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Climate Change, International Environmental Law Principles, and the North-South Divide

Sumudu Atapattu*

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I. INTRODUCTION

The United National Framework Convention on Climate Change (“UNFCCC”),¹ adopted by the international community at the Earth Summit in 1992, has many unique features, including a list of principles to guide the parties when fulfilling their obligations under the Convention. Principles play several roles in international law. These range from providing guidance to states in the fulfillment of their obligations to resolving, as well as avoiding, disputes.² They also provide guidance to national courts and shape national legislation. In some instances, national legislation and decisions of national courts can give rise to the emergence of international principles. The precautionary principle, discussed below, is a good example of this bottom-up approach.

The adoption of these principles has given rise to major divisions along North-South lines.³ North-South divisions, however, should not obscure the many divisions *within* the Global North and the Global South. Climate change has given rise to divisions and negotiating blocs along issues, in addition to the broad North-South divide discussed here. Within the Global North, there are regular divisions between the United States and Australia, on the one hand,

* Director, Research Centers, University of Wisconsin Law School, Executive Director, UW-Madison Human Rights Program and Lead Counsel, Center for International Sustainable Development Law, Montreal, Canada.

¹ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107. [hereinafter UNFCCC].

² Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 74, 74–75 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque. eds., 2015).

³ *Id.*

and the European Union (“EU”), on the other.⁴ Within the Global South, there are divisions among emerging emitters like China, India, and Brazil, oil producing states, and the alliance of small island states.⁵ The initial divisions present at the beginning of the negotiations of the UNFCCC have continued to date.⁶ One interesting development is the emergence of Brazil, South Africa, India, and China—or “BASIC” countries—as a negotiating bloc.⁷

This Article discusses the international law principles specifically included in the UNFCCC through a North-South lens. The North-South framework received extensive analysis in *International Environmental Law and the Global South* published by the Cambridge University Press in 2015.⁸ This volume examined “the ways in which the North-South divide has compromised the effectiveness of international environmental law” and noted that “the terms *North* and *South* distinguish wealthy industrialized nations . . . from their generally less prosperous counterparts in Asia, Africa, and Latin America.”⁹ This Article seeks to apply the North-South framework to the adoption of the principles included in the UNFCCC and discuss how the North-South split has also influenced the application of the principles. This Article proceeds in three parts. In Part II, it will discuss Article 3 of the UNFCCC and the North-South debates surrounding its adoption. Then, Part III will discuss the North-South debates surrounding these principles themselves. Finally, the Article will briefly discuss the future of these principles and conclude with some observations.

II. ADOPTION OF ARTICLE 3 ON PRINCIPLES

No environmental issue caused such intense debates along North-South lines as climate change has in recent years. The Global South continues to argue that climate change is a rich country-made phenomenon. It argues that countries in the Global North benefited from economic development that resulted in the unabated release of massive amounts of greenhouse gases (“GHGs”) into the atmosphere that gave rise to climate change.¹⁰ They argue that it is, therefore, unfair to expect them to curb their economic development

⁴ DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 670 (5th ed., 2015) [hereinafter HUNTER ET AL.].

⁵ *Id.* at 669–70.

⁶ *Id.*

⁷ BASIC stands for Brazil, South Africa, India, and China. This coalition has emerged as a powerful negotiating bloc in relation to climate negotiations. See Rowena Maquire & Xiaoyi Jiang, *Emerging Powerful Southern Voices: Role of BASIC Nations in Shaping Climate Change Mitigation Commitments*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, *supra* note 2, at 214, 216.

⁸ See generally, *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, *supra* note 2.

⁹ Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, *supra* note 2, at 1, 2.

¹⁰ Atapattu, *supra* note 2.

and engage in expensive mitigation measures when they did not receive the benefits of industrialization.¹¹ While there was some doubt in 1992 as to whether climate change was manmade, the Intergovernmental Panel on Climate Change ("IPCC"), a body of over one hundred scientists from around the world appointed by the U.N., put this issue to rest in 2007, and reaffirmed later in 2014, by confirming climate change is manmade and its consequences are already manifesting.¹² Given the disproportionate contribution to the problem and the disproportionate impact on certain states and communities, the international community adopted the common but differentiated responsibility principle as the overarching framework to address climate change.¹³ This became a very contentious issue. This is not the only principle embodied in the UNFCCC, however. Several other principles are incorporated in Article 3 titled "principles."¹⁴

¹¹ *Id.*

¹² CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS (2007), https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf. IPCC synthesizes global research on climate change and represents the most authoritative voice on climate science.

¹³ UNFCCC, *supra* note 1, at pmbl., art. 3.

¹⁴ UNFCCC, *supra* note 1, at art. 3. Given its importance, Art. 3 is reproduced here:

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.
3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.
4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

This provision incorporates several important principles: the common but differentiated responsibility principle ("CBDR"); the inter and intra generational equity principle; the precautionary principle; sustainable development, which curiously is framed as a right; special needs of developing countries and giving full consideration to those disproportionately affected; the principle of cooperation; and the principle that climate change measures should not constitute arbitrary or unjustifiable discrimination or disguised restriction on international trade. Of these, the following principles are selected for discussion from a North-South perspective: the CBDR, sustainable development, the precautionary principle, and the inter and intra generational equity principle. These will be discussed in the next section.

The adoption of Article 3 itself gave rise to intense North-South debate. While most Southern countries favored the inclusion of an article on general principles, Northern countries questioned the need to do so.¹⁵ China first proposed an article on general principles.¹⁶ Some countries in the Global South went to the extent of stating the Convention should include only principles and that commitments should be included in future protocols.¹⁷

However, not all Southern countries favored the inclusion of principles in the Convention.¹⁸ Argentina, for example, questioned their inclusion, arguing principles were more suited for political declarations, not binding documents.¹⁹ Most vocal among the countries of the Global North against the inclusion of principles was the United States.²⁰ It argued that the legal status of these principles was unclear and in any event, if principles are to be included, the proper place for them was the preamble.²¹ The United States further argued that if principles were themselves commitments, they should be designated as such in the Convention.²² Bodansky believes the reason why the United States opposed the inclusion of a separate provision on principles is, because of their

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5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Id.

¹⁵ See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 501 (1993).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Bodansky, *supra* note 15.

²¹ *Id.*

²² *Id.*

open-ended character, it is not clear where they will eventually lead.²³ This is particularly true of the CBDR principle to which developing countries have clung like a lifeline and which deadlocked the negotiations at the Copenhagen summit.²⁴

The Global South ultimately succeeded in including a separate article on principles, but it was a watered down version of the first proposal. Although the United States was unsuccessful in getting Article 3 removed from the draft, it successfully pressed for several amendments to it.²⁵ First, a *chapeau* was added stating that the principles should “guide” the parties.²⁶ Second, the term “parties” replaced “states.”²⁷ Given, however, that treaties only create obligations for the parties to that treaty, the change makes little difference.²⁸ The final addition was the term “*inter alia*” to the *chapeau* to indicate that parties may take other principles into account when implementing the treaty.²⁹ This addition does not make sense either. These treaties do not operate in a vacuum, and other international law principles, particularly customary international law principles and obligations that states agreed on under other treaties, would be applicable whether or not the treaty in question specifically included them. For these reasons, this victory for the United States seems symbolic and psychological rather than legal. However, it has been argued “these three modifications were intended to forestall arguments that the principles in Article 3 are not part of customary international law and bind states generally. Instead, the principles clearly apply only to the parties and only in relations to the Convention, not as general law.”³⁰

Far more important are the principles that did not find a home in Article 3: the right to development; the equal right to ocean sinks; the principle that GHG emissions of developing countries must grow (a different version of this did get included); the principle that no environmental conditions must be imposed on aid; the main responsibility of developed countries to reduce greenhouse gases; and principles on liability and compensation.³¹ In addition, developing countries had to compromise on the substance of the principles while other principles were transferred to the preamble due to opposition by developed countries.³²

²³ *Id.*

²⁴ Lavanya Rajamani, *The Making and Unmaking of the Copenhagen Accord*, 59 INT'L & COMP. L. Q. 824, 824 (2010).

²⁵ Bodansky, *supra* note 15, at 502.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

²⁹ Bodansky, *supra* note 15, at 502.

³⁰ *Id.*

³¹ *Id.* at n.310.

³² *Id.*

The United States had also opposed the term “principles” in Article 3 and tried to remove any reference to it in the Convention, without much success. An added footnote, however stated that “[t]itles of articles are included solely to assist the reader” and apparently conveyed that titles are without legal significance.³³ In addition, the United States sought to emphasize that a party could not be found in violation of Article 3 in a dispute settlement proceeding under Article 14, but the final version of Article 3 does not contain a limitation of this nature.³⁴ The length to which the United States has gone to ensure that no binding obligations will flow from a framework convention is truly amazing. Similar efforts have been made at parallel events with the adoption of other documents.³⁵

III. SELECTED PRINCIPLES IN THE UNFCCC

This section seeks to discuss the North-South debates surrounding the adoption of principles included in the UNFCCC. The following principles are selected for discussion: the CBDR principle, the inter and intra generational equity principle, the precautionary principle, and sustainable development. An in-depth discussion of these principles is beyond the scope of this Article.

A. *The Common but Differentiated Responsibility Principle*

No principle has perhaps given rise to more intense contestation than the common but differentiated responsibility (“CBDR”) ³⁶ principle in recent years.³⁷ An exception to the cardinal principle of sovereign equality, this principle recognizes the unequal contribution by states to environmental problems as well as the disparate ability of states to address these problems.³⁸ While not articulated as such, it formed the legal regime governing ozone

³³ *Id.* at n.308.

³⁴ Bodansky, *supra* note 15, at 502, n.308.

³⁵ For example, the United States has consistently objected to the adoption of the right to development and attached an interpretative statement to Principle 3 of the Rio Declaration, which refers to the right to development:

The United States understands and accepts the thrust of Principle 3 to be that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present and future generations are taken into account. The United States cannot agree to, and would disassociate itself from, any interpretation of Principle 3 that accepts a “right to development” or otherwise goes beyond that understanding Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of human rights set out in the Universal Declaration of Human Rights.

HUNTER ET AL., *supra* note 4, at 450–51.

³⁷ For an in-depth discussion of the CBDR principle, see LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2006).

³⁸ See SUMUDU A. ATAPATTU, *EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 379–436 (2007).

depletion,³⁹ and was included as a principle for the first time in the Rio Declaration on Environment and Development in 1992.⁴⁰ Principle 7 of the Rio Declaration embodies the CBDR principle,⁴¹ but is a far cry from the original proposal by the Group of 77 ("G-77") that referred to the historic responsibility of the Global North for creating global environmental problems and was rejected by Northern states at the Rio Conference:

The major cause of the continuing deterioration of the global environment is the unsustainable patterns of production and consumption particularly in developed countries In view of their main historical and current responsibility for global environmental degradation and their capability to address this common concern, developed countries shall provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development.⁴²

As one might expect, this version gave rise to deep North-South debates. However, even the diluted version that ultimately made its way into the Rio Declaration was not sufficient to appease the United States, which appended an interpretative statement to Principle 7 when it signed the Rio Declaration:

The United States understands and accepts that principle 7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities. . . . The United States does not accept any interpretation of principle 7 that would imply a recognition or acceptance by the United States or any international obligations or liabilities, or any diminution in the responsibilities of developed countries.⁴³

³⁹ Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 323. For a discussion of the legal regime, see HUNTER ET AL., *supra* note 4, at ch. 10.

⁴⁰ U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. 1) (Aug. 12, 1992) [hereinafter Rio Declaration].

⁴¹ *Id.* at Principle 7 lays down this principle:

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.

⁴² Atapattu, *supra* note 2, at 96.

⁴³ *Id.* at 96–97.

Given that the Rio Declaration is a non-binding document, appending an interpretative statement is indeed puzzling, but it shows that the United States did not leave any room for doubt as to its position with regard to the legal ramifications of the CBDR principle. This interpretative statement reinforces northern superiority and is a far cry from acknowledging the historic contribution of northern countries to global environmental problems.⁴⁴

Despite the controversy surrounding its adoption, the CBDR principle breaks new ground in international law. It is an exception to the cardinal principle of sovereign equality of states and forms the legal framework governing ozone depletion and climate change. Although its effectiveness was diluted regarding mitigation with the adoption of the Paris Agreement on Climate Change in 2015, which opted for voluntary emission reduction commitments, it continues to play an important role in relation to adaptation, finance, and the loss and damage mechanism.⁴⁵

Article 2 of the Paris Agreement states the agreement “will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”⁴⁶

B. Inter and Intra Generational Equity Principle

Climate change has consequences that extend far beyond the current generation. If the current generation continues to emit GHGs without taking drastic measures to mitigate emissions, these adverse consequences could stretch to harm several future generations. Thus, inter-generational equity has become an important principle in the context of climate change.⁴⁷ The International Court of Justice (“ICJ”) affirmed this in its advisory opinion on *The Legality of the Threat of Use of Nuclear Weapons*.⁴⁸ The ICJ noted, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”⁴⁹ In his dissenting opinion in the *Nuclear Tests Case*, Judge Weeramantry pointed out that the case raised the principle of inter-generational equity as no other case had done before, and that it was “an important and rapidly

⁴⁴ *Id.* at 97.

⁴⁵ The Preamble to the Paris Agreement retains a reference to the CBDR principle, although the obligations are no longer based on it. The Paris Agreement, pmbl., Apr. 22, 2016, FCCC/CP/2015/L.9/Rev.1.

⁴⁶ *Id.* at art. 2, para. 2.

⁴⁷ See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

⁴⁸ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 95 (July 8).

⁴⁹ *Id.* at para. 29.

developing principle of contemporary environmental law.”⁵⁰ Referring to Principle 1 of the Stockholm Declaration, which proclaims a solemn duty to protect and improve the environment for present and future generations, Judge Weeramantry noted that the case raised the possibility of damage to generations yet unborn.⁵¹

Many environmental treaties embody the inter-generational equity principle. The UNFCCC,⁵² the Convention on Biological Diversity,⁵³ the Desertification Convention,⁵⁴ the Paris Agreement,⁵⁵ and many soft-law instruments⁵⁶ refer to the need to protect future generations. It has been articulated that the Rio Conference on Environment and Development cemented the inter-generational equity principle in international law:

Beyond doubt, the 1992 Rio Earth Summit represents the first international effort to safeguard the quality of life of posterity. It is indeed remarkable that the three major documents signed at Rio, namely, the Rio Declaration, the Convention on Biological Diversity and the Convention on Climate Change incorporate the concept of intergenerational solidarity and responsibilities.⁵⁷

While northern countries tend to emphasize the *inter*-generational equity principle, southern countries emphasize the *intra*-generational equity aspect.⁵⁸ Southern states have consistently maintained that inequities among the current generation must be addressed before one can talk about equity among generations.⁵⁹ While the intra-generational equity principle seeks to redress the imbalance and inequities in the current generation, it would be irresponsible to ignore the impact of our activities on future generations. The international community reaffirmed the inter-generational equity principle in the Paris Agreement.

⁵⁰ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, (N.Z. v. Fr.), 1995 I.C.J. 97, at 341 (Sept. 22) (dissenting opinion of Weeramantry, J.).

⁵¹ *Id.* at 340–42.

⁵² See UNFCCC, *supra* note 1, at art. 3.

⁵³ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

⁵⁴ United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 U.N.T.S. 3.

⁵⁵ See The Paris Agreement, *supra* note 45, at pmbl.

⁵⁶ See generally ATAPATTU, *supra* note 38, at ch. 2.

⁵⁷ See Emmanuel Agius, *Obligations of Justice Towards Future Generations: A Revolution in Social and Legal Thought*, in FUTURE GENERATIONS AND INTERNATIONAL LAW 3 (Emmanuel Agius et al. eds., 1998).

⁵⁸ See John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 924 (1991).

⁵⁹ *Id.*

C. Sustainable Development

Sustainable development is another principle that has given rise to serious contention, at least in its original incarnation, when the World Commission on Environment and Development ("WCED") first proposed it in 1987 to reconcile economic development and environmental protection.⁶⁰ Since then, sustainable development has evolved to encompass three pillars—economic, social, and environmental⁶¹—and now forms the basis of the Sustainable Development Goals adopted by the international community in September 2015.⁶²

When Principle 3 of UNFCCC was being negotiated, Southern countries pressed for the inclusion of the principle that "the right to development is an inalienable human right" and asserted that "[a]ll peoples have an equal right in matters relating to reasonable living standards."⁶³ "Some developed countries . . . [on the other hand, wanted] to include a principle that states have a duty to aim [for] sustainable development."⁶⁴ Both versions of Principle 3 gave rise to considerable controversy during negotiations. The United States in particular, which has consistently opposed the right to development despite its adoption by the U.N. General Assembly in 1986,⁶⁵ maintained that development is a goal to aspire to, not a right.⁶⁶ The United States was also concerned that the right to development could be used by developing countries to "demand financial assistance from developed countries."⁶⁷ Developing countries, however, feared that sustainability would become the new conditionality on financial assistance.⁶⁸ They believed that sustainable development was another ploy by Northern countries to stall their development,⁶⁹ a duty that did not apply to the Global North, which is already developed.⁷⁰

⁶⁰ See Our Common Future, Rep. of the World Comm'n on Env't and Dev., annex, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter *Our Common Future*].

⁶¹ Rep. of the World Summit on Sustainable Dev., para. 5, U.N. Doc. A/Conf.199/20 (Sept. 4, 2002).

⁶² G.A. Res. 70/1, para. 59, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015) [hereinafter *Sustainable Development Goals*].

⁶³ See Bodansky, *supra* note 15, at 504.

⁶⁴ *Id.*

⁶⁵ See G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986).

⁶⁶ See HUNTER ET AL., *supra* note 4, at 445.

⁶⁷ See Bodansky, *supra* note 15, at 504.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Illeana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 20, 25 (Philippe Sands ed., 1993) (asserting that, with the adoption of Principle 8 of the Rio Declaration, developed countries became full partners in the quest for sustainable development).

The final version of Principle 3 of the Rio Declaration addressed the concerns of both Southern and Northern states by asserting that “the Parties have a right to, and should, promote sustainable development”⁷¹ which is different from the right to development.⁷² Couching sustainable development as a right seems to have appeased both groups of states.⁷³

The WCED was appointed by the U.N. General Assembly in 1983 to find a way to reconcile economic development as emphasized by Southern countries, with environmental protection, as emphasized by Northern countries.⁷⁴ At the Stockholm Conference on the Human Environment in 1972, Southern countries, many of which were newly decolonized, voiced their opinion that environmental protection was a luxury they could ill-afford.⁷⁵ This led to a polarization in the U.N. between Southern countries and Northern countries, which resulted in an impasse on the issue of environmental protection.⁷⁶ As a way to bridge the gap, the WCED proposed sustainable development to reconcile economic development with environmental protection.⁷⁷ Although sustainable development has been included in treaties and other documents since the WCED report and has attracted broad support, deep divisions still exist.

It remains to be seen whether the adoption of the Sustainable Development Goals will ease this situation.⁷⁸ The Rio Declaration on Environment and Development, adopted in 1992, endorsed and elaborated on the notion of sustainable development which has since enjoyed broad support from both Southern and Northern states.⁷⁹ Lack of a precise definition led some to argue that many things can fall within sustainable development.⁸⁰ Similarly, some activists from the South contend that “sustainable development means that the needs of the *North* will be met without compromising the needs of future

⁷¹ Rio Declaration, *supra* note 40, at princ. 3.

⁷² The U.N. General Assembly took years to incorporate sustainable development into the right to development discourse, despite appointing the WCED around the same time the Declaration on the Right to Development was being adopted. These two discourses were finally brought under one umbrella with the adoption of the Sustainable Development Goals in 2015.

⁷³ See generally Bodansky, *supra* note 15.

⁷⁴ See HUNTER ET AL., *supra* note 4, at 144.

⁷⁵ See Karin Mickelson, *The Stockholm Conference and the Creation of the North-South Divide in International Environmental Law and Policy*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 2, at 116 (discussing the intervention of Mrs. Indira Gandhi, then-Prime Minister of India, at the Stockholm Conference).

⁷⁶ See Our Common Future, *supra* note 60.

⁷⁷ *Id.*

⁷⁸ See Sustainable Development Goals, *supra* note 62.

⁷⁹ See HUNTER ET AL., *supra* note 4, at 169.

⁸⁰ See *id.*

generations.”⁸¹ “Given that Northern countries, with twenty percent of the world’s population, consume eighty percent of the world’s resources,” there is an urgent need to curb consumption of resources by these countries and elites in Southern countries who try to emulate their counterparts in the North.⁸² The international community recognized the link between sustainable development, poverty, and consumptions patterns in the 2002 Johannesburg Declaration on Sustainable Development:

We recognize that poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development. The deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing worlds pose a major threat to global prosperity, security and stability.⁸³

There is no question that developing within the boundaries of nature is urgently needed. Similarly, raising the living standards of those in poverty while simultaneously curbing the consumption of those in affluent countries is also imperative. Thus, sustainable development is necessary for every person whether one lives in poverty or affluence.

D. Precautionary Principle

The precautionary principle continues to be contested under international environmental law. It was used for the first time in the legal regime governing ozone depletion and was included in the Rio Declaration as an approach.⁸⁴ Moreover, it was included as a principle in the UNFCCC,⁸⁵ and it has since been included in the Biosafety Protocol.⁸⁶ Rio Principle 15 embodies the precautionary approach: “to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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.”⁸⁷

⁸¹ See Atapattu, *supra* note 2, at 90 (emphasis added) (quoting C. Raghavan in HUNTER ET AL., *supra* note 4, at 154).

⁸² See Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT’L L. 151, 154 (2015).

⁸³ See World Summit on Sustainable Dev., *supra* note 61, at ¶ 11–12.

⁸⁴ Rio Declaration, *supra* note 40, at princ. 15.

⁸⁵ UNFCCC, *supra* note 1, at art. 3.

⁸⁶ Cartagena Biosafety Protocol to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208 [hereinafter Cartagena Biosafety Protocol].

⁸⁷ Rio Declaration, *supra* note 40.

During the negotiations of the Rio Declaration, there was considerable debate as to whether it should be called a principle, an approach, or a guideline.⁸⁸ There were many North-South divisions as well as North-North divisions surrounding its adoption.⁸⁹ Southern countries and the EU generally favored it as a principle; while the United States, Australia, and several other countries objected to its use as a principle for fear of legal ramifications.⁹⁰ During the negotiations of the Biosafety Protocol, there were similar objections, but ultimately, the African group, which represented the “like-minded group,” prevailed.⁹¹ At Rio, the United States insisted on the inclusion of “cost effective measures” in Principle 15 and referred to it as an approach as opposed to a principle.⁹² Similar debates took place during the negotiations of Principle 3 of UNFCCC regarding whether cost-effectiveness should be included, in doing so introducing “economic considerations into what otherwise is a purely environmental standard.”⁹³ At the final session, the Chair of the Intergovernmental Negotiating Committee (INC) omitted any reference to cost-effectiveness because some European countries had opposed it and because there was a separate provision that addressed it.⁹⁴ Both the United States and Saudi Arabia had attempted to reintroduce this to the precautionary principle but were met with opposition.⁹⁵ The United States then proposed combining the two provisions and the INC accepted this compromise.⁹⁶ The final text of Article 3 demonstrates that the U.S. position ultimately prevailed.

IV. FUTURE DIRECTION OF PRINCIPLES: SOME CONCLUDING THOUGHTS

As discussed above, the adoption of a separate provision on principles in the UNFCCC gave rise to deep North-South divisions as well as North-North and South-South debates during the negotiation process. These controversies have continued to this day, as negotiations on climate change have shown. The controversy surrounding the CBDR principle stalled action on climate change for several years, which almost resulted in a gap between commitment periods. It was the ingenious way of encapsulating voluntary commitments within a binding framework that ultimately salvaged the climate talks at the 21st Conference of Parties (COP21) in Paris in 2015 and allowed the international

⁸⁸ Bodansky, *supra* note 15, at 502.

⁸⁹ Atapattu, *supra* note 2, at 105.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Bodansky, *supra* note 15, at 503–04.

⁹³ *Id.* at 503.

⁹⁴ *Id.* at 504.

⁹⁵ *Id.*

⁹⁶ *Id.*

community to fulfill its promise of adopting “a binding document” to govern the post-2020 legal regime.⁹⁷

The North-South divide continues to play a pivotal role in shaping negotiations relating to environmental issues at the international level. This debate has been particularly intense in relation to traditional knowledge, transboundary movement of hazardous waste, and climate change. For example, some have referred to the extraction of resources from the Global South by the Global North as “looting,” asserting that common heritage has been turned into a modern colony for the North.⁹⁸ This has also been referred to as “biopiracy.”⁹⁹ Moreover, dumping of hazardous waste in territories of the Global South has been called “toxic colonialism”¹⁰⁰ as poor countries bear the cost of industrialization without receiving any benefits of production.¹⁰¹ Climate change has been called “an act of aggression” by the Global North against the Global South.¹⁰²

These principles play an important role in international law, and, despite the North-South divisions surrounding their adoption and application, their contribution to the development of law is significant. However, these continuing North-South divisions and their origins should be taken into consideration in the development of the law. We need to address the concerns of both groups. The groups’ concerns are entrenched in wider issues such as the grave imbalance in the global economic system, which has colonial origins and underpinnings. “Northern countries cannot continue to ignore the legitimate concerns of Southern countries, particularly when it comes to poverty alleviation. Southern countries, for their part, cannot continue to blame the North for all of the planet’s ills.”¹⁰³ Instead, they need to start taking responsibility for their share of the contribution to environmental problems

⁹⁷ At COP17 at Durban, the parties pledged to adopt “this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.” Conference of the Parties, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, ¶ 4, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012); see CHRIS WOLD ET AL., CLIMATE CHANGE AND THE LAW 348 (2d ed. 2013). Thus, much hinged on the Paris Conference and the parties had to adopt some form of a “binding” agreement. Adopting a hybrid document seemed to have been the only way to appease both the Global North, which insisted on having the participation of all states, and the Global South, which insisted on retaining the CBDR principle.

⁹⁸ See HUNTER ET AL., *supra* note 4, at 108.

⁹⁹ Janna Rose, *Biopiracy: When Indigenous Knowledge is Patented for Profit*, THE CONVERSATION (Mar. 7, 2016, 7:32 PM), <http://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589>.

¹⁰⁰ See HUNTER ET AL., *supra* note 4, at 955.

¹⁰¹ *Id.*

¹⁰² *Drying Up and Flooding Out*, ECONOMIST (May 10, 2007), <http://www.economist.com/node/916342>.

¹⁰³ Atapattu, *supra* note 2, at 108.

and cooperate with one another to address the biggest threat to our survival—climate change.

