and legal obligation of burden sharing. Besides, the developing countries which are guaranteed sufficient flexibility to undertake obligations to be able to meet their socio-economic needs, now find themselves as being forced to discard the Kyoto Protocol or re-negotiate the same<sup>32</sup>.

The second reason to ascribe a victory is because the developed countries have successfully killed the overarching principle of CBDR as the negotiations at Rio+20 'Future We Want' document clearly shows. This preambular paragraph is further strengthened by Article 3, paragraph 1 of the UNFCCC which provides "The Parties should protect the climate system for the present and future generations of humankind, on the basis of equity and in accordance with their common but dif-

<sup>32</sup> L. Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly' (2008) vol.57, *International Comparative Law Quarterly*, pp. 909-939.

ferentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the *lead* in combating climate change and the adverse effects thereof". By broad-basing the section of "Finance" in paragraphs 253-268 the document has made every country big and small, rich and poor, responsible to share the responsibility of achieving sustainable development. While no sane person can argue that all should make efforts to achieve the future negotiated sustainable development goals (SDGs), it has to be pointed out that a declaration/text such as Rio+20 has compromised the role of the developed world to take the lead in combating poverty and addressing the concerns of the poorer countries.

The third possible reason for celebration can be that very few countries have questioned the record of the developed countries in meeting their targets or abiding by international obligations. For example, the Kyoto Protocol to the UNFCCC provides that Annex-I Parties which have obligations in the first commitment period, should abide by their prescribed/assigned amounts and re-negotiate a second commitment period. Except a few Scandinavian countries, none of the other Annex-I countries have fulfilled their international obligations under the Kyoto Protocol in the first commitment period. Now what the consequences are for breach of international obligations, surely you don't need compliance mechanisms for developed countries' Parties?

#### A. Capacity Building

A closely related or intertwined concept to undertaking sustainable development obligations is that of capacity building of developing and lesser developed States<sup>33</sup>. To build the capacity of a country is like helping an individual in times of dire straits. Just like humans requires capacities to be developed, so too do countries who are unable to undertake international obligations. In the field of sustainable development or environmental law, capacity building or assistance can be of two types. One, for dissemination of information i.e. to understand the purpose and objective of the treaty to be able to ratify a treaty. And, two, when they become a party to a treaty to impart training to enforcement

<sup>33</sup> See generally, *Capacity Building for Sustainable Development: An Overview of UNEP Environmental Capacity Developmental Activities*, UNEP, Nairobi, 2002.



officials of various ministries through workshops to be able implement the treaty obligations at the domestic level. The UNEP undertakes these exercises by conducting regional workshops and also by helping states by drafting domestic legislations.

This need is recognised by Principle 6 of the Rio Declaration that provides that "The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries. Likewise, Principle 9 adds, that "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies".

The importance of capacity building cannot be over-emphasized, as it's closely linked to the principle of sovereign equality of states. There is no point in harping on equality if the stark reality of a large of Asian, African, Caribbean and Small Islands States cannot be seen by the international community. While Maldives and a number of AOSIS states are looking for alternate sites to relocate their population, larger countries are reducing their voluntary contributions for holding expert group meetings or training programmes. Where is the international law of cooperation<sup>34</sup> or the movement towards international solidarity<sup>35</sup> which scholars are calling for?

## **VII. Assessment and suggestions**

Before we look at the future roadmap a word or two on the brouhaha of multilateralism being hailed as one of the most important achievements of Rio+20 Conference. While one can deny the comfort of a Foreign Minister or Environment Minister going home of the text of the 'Future We Want', there must be honesty of purpose when you analyse

<sup>34</sup> Wolfgang Friedman, *The Changing Structure of International Law*, London, 1964.

<sup>35</sup> Ronald St. John MacDonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden, 2012.

the results of the Rio+20 document.

It is a compromised political document which will act as a blueprint for drawing up SDGs and attendant plan of actions. At best it is a declaratory statement which the UNGA will chew and digest and bring out a smaller concise, clear text capable of being implemented. If this is hailed as a major diplomatic achievement of the Brazilian negotiators, then it is only that and nothing else.

As we have seen the Rio Declaration was the result of a serious work done by the Brundtland Commission and many other expert bodies. An analysis of the multilateral negotiations will show that multilateralism was a greater achievement at the 1992 United Nations Conference and Development than at Rio+20. Three outstanding achievements were; negotiations built upon the edifice of common but differentiated responsibilities; a genuine desire for cooperation; and undertaking of negotiations in good faith.

The only issue flagged by the Conference without offering any solutions or commitments was that "Poverty eradication is the greatest global challenge facing the world today and an indispensable requirement for sustainable development". While all agree that poverty is the challenge the way to take the challenge head-on would have been by creating a trust fund for the developing, lesser developed and also AOSIS states considering the threat of climate change being real and grave. But what have we got. The CBDR principle compromised, the need for financial resources and technology diluted and the entire future shifted to the UNGA, which would need to negotiate these SDGs in the light of the Millennium Development Goals and also commitments under treaty regimes.

This has led fragmentation of treaty regimes and also those works related to UN system and its international organizations, tribunals and mandates addressing same or related fields.<sup>36</sup> The same is true also of the different organizations/institutions/processes working in the field of environment. The situation became so grave that the UN International Law Commission undertook the study of the topic. It must however, be conceded that two novel and positive outcomes of the Rio+20 Confer-

<sup>36</sup> M. Koskeniemi, *Fragmentation of International Law*, Final Report to UNGA, doc.A/RES/61/34, December 2006

ence have been the agreement to establish a high level intergovernmental political forum to replace in future the Commission on Sustainable Development; and also to strengthen international environmental governance by upgrading the United Nations Environment Programme to a full-fledged specialized agency with universal membership.

The need of the hour is to make a sustained effort to create a new international order based on justice and a 'Common Law of Mankind'<sup>37</sup>, which while recognising the failings of a typical Westphalian western model, allows states to adopt their own models of sustainable development. The principles which Rio+20 preferred to ignore such equity, fairness, justice for smaller nations based on the principle of CBDR must be revived by the UNGA. The Secretary General of the United Nations has an onerous and difficult task at hand to steer the negotiations for a new and ambitious but realistic text containing SDGs and guarantee of the future of the planet Earth we all so dearly desire and cherish.

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