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The Movement towards Ecologically Sustainable Development (ESD): Giving Universal Legal Expression to the Fusion between Environment, Equity and Economy

By Tobin Joshua Bennett

Law Student, University of Tasmania School of Law

This is an interdisciplinary call to arms¹. It is now imperative that workable solutions are identified and the role of every human being is appreciated, in an international effort to both arrest the dissipation of our natural environment, whilst simultaneously developing an informed international mind-set against which future approaches to environmental law and policy can evolve. Traditional, narrow and largely unhelpful, legal, economic, scientific and broad social theories are, to the extent that they contribute nothing and prevent everything, to be abandoned. In essence, the environmental debate must shed itself of the idiosyncrasies² that have, to date, prevented it from attaining universal acceptance and support.

International law plays a questionable role in the promotion of universal environmental understanding. Legal solutions do not represent the only approach to establishing an international regime for the protection of the environment. In fact, many existing international law doctrines, such as the principle of State sovereignty³, present a hurdle by inadvertently acting as a shield for recalcitrant States looking to prevent international scrutiny of their domestic environmental management. However, the international legal order is more flexible than these criticisms give it credit. The international legal order has, historically, lent itself more to international political coercion than fear of specific instrument related sanctions⁴. Therefore, once an appropriate level of international understanding and acceptance of principles of international environmental law exist, any retreat from international forums will result in appropriate international sanction requiring States to, ultimately, fall into line. Moreover, once an appropriate level of international understanding and practice is achieved, this is evidence of customary international law that, although subject to the persistent-objector doctrine, States must adhere to without necessarily opting into⁵. In short, although the principle of State sovereignty presents problems for universal solutions to environmental issues, it is not unique to the environmental subject matter and should not divert attention away from the primary objective of altering the international mind-set for resolving environmental issues⁶.

At the recent World Summit on Sustainable Development⁷, it was declared that:

“Thirty years ago, in Stockholm, we agreed on the urgent need to respond to the problem of environmental deterioration. Ten years ago, at the UN Conference on Environment and Development, held in Rio de Janeiro, we agreed that the protection of the environment and social and economic development are fundamental to sustainable development, based on the Rio Principles. To achieve such development, we adopted... the Rio Declaration, to which we reaffirm our commitment”⁸

At best, the concept of sustainable development (SD) is a precarious one. That is, although references to SD litter environmental literature, the content of the principle is chameleon like. Unexplored, SD, as a concept,

1 The problems associated with protection of the environment cannot be solved solely by laws. Instead a comprehensive approach to environmental protection, that focuses on legal and non-legal factors, is obligatory. Ramlogan, R. “The Environment and International Law: Rethinking the Traditional Approach” (2001-02) 3. *Res Communes: Vermont’s Journal of the Environment*, 1 at 159.

2 Ramlogan, R. *Ibid* at 1.

3 “The concept of absolute sovereignty of States will have to make concessions as never before in face of today’s emerging environmental crisis. There will have to be a high degree of willing subordination of national sovereignty in favour of the common good of all nations” – Sir Ninian Stephen, “The Growth of International Environmental Law” (1991) 8. *Environmental Planning Law Journal*, 183 at 185.

4 Blay, S *et al.* *Public International Law – An Australian Perspective*. Oxford University Press: Melbourne, 1997, at 12.

5 *Ibid*, at 62,68.

6 While acknowledging that Nation States are still in a virtual state of nature with respect to the exercise of power, few would dispute the fact that international law, daily, erodes the realm of that natural sovereignty and circumscribes it with treaties, trade agreements, UN Resolutions and a plethora of good faith accords: Panjabi, R. “From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law” (1993). *Denver Journal of International Law and Policy*, 215 at 218.

7 Johannesburg, South Africa, 26 August – 4 September 2002. Hereinafter referred to as the World Summit.

8 The Johannesburg Declaration on Sustainable Development: Declaration 8. Hereinafter referred to as the Johannesburg Declaration.

is little more than political rhetoric. Critically, SD should not be viewed as a freestanding principle that cures otherwise anthropocentric views towards environmental management. Statements like those made at the World Summit perpetuate the SD myth. It is no good reaffirming a commitment to SD, as understood at the time of the Rio Declaration⁹, if, at the time of the Declaration, there was no common understanding of what comprised SD¹⁰.

This paper proposes a revised universal legal principle of Ecologically Sustainable Development (ESD). ESD should supersede current, misguided, terminology, such as SD, used to label long-term environmental objectives. As a principle, ESD would give an appropriately balanced international legal expression to three key areas of the environmental debate. First and foremost, ESD defines sustainability in terms of the environment and not in terms of the ability of the human race to continue an arbitrarily determined level of developmental exploitation. This is achieved through an expansive use of the precautionary principle (PP). Secondly, ESD appreciates the plight of the world's developing countries. In order to ensure the economic capacity of the developing world, to discharge environment obligations, intra-generational appropriation of wealth is required. Finally, ESD recognises that continuity of human existence in some way relies upon the ability of the race to develop. Critically the concept of development must be re-appraised and then re-defined, tending towards qualitative, as opposed to purely quantitative, indicators to measure growth.

Element 1 – Environment

A revised ESD must supersede current 'sustainable terminology'. McGoldrick¹¹ notes that the widespread use of the expression SD dates from the Report of the World Commission on Environment and Development (WCED), *Our Common Future*, in 1987¹². The Commission's understanding of SD was as follows:

“Development that meets the need of the present without compromising the ability of future generations to meet their own needs”¹³

Arguably, as conceived above, SD is little more than political rhetoric reconciling the competing agendas of so-called 'developers' and 'environmentalists'. At most, it is an unarticulated, western-democratic vision of a, supposed, sustainable level of exploitation that is, essentially, anthropocentric. Curiously, at the time of the WCED Report, the Commission had available to it, for reference, both the 1972 Stockholm Declaration¹⁴ and the 1982 World Charter for Nature¹⁵. Despite this, the WCED Report, in developing the language of SD, has attempted to limit the environmental debate to the simple issue of maintaining human development both now and into the future. As defined, SD fails to require environmental protection for its own sake fails to address the concerns of the developing world and fails to re-appraise the concept of development.

Notwithstanding the narrow definition of SD provided by the WCED Report, SD supposedly evolved into ESD in the Declaration¹⁶. At this time, SD was viewed as comprising three core ideas¹⁷:

- Acceptance of limitations on the exploitation and consumption of many resources;
- Recognition that present generations owe conservation duties to future generations and;
- Necessity to integrate these duties into individual as well as public choices

9 The Rio Declaration on Environment and Development. Hereinafter referred to as the Declaration. Adopted at the UN Conference on Environment and Development (UNCED), Rio de Janeiro, Brazil, 3 June – 14 June 1992.

10 The danger which sustainable development faces is that which self-determination is currently facing. Self-determination has become so controversial, so value-laden and so open to abuse by political forces and claimant groups that it is struggling to cope with the demands placed upon it. If that were not enough, it is pressed into use as the way to resolve the increasing number of ethnic group and minority problems the world faces. If sustainable development is to avoid the same fate, it is the more specific international law principles and rules that lie within the three pillars (International Environmental Law, International Human Rights Law and International Economic Law) that must develop and evolve to meet new challenges and situations: McGoldrick, D. "Sustainable Development and Human Rights: An Integrated Conception" (1996) 45. *The International and Comparative Law Quarterly*, 796 at 803.

11 McGoldrick, D. *Ibid* at 796.

12 Hereinafter referred to as WCED Report.

13 McGoldrick, D *Ibid*, at 796.

14 The Declaration of the UN Conference on the Human Environment. Adopted at the UN Conference on the Human Environment (UNCHE), Stockholm, Sweden, 5 June – 16 June 1972.

15 Adopted by UN General Assembly Resolution 37/7.

16 Tarlock, A.D. "Ideas Without Institutions: The Paradox of Sustainable Development" (2001) 9. *Indiana Journal of Global Legal Studies*, 35 at 38.

17 Wirth, D.A. "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?" (1995) 29. *Georgia Law Review*, 599 at 606-607.

ESD required a fourth idea¹⁸:

- Development must take place with far less environmental destruction than has been the case in the past

The first two ideas represent poor attempts at articulating broader SD implications; they are simply a padded-out expression of the WCED Report definition of SD. The third idea is progressive, in that it more closely recognises the need for a change in human behaviour, at all levels, particularly the need to change individual consumer behaviour. The additional, fourth, idea tends towards a need to protect the environment for its own sake, but is expressed in embarrassingly pathetic language. How compelling is a request to act in a less environmentally destructive manner?

Consequently, the Declaration's expression of the relationship between man, his endeavours and the environment is, at best, unclear. Principles 1¹⁹ and 8²⁰ reinforce human development as the paramount concern, Principle 1 expressly placing the human being at the centre of concerns for SD. This anthropocentric view is made clear through the expression of a human 'entitlement' to a healthy and productive life. Arguably, any entitlement should not be expressed in an adversarial manner to place human endeavour in competition with the natural environment. Rather, the health and productivity of human beings should be attained as a result of, not instead of, a sustained natural environment. Moreover, Principle 8 is deficient in two respects. Firstly, it assumes universal acceptance of the concept of sustainability. As explained previously, this is not a freestanding concept. Secondly and further, sustainability criteria will, arguably, reflect the perspective that human development is paramount, as advocated in Principle 1. Analysis of the joint and several affect of Principles 1 and 8 highlights the need for an informed and revised ESD principle.

The Precautionary Principle and Environmental Impact Assessment

The PP²¹ represents the nucleus of a revised ESD principle²². By definition it places the environment first. At the most fundamental, the PP dictates that when the environmental impact of proposed activity is scientifically uncertain, the international community must defer to the interests of the environment and, in certain circumstances, actively protect the environment²³. PP requires that a series of environmental impact assessments (EIA)²⁴ is undertaken to document and assess the strength of the cause and effect relationship between proposed human activity and the natural environment²⁵. Notably, there is scientific concern that a reality gap exists between EIA as a long-term scientific process and EIA, as popularly conceived, as a short-term administrative process whereby statutory requirements promote decision making in a one-off, positive or negative, sense²⁶. It is argued that EIA sampling procedures, in an administrative context, lack the opportunity for replication and long-term observation and consequently, represent little more than political

18 Tarlock, A.D. *Ibid* at 38.

19 Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

20 To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

21 Most interpretations of the precautionary principle include the following components: (a) evidentiary threshold (eg: a threat of serious or irreversible harm), (b) scientific uncertainty, (c) full or partial reversal of the burden of proof and (d) measures taken in response (precautionary measures) Thereby the precautionary principle requires both an assessment of the effects of causal activities and an assessment of response measures. The shifting of the burden of proof, required by a revised ESD principle, will only be attainable if there is broad acceptance and understanding that property rights can no longer be considered absolute rights – they are rights to be exercised in an ecological context: Taylor, P. "Heads in the Sand as the Tide Rises: Environmental Ethics and the Law on Climate Change" (2000/2001) 19. *UCLA Journal of Environmental Law and Policy*, 247 at 254-255, 257.

22 Applying the precautionary principle... is likely to change the focus of adjudicators to concentrating, not so much on the weight of existing evidence but on the limits of scientific knowledge: Bates, G. "Implementing ESD: Editorial" (1994) 11. *Environmental and Planning Law Journal*, 251 at 252.

23 Wyman, L. "Acceptance of the Precautionary Principle – Australian v International Decision-Makers" (2001) 18. *Environmental and Planning Law Journal*, 395 at 395.

24 EIA can be defined as: a component of a planning process by which environmental considerations are integrated into decision-making procedures for activities that may have adverse environmental effects. The principal purpose of EIA is to facilitate informed decision-making through a scrutiny of anticipated environmental effects: Wirth, D.A. *Ibid* at 629.

25 Barton, C. "The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine" (1998) 22. *Harvard Environmental Law Review*, 509 at 521.

26 Stewart, A. "Scientific Uncertainty, Ecologically Sustainable Development and the Precautionary Principle" (1999) 8. *Griffith Law Review*, 350 at 356.

value judgments – under such circumstances EIA appears conclusive, but may remain inherently uncertain²⁷.

A number of observations arise from the above concern. Fundamentally, the PP is one of commonsense²⁸. The PP acknowledges scientific uncertainty, which is why it was developed. Although the administrative process demands a level of certainty beyond what an EIA can provide, such demands are ostensibly reconcilable with an impetus to increase the store of scientific knowledge regarding the natural environment. The concern that, beyond demanding scientific certainty where it cannot be provided, administrators will resort to broader political criteria in evaluating EIA²⁹ is not an indictment on the EIA process itself, rather something that cannot be avoided no matter the specifics of EIA assessment. The level of protection against such administrative behaviour in environmental and other, areas has always related to the degree of information available to the people. A broader ESD principle, comprising the PP and EIA procedures, attempts to raise public awareness about environmental issues but cannot prevent flagrant administrative abuse of process without more.

The Declaration fails to clearly articulate the extent to which it requires States to adopt the PP³⁰. Alarming; the combined effect of Principles 15³¹, 17³² and 1 may condone flagrant disregard for the natural environment in the face of scientific uncertainty. Principle 15 is too narrow. It requires the PP only in relation to irreversible damage, rather than whenever the environmental impact of proposed activity is scientifically uncertain. As a matter of interpretation, the express mention of EIA in Principle 17 prevents its application as integral to the PP in Principle 15. The impact of this drafting approach is twofold. Firstly, a determination in accordance with Principle 15, that there exists a threat of serious or irreversible damage, is more likely to be politically value-laden, with no requirement that an EIA occur so as to allow for appropriate scientific consideration. Secondly, Principle 17 merely requires an EIA, but makes no mention of the PP.

Overall, the impact of Principle 15 and 17 is unclear. At best, the PP will only be adopted in extreme circumstances of pending environmental damage and not as a blanket assessment procedure, applied, in the face of scientific uncertainty about environmental impact. At worst, given political pressures or capacity of States, classifications of irreversible damage will never be made. If they are, measures to prevent such damage will likely be limited because it is seen as not cost-effective by local authority. Further, where EIA is undertaken, it is likely to provide little assistance given lack of a follow-up requirement. Finally, in cases where environmental impact is deemed a mere disturbance, or where no competent local authority exists to regulate activity, no element of precaution is likely to be applied.

Element 2 – Equity

It is ultimately necessary, but currently unrealistic, to expect the developing world to assume responsibilities, in respect of the environment, on the same level as the developed world - a history of colonial oppression and economic disparity continues to have contemporary ramifications³³. Unabated, such inequality will lead to a pre-occupation, on the part of developing nations, at the expense of the environment, with attaining a level of development equal with that of developed nations³⁴. A number of points must be borne in mind. Firstly, environmental protection must remain paramount. Secondly, developing nations should have a right to development, however this should not equate to an unbridled

27 *Ibid* at 356.

28 *Ibid* at 364.

29 *Ibid* at 359.

30 Whilst Principle 15 codified a precautionary approach for the first time at the global level, the formulation of the text is less forward-looking than many of its predecessors: Wirth, D.A. *Ibid* at 636-637.

31 In order to protect the environment, the precautionary approach should 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.

32 Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to the decision of a competent national authority.

33 Mansell, W and Scott, J. "Why Bother About a Right to Development?" (1994) 21. *Journal of Law and Society*, 171 at 172.

34 Ramlogan, R. *Ibid* at 62.

right to exploit natural resources for economic prosperity. Finally, for points one and two to be achieved, the developed world must assume the great proportion of initial responsibility for ensuring long-term economic equality.

Short-term (common but differentiated responsibility)

Principles 5³⁵, 6³⁶, 7³⁷ and 9³⁸ of the Declaration deal, primarily, with the short-term requirements of establishing economic equality. However, beyond broad recognition of existing economic disparity, the Declaration does little to accept and explain the reasons for such disparity, particularly the incidence of historical economic oppression. Although Principle 7 acknowledges disparate contributions to global environmental degradation and a consequent need to differentiate the responsibilities of States, such acknowledgment appears only to refer to the contemporary setting. Further, despite reference in Principle 9 to the need for capacity building, there is no requirement that technological or financial exchange be undertaken freely as part of the pursuit of economic equality. Consequently, taken together, Principles 7 and 9 inadvertently reinforce long-term economic disparity. That is, failure to accept responsibility for contemporary economic disparity leaves the developing world without closure, whilst it is unrealistic to expect that, without unconditional transfer of initial capital, the developing world could participate in a global exchange of scientific or technological information.

A revised ESD principle requires the unconditional provision of financial and technical assistance, by the developed world, to ensure the developing world has the capacity to assume international environmental responsibilities. The developed world must acknowledge that the requirement of a common but differentiated level of responsibility results from *past* and present use and command, of technological and financial resources. The developed world accepts historical wrongs and offers to assist the developing world in attaining an equal economic status³⁹. Thereby, recognising common but differentiated responsibilities, does not equate to a long-term concession enabling the developing world a right to abuse its natural resources⁴⁰. Rather, it is economic assistance in lieu of such a right. Essentially, the developed world is assisting the developing world by returning the benefits of historical environmental plunder⁴¹.

Long-term (a right to development)

In the long-term, although not amounting to a concession for unbridled development, the recognition of common, but differentiated, responsibilities can be reconciled with a right to development. In fact, this right is essential for continued environmental protection. If a long-term right to development is not recognised, the transitional period of financial and technical assistance will be, conceivably, indefinite. A right to development provides the long-term economic capacity to focus on environmental management, as opposed to short-term realisation of foreign exchange through the exploitation of natural resources⁴². A right to

35 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.

36 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.

37 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.

38 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.

39 There will be no, just, environmental order without this appreciation by the developed world. The lofty pronouncements of the west, regarding equity, will gain respect and credibility only if they are followed by deed and action: Hassan, P. "Toward an International Covenant on the Environment and Development" (1993). *Proceedings of the American Society of International Law*, 513 at 522.

40 Therefore developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment: Panjabi, R. *Ibid* at 239.

41 Ramlogan, R. *Ibid* at 64.

42 Ramlogan, R. *Ibid* at 7.

development must recognise the evolving appreciation of the interrelations between human rights and the protection of the natural environment⁴³.

Three broad descriptions of the relations between human rights, including a right to development and environmental protection have been identified⁴⁴. The differing categories stem from disagreement as to whether environmental protection aims to enhance human well-being or whether it has broader goals which subordinate short-term human needs to the overall protection of nature⁴⁵. The categories are as follows:

- Environmental issues belong within human rights discourse, because the ultimate goal of environmental protection is to enhance the quality of human life;
- Human beings and their rights are merely one element of a complex, global ecosystem, which should be preserved for its own sake – under this approach human rights are subsumed under the primary objective of protecting nature as a whole;
- Human rights and environmental protection represent different but overlapping societal values

Shelton suggests that category three best reflects current law and policy⁴⁶. Arguably, although best reflecting current practice, category three wrongly places human endeavour before environmental protection. To suggest that human rights, although impacting on the environment, exist without consideration of it, is misguided. Critically, category two represents the correct way to reconcile competing human and environmental needs. Under category two, human rights that do not impact on the environment will have a separate and distinct existence, however those that do impact, such as the right to development, although not necessarily disregarded, will, necessarily, be restricted accordingly. This means of reconciling competing human and environmental interests maintains the integrity of the environment as of paramount concern.

Given the deficiencies inherent in Principles 7 and 9, it is surprising that Principle 3⁴⁷ of the Declaration so forcefully recognises a right to development. Notably, the Declaration does not explore the right to development, beyond its express recognition in Principle 3, except so far as it is implicit in Principle 12⁴⁸. Arguably, given the predominately anthropocentric view of the Declaration, it was perhaps thought unnecessary to intrude upon the jurisprudence of human rights law. However, as a revised ESD principle places the environment first, it is necessary to spell out what such a ‘right to development’ should encompass in this context.

A right to development has been heralded as the newest and most topical strand of a series of ‘self-determination’ rights⁴⁹. According to the UN General Assembly Resolution⁵⁰ recognising the right to development, such right is an:

“...Inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”

43 Ecological Human Rights (EHR) describes human rights that are subject to certain limitations, recognising that individual freedoms are exercised in an environmental context, in addition to a social context. EHR implements an eco-centric ethic, imposing responsibilities and duties upon humanity to take intrinsic values and the interests of the natural community into account when exercising human rights. In this way, ecological limitations qualify the exercise of basic rights and freedoms, such as the right to the free use and enjoyment of property: Taylor, P. *Ibid* at 273. Given the disparity between developed and developing States, the focus of an environmental right has been on rights to development and self-determination. This paper argues that these perspectives are reconcilable.

44 Shelton, D. “Human Rights, Environmental Rights, and the Right to Environment” (1991) 28. *Stanford Journal of International Law*, 103 at 104-105.

45 *Ibid* at 104.

46 *Ibid* at 105.

47 The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

48 States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.

49 Mansell, W and Scott, J. *Ibid* at 173. Economic self-determination is assured in Article 1 of the twin human rights covenants. However, it has been recognised that the political reality of economic power tied the hands of many States, which were unable to use and develop their own resources as they saw fit. In the early 1970s proposals were put forward for a new international economic order (NIEO). These proposals sought a fundamental restructuring of trade, trans-national corporations, aid and international institutions. The proposed NIEO found expression in UN General Assembly Resolutions 3201 and 3202 of 1 May 1974.

50 41/128 (4 December 1986) – Article 1.

Advocates of the right to development recognise that the very notion of development, as it popularly conceived, has often proved debilitating not only to the environment, but also to humans themselves⁵¹. This stems from the inherently insatiable needs which the very notion of development imputes and because in a historical sense, since World War II, development, arguably, has solved very few of the problems at which it was directed⁵². Mansell and Scott observe a number of characteristic features of the contemporary notion of development⁵³:

- The dominant conception of development contains within it the aim of a monoculture with the market at its heart;
- Ideas of development set out to alleviate problems which were defined as problems by the West;
- So long as 'poverty' is conceived of only as *economic* poverty, then the obvious alleviation is financial – but the idea of poverty is considerably more complicated than a simple shortage of financial resources

Clearly, western development simply equates to economic growth. This prompts short-term physical exploitation of natural resources as a means of attaining developmental status and leads to a failure to realise fundamental human entitlements such as health, education and access to a clean environment⁵⁴. That is, western development perpetuates a vicious cycle, whereby our methods of attaining more lead us hopelessly and inevitably, towards the realisation of less. Development, as economic growth, must yield, almost entirely, to a revised ESD principle – it offends against views of the proper relation between the environment and humans, in Element 1 above and, as discussed below, will offend against a newly proposed economic focus, Element 3. Moreover, Element 2, above, looks to ensuring long-term economic equality – hitherto notions of development represent nothing more than attempts at reinforcing the economic superiority of the developed, western, world.

A revised ESD equates development with empowerment of peoples⁵⁵. Redefining a right to development in this way reconciles it with the fundamental objective of environmental protection. It requires development be concerned with:

“Confirming the possibility of cultural diversity, with the valuing of ‘local’ knowledge, with the husbanding of resources for the future as well as the present, with the reduction of unnecessary mortality and the security of the means of life itself”⁵⁶

Development, as empowerment, looks to ensuring substantive change. This requires developed States to do more than, ostensibly, provide financial aid. It focuses on the act of 'giving' and the conditions attached⁵⁷. It heeds the following observations of a UN study⁵⁸ into the international aspects of a right to development:

“One of the great dangers in development policy lies in the tendency to give the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten with means. Human rights may be exchanged and human beings seen only as instruments of production, rather than as free entities for whose welfare and cultural advance the increased production is intended”⁵⁹

Achieving economic equality demands, short-term, inequitable treatment. Critically, in the long-term, although a right to development is justified, it must, initially, proceed within an equity framework and ultimately defers to a broader environmental protection objective. There is little doubt the developed world bears historical responsibility for the problem of environmental degradation, but, unless both short and

51 Mansell, W and Scott, J. *Ibid* at 182.

52 *Ibid* at 180.

53 *Ibid* at 181.

54 *Ibid* at 186.

55 *Ibid* at 183.

56 *Ibid* at 183.

57 *Ibid* at 190.

58 UN Study on the international aspects of the right to development (1979). Presented to the Commission on Human Rights (UN Doc E/CN 4/1334).

59 UN Doc E/3447/Rev. 1, Para. 19.

long-term equitable considerations are addressed, this contribution may be overshadowed by unrestrained industrialisation among developing States in the first half of the twenty-first century⁶⁰.

Element 3 – Economy

A revised ESD principle must address the broader relationship between the natural environment and human need for development and economic growth, as expressed in Principle 4⁶¹ of the Declaration. More than simply requiring that EIA be undertaken in order to prevent otherwise excessive developmental practice, developmental practice itself needs to be redefined to incorporate environmental concerns. This paper has urged a fundamental rethinking of the way humans perceive their relations with the natural environment. Human attitude toward consumption and development is the ultimate determinant upon which the longevity of the natural environment depends. *Prima facie*, Principle 16⁶² is the most critical of all Declaration Principles. Beyond a precautionary approach to development, beyond the short-term need to establish equality between developed and developing States, Principle 16 urges the critical rethinking of the international economic order required by a revised ESD principle. However, Principle 16 must be informed by evolving economic thinking if it is to have real impact.

A conventional macroeconomic process presumes an unlimited supply of material inputs and an infinite natural capacity to absorb waste outputs⁶³. In this way, standard macroeconomics utilises assumptions, about the relationship between human and ecological activity, which lack a sound scientific basis⁶⁴. As an alternative, ecological economics (EE)⁶⁵ is a new strand of economic thinking that recognises that economic activity is and should be, limited by the constraints of the ecosystem⁶⁶. Although Principle 16 requires the internalising of environmental costs, it fails to clearly articulate why this internalisation is necessary – that is, the environment is a scarce resource that must constrain the traditional economic process. Without this appreciation, economic players with the capacity to conceive marginal benefits of pollution as exceeding their marginal costs of polluting will continue developing unabated.

Ecological economists (EEs) and a revised ESD principle, require the identification of an optimum-scale economy as the objective of macroeconomic policy instruments⁶⁷ such as the Declaration. EEs have been especially critical of the concept of SD, defined by the WCED Report and utilised by the Declaration⁶⁸. As argued, SD is little more than an unarticulated political mantra that, because of the disagreement over its interpretation, can and has been, co-opted by just about any group with an interest in the environment/development debate⁶⁹. The insertion of Principle 16, without more, assumes that by simply identifying and apportioning environmental costs, any development undertaken will, necessarily, be sustainable. In this way, Principle 16 facilitates a user-pays system that avoids answering the ultimate question of how much the economic subsystem can grow before it places an unsustainable burden on the natural ecosystem.⁷⁰

60 Ramlogan, R. *Ibid* at 75.

61 In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

62 National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

63 Kysar, D.A. "Sustainability, Distribution, and the Macroeconomic Analysis of Law" (2001) 43. *Boston College Law Review*, 1 at 1.

64 *Ibid* at 1.

65 *Ibid* at 9-16. The discipline's modern origins can be traced to three landmark articles from the late 1960s and early 1970s – (a) "The Economics of the Coming Spaceship Earth" (1966:Kenneth Boulding): *In a spaceship, one cannot ignore the by-products of production and consumption. A shift is required to the quality of economic activity from the quantity of economic activity.* (b) "The Tragedy of the Commons" (1968: Garrett Hardin): *Economists can only continue their self-imposed disciplinary isolation at the cost of ecological health and perhaps human survival.* (c) "The Entropy Law and the Economic Problem" (Nicholas Georgescu-Roegan): *Demonstrated a common sense view that resources are limited, because their use necessarily entails their dissipation. Therefore, rather than an isolated exchange loop capable of perpetual expansion, the economic process is fixed to a base of materials that is subject to identifiable constraint.*

66 Kysar, D.A. *Ibid* at 1.

67 *Ibid* at 25.

68 *Ibid* at 24.

69 *Ibid* at 24.

70 *Ibid* at 22.

Agreeably, identifying an optimum level for economic development, *vis-à-vis* the natural environment, is a task of monstrous proportions – something that is perhaps unattainable. However, scientific theory and empirical evidence make it clear that it is erroneous to continue to view the macroeconomic market as an isolated system having no impact upon the natural environment⁷¹. If traditional macroeconomic theories are continually utilised it is certain that demands on natural resources will be allowed to outstrip the capacity of the natural environment to provide, whilst the corresponding proliferation of waste product will undoubtedly overwhelm the natural environment's absorption capacity. Moreover, it is not a complete answer to suggest that the advent of man-made materials will be sufficient to supplement the under-abundance of natural resources – this may be a short-term solution, but does little more than shift the natural strain to a differing combination of natural resource and fails to appreciate that man-made materials must find their origins in, some level of, natural resource. In short, the material scales of current economic development and consumption levels will, ultimately, exceed the carrying capacity of the earth⁷².

Consequently, society's challenge must be to limit economic activity, rather than expand it⁷³. This challenge requires, as discussed in the long-term objectives of Element 2, a focus on achieving human development rather than mere economic growth. As EEs identify, ignoring any ecological limits to growth, there is little reason to suppose that increases in the sheer magnitude of the human economy are always desirable from the perspective of social welfare⁷⁴. Thereby, development can be achieved by focusing on quality rather than quantity, human entitlements rather than unquestioning consumption. If economic growth indicators such as Gross National Product are to remain relevant, their criteria must be realigned with fundamental areas of human endeavour, rather than simple income expenditure⁷⁵. At the very least, the economic refocus required by a revised ESD principle looks to affording the natural environment a greater, temporal, opportunity to regenerate. That is, if humans view the attainment of basic entitlements and the qualitative appraisal of development, as essential, the impact of consumption and waste upon the natural environment will be reduced.

The World Summit – Concluding Comments

The Johannesburg Declaration differs to those adopted at UNCHE and later at UNCED. The Johannesburg Declaration reaffirms its commitment to SD, recognises its political origins and outlines perceived challenges facing mankind's effort to ensure environmental protection. As such, the Declaration Principles' continue to represent the broad understandings and aspirations of the international community in respect of environmental issues – hence the focus of this paper.

Arguably, notwithstanding specific outcomes, not the subject of this paper, the Johannesburg Summit did little to advance broader understanding of the issues of the environmental debate. The very fact that no significant redrafting of the Declaration took place evidences the stagnate nature of environmental discourse given current concerns surrounding political instability in Iraq and broader concern about the proliferation of international acts of terrorism. Although the World Summit undoubtedly focused international attention, it did so for all the wrong reasons. As stated by the Secretary-General of the World Summit, Nitin Desai;

“The primary focus that we have is to find mutual interest, but some participants are taking positions solely on the basis of national interest... I am convinced it is impossible to get global agreement on critical issues of sustainable development if we pursue it on the basis of identifying what is in the national interest of each country”⁷⁶

Evidencing this statement, the United States of America (US) and Australia continued to adopt a stubborn line on greenhouse gas emissions by refusing to ratify the Kyoto Protocol, whilst Zimbabwe President

71 *Ibid* at 19.

72 *Ibid* at 25.

73 *Ibid* at 27-28.

74 *Ibid* at 29.

75 *Ibid* at 31.

76 Peatling, S. “Australia, US urged to be less selfish”. *The Age Newspaper*, Friday, August 30, 2002 at 10.

Robert Mugabe continued to voice his disapproval at western interference in Zimbabwe's current political crisis⁷⁷. *Inter alia*, the attitudes of the US, Australia and Zimbabwe indicate continued international failure to appreciate the universal and interrelated nature of environmental problems and the worsening divide between the developed and developing world. The developed world continues to deny historical economic oppression and the developing world continues to assert the existence of a misguided right to exploit their natural resources.

Nevertheless, despite a number of recognised idiosyncrasies surrounding the environmental debate⁷⁸, this paper, in accordance with a proposed, revised, ESD principle, believes that, given the flexible nature of the international legal system, sufficient legal and political tools do exist to advance the long-term, international, protection of the natural environment. Declarations such as the twenty-seven principles expressed at UNCED do not purport to be hard-law instruments regulating specific environmental matters and regions. Instead, given the incremental process by which international law is developed, the Declaration is critical as representing a conceptual framework against which specific international, regional and national environmental law can be developed and implemented⁷⁹.

As the Declaration represents the common understanding and aspirations of the international community, it must be continually scrutinised to have contemporary relevance akin to the UN Charter and various human rights covenants. The fundamental criticism of the principles of the Declaration and indeed broader environmental understanding is the anthropocentric focus taken. This paper looks to using a revised ESD principle as a means of altering this international mindset on environmental matters. A revised ESD principle looks to what are considered the three broader considerations of environmental protection, but stresses that above all else, the environment must come first. Critically, this view is not irreconcilable with basic human rights and needs, but rather, requires humans to reappraise issues such as human equality and the need for human development. This paper argues that once a change in the international mindset is achieved, workable solutions to interrelated international problems, satisfactory to both the developed and developing world, will present themselves.

77 *Ibid* at 10.

78 Ramalogan, R. *Ibid* at 1.

79 Today, all evidence points to the likelihood that the formulation of 'soft-law' will proliferate more rapidly than the negotiation of formal international agreement: Ramlogan, R. *Ibid* at 4.