

# **SUSTAINABLE DEVELOPMENT OF NATIONAL ENERGY RESOURCES: WHAT HAS INTERNATIONAL LAW GOT TO DO WITH IT?**

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**DOI:** <https://dx.doi.org/10.4314/jsdlp.v8i1.16>

## **1. INTRODUCTION**

It is particularly apt to be addressing the sustainable development of energy resources before this august audience. As Professor Omorogbe states in her welcome address, the ILA Nigerian Branch Committee, under the auspices of which this Third Annual Conference is organized, replicates the international committee at national level. Indeed, the topic of “Legal Aspects of Sustainable Development” has been the subject of ILA study since the International Committee on the Legal Aspects of the New International Economic Order reconstituted itself as the International Committee on Legal Aspects of Sustainable Development at the 1992 Cairo ILA Conference.<sup>1</sup> This date is significant for, of course, 1992 was the year of the UN Conference on Environment and Development from which the law and policy of sustainable development has grown.<sup>2</sup> Amongst other things, this Committee

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1 ILA Report of the Sixty-Fifth Conference (Cairo, 1992), Resolution 12. The Committee was headed by Kamal Hossain (Bangladesh) with Nico Schrijver (Netherlands) as General Rapporteur. Illustrating the complexity of the subject, the Committee immediately established three subcommittees on protection of the environment, good governance and the international economic order, respectively: Report of the Sixty-Sixth Conference (Buenos Aires, 1994) p. 135. Sustainable development was also one of the principles examined by the ILA Committee on the Legal Principles Relating to Climate Change.

2 It was not working from a blank slate of course: the 1972 UN Conference on the Human Environment held in Stockholm reaffirmed in Principle 21 of the conference Declaration States’ permanent sovereignty over their natural

produced the New Delhi Principles of International Law relating to Sustainable Development as part of its fifth and final report in 2002.<sup>3</sup> At the time it noted “that sustainable development has become an established objective of the international community and a concept with some degree of normative status in international law.” However, the Committee went on to observe, “[t]his is not to say that its contents are clear.”<sup>4</sup> Nonetheless in distinguishing the various dimensions of the concept, one of the recurring themes has been sustainable use of natural resources.<sup>5</sup> Appropriately enough, therefore, the first of the New Delhi Principles is “The duty of States to ensure sustainable use of natural resources”.<sup>6</sup> The Committee was reconstituted as the Committee on International Law on Sustainable Development in 2003 and submitted its fifth and final report at the Sofia Conference in 2012.<sup>7</sup> These added a gloss to the 2002 New Delhi Principles in the form of

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resources, while at the same time recognizing the responsibility of States to ensure that activities under their jurisdiction and control do not cause harm to other States nor to areas beyond national jurisdiction. The establishment of UNEP – in Nairobi – followed and it was the UNEP Governing Council which adopted as a guideline for its work the 1987 report *Our Common Future* by the World Commission on Environment and Development headed by Gro Brundtland.

3 The Declaration is annexed to Resolution 3/2002, ILA Report of the Seventieth Conference (New Delhi, 2002), p. 22.

4 “1992 Committee”, Fifth and Final Report, *ibid.*, p. 387.

5 *Ibid.*, p. 388. “Energy”, on the other hand, has not come within the purview of the ILA, the sole reference to “energy” from 1873 to 2008 (when the ILA prepared an *Index of the Reports of Conferences* (2013) from the first conference in Brussels in 1873 to the seventy-third conference in Rio in 2008) being the reference in the Sustainable Development Committee to the conclusion of Energy Charter Treaty in 1994: ILA Report of the Sixty-Seventh Conference (Helsinki, 1996), p. 293, noting its coverage of investment in energy projects, particularly in oil and gas production and transportation. “Oil” fares only slightly better, having been discussed in the relation to PSNR in the previous incarnation of the Committee on the NIEO, and in relation to State contracts and to marine environmental protection (oil pollution) and safety (oil rigs and collisions at sea). Gas does not even receive a separate index entry. Nuclear energy, on the other hand, has received more extensive scrutiny in terms of its peaceful use/non-proliferation, and liability and responsibility issues. This is not to suggest that other areas of ILA activity are irrelevant to the international regulation of energy resources, but only to underscore that specific consideration of the energy context for e.g. the formation of customary law, has been scant or absent.

6 *Op. cit.* n. 4, p. 25.

7 ILA Report of the Seventy-Fifth Conference (Sofia, 2012), p. 821. The Committee was established under the chairmanship of Nico Schrijver, with Duncan French (UK) and Ximena Fuentes (Chile) as co-rapporteurs.

the 2012 Sofia Guiding Statements which, read together, the Committee hoped would “give greater insight both into what sustainable development as a normative concept law [sic] has achieved, but also what it is still capable of achieving”.<sup>8</sup> In terms of sustainable use of natural resources, the Committee makes three observations:

- (i) “not without some controversy” ... it “is increasingly a rule of customary international law, notwithstanding the geographical location and/or legal status of the natural resource involved”.<sup>9</sup> Like the New Delhi Principles, the emphasis is on duties as well as rights, in particular “rational and sustainable management of natural resources and ecosystems”.<sup>10</sup>
- (ii) “though the content of the general rule will vary depending on whether it is a shared natural resource, a common resource or within the exclusive confines of the territory of a State, the general obligation of sustainable use is increasingly accepted”.<sup>11</sup> (Here the Committee is speaking of natural

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8 Ibid., p. 822.

9 Ibid., p. 838. “Increasingly” is an unfortunate word choice here, if it is accepted that rules (unlike principles) apply in an all or nothing fashion (Dworkin). To put it more succinctly, it is either a rule of customary international law or it isn't.

10 Op. cit. n. 8, pp. 837-8. This is repeated in Guiding Statement (3) which provides that, “as a matter of common concern, the sustainable use of all natural resources represents an emerging rule of general customary law, with particular normative precision identifiable with respect to shared and common natural resources”. Nonetheless, Guiding Statement (1) is more cautious regarding the umbrella concept of sustainable development, stating that “recourse to the concept of “sustainable development” in international case-law may, over time, justify a hardening of the concept itself into a principle of international law, despite a continued and genuine reluctance to formalize a distinctive legal status”: *ibid.*, p. 866.

11 Ibid., p. 838. For a less optimistic view of international law nearly 40 years on, see S. P. Subedi, “Reassessing and Redefining the Principle of Economic Sovereignty of States” in D. French (ed.), *Global Justice and Sustainable Development* (2010), 403-10, p. 403: “The law has not moved very far from the 1972 Stockholm Declaration ... or the 1974 Charter of Economic Rights and Duties of States with regard to the regulation or conservation of natural resources located entirely within the national borders of States concerned, especially with regard to those natural resources which are non-renewable. There is no clear requirement on individual States to ration the exploitation of *non-renewable natural resources* either in the interests of the future generation or the environment” (emphasis added). Nor is there agreement on the treatment of national energy resources as “shared” or “common”, and there is a lack of agreement on what constitutes a “shared resource” and the rights and

resources generally; much more controversial is whether oil and gas are shared natural resources, with a recent attempt by the ILC Special Rapporteur on Shared Resources to address them meeting strong resistance from major States.)<sup>12</sup>

- (iii) “the level and obligation of conservation required in the sustainable use of any particular natural resource will vary in light of all circumstances, though as a matter of the general obligation, a State is expected to act in accordance with precaution and due diligence and in the interests of the long-term sustainability of the resource *and the benefit of their peoples.*”<sup>13</sup>

This last point resonates with the early articulations of permanent sovereignty over natural resources, one of the general principles “at the core of international law relating to sustainable development”.<sup>14</sup> Paragraph 1 of the 1962 Declaration on Permanent Sovereignty over Natural Resources expressly refers to peoples, as well as nations:

The right of peoples and nations to permanent sovereignty over natural resources must be exercised in the interest of their national development and the well-being of the people concerned.<sup>15</sup>

Historically, the evolution of the principle of permanent sovereignty over natural resources (PSNR) commenced with an acknowledgement of both State and peoples’ rights to these resources.<sup>16</sup> While subsequent soft law and treaty iterations of PSNR have omitted reference to

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responsibilities which flow from such characterization: see C. Redgwell and L. Rajamani, “Energy Underground: what’s international law got to do with it?” in D. Zillman *et al* (eds), *Energy Underground: Energy Law and Transformational Change* (2014), 107, 119.

12 S. Murase, “Shared Natural Resources: Feasibility of Future Work on Oil and Gas” ILC, 62nd session, 9 March 2010.

13 *Ibid.*, emphasis added.

14 Report of the Seventieth Conference, *op. cit.* n. 4, p. 389. Also recognized in judicial decisions, e.g. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 19 December 2005 <<http://www.icj-cij.org>>.

15 qUNGA Res. 1803 (XVII), 14 December 1962.

16 Compare UNGA Resolution 545 (VI), 5 February 1952 and UNGA Resolution 1803 (VII) 1962 (“the right of peoples and nations”) with UNGA Resolution 3281 (XXIX) 1974 (“every State”). Treaty articulations now use the exclusive “sovereign right(s) of states’ framing, e.g. Article 193 of the 1982 UN Convention on the Law of the Sea and Article 18 of the Energy Charter Treaty.

“peoples”,<sup>17</sup> and it cannot be considered part of the customary law articulation of this principle, it *does* form part of the collective right of peoples to self-determination.<sup>18</sup> This has led some to argue that “peoples” have a dual character as both subject and beneficiary of the principle of permanent sovereignty over natural resources and the consequences for, inter alia, the assertion of rights over (the State’s) natural resources.<sup>19</sup> The sustainable use of natural resources is thus instrumental (and intergenerational) in ensuring the well-being of present and future generations. But this is not a passive vertical relationship: principles of international law relating to sustainable development include respect for human rights, both substantive and participatory (e.g. public participation and access to information and justice are included in the ILA Delhi Principles) and good governance norms. Some of these concepts have been given contemporary salience in references to a “social license to operate” and in direct benefit sharing arrangements<sup>20</sup> which extend far beyond the alleged “trickle down” effect of conventional petroleum profits’ taxes, rents and royalties

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17 Treaty articulations now use the exclusive “sovereign right(s) of States” framing: see e.g. Principle 21 of the 1972 Stockholm Declaration; Principle 2 of the Rio Declaration; Article 3 of the Convention on Biological Diversity; Article 18 of the Energy Charter Treaty.

18 See G. Triggs, “The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective” and C. Redgwell, “The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity” in D. N. Zillman, A. Lucas, and G. Pring (eds.), *Human Rights in Natural Resources Development* (2002). Natural resources have also been addressed by the ILA Committee on Rights of Indigenous Peoples in the context of what it describes as the contested extent of indigenous peoples’ rights to their natural resources: Interim Report, ILA Report of the Seventy-Fourth Conference (The Hague, 2010), p. 865, noting also that provisions of the UN Declaration on the Rights of Indigenous Peoples “do not wholly clarify relevant international law”. See UN GA Res. 61/295 of 13 September 2007. See also identical Articles 1(2) of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, recognizing the right for peoples freely to dispose over their natural resources.

19 See further D. Dam-De Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (2015), pp. 49-50.

20 For discussion of early attempts at resource benefit sharing via intergenerational funds such as the Alaskan Permanent Fund, see C.Redgwell, *Intergenerational Trusts and Environmental Protection* (1999), pp. 25-30 (trust funds).

accruing to the State and used for public benefit.<sup>21</sup> Morgera has argued convincingly that benefit sharing may also serve as a bridge between the environmental and human rights accountability of multinational corporations, particularly in relation to indigenous peoples and local communities.<sup>22</sup>

As the foregoing illustrates, the ILA framing of the duty of States to ensure the sustainable use of natural resources “is a broad notion, reflecting a number of inter-connected obligations in international law”, some of which are settled – e.g. the “no significant harm” principle stated in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, and repeated in Article 2 of the 1992 Rio Declaration on Environment and Development – and others which “remain nascent and contested” – that States should manage their “territorial” natural resources sustainably being an example.<sup>23</sup> How far it can be assumed that international law now imposes on States a general obligation of conservation and sustainable use of natural resources remains an open question, the answer to which is heavily context-dependent, with significant detail left to international treaties and other instruments – or to domestic law and policy – to flesh out. And, as noted above, where the natural resources in question are energy resources, the argument that there exists a substantive obligation sustainably to use such resources is even more difficult to sustain.

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21 See generally L. Barrera-Hernandez, B. Barton, L. Godden, A. Lucas and A. Rønne (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (2016), and in particular the contribution by Y. Omorogbe, “Resource Control and Benefit Sharing in Nigeria”, pp. 259-277.

22 See, inter alia, E. Morgera, “Benefit-sharing as a Bridge between the Environmental and Human Rights Accountability of Multinational Corporations” in B. Boer (ed), *Environmental Law Dimensions of Human Rights* (2015), ch 2; and *ibid.*, “The Need for an International Legal Concept of Fair and Equitable BenefitSharing” (2016) 27:2 *European Journal of International Law*, 353. On the intersection between environmental and human rights, see *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*. John H. Knox, UN Doc A/HRC22/43, 24 December 2012.

23 D. French “From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber’s 2011 Advisory Opinion” (2011), 26 *International Journal of Marine and Coastal Law*, 525-68, p. 537.

## 2.0 SUSTAINABLE DEVELOPMENT OF ENERGY RESOURCES: A LIMITATION ON PSNR?

This is because energy choice is closely associated with the sovereignty of States and there is ample evidence of a reluctance to relinquish control over energy choice to external international bodies. Thus, the vast bulk of international energy regulation is concerned with facilitating energy activities, and with mitigating the negative transboundary effects of energy extraction and use through harmonized rules and procedures reliant on national implementation, rather than dictating sovereign energy choices. There are as yet no international instruments parallel to, for example, the European Union's renewables directive: even soft law instruments stop short of "binding" States to a global renewable energy target. Similarly, the climate regime relies on flexible mechanisms for implementing greenhouse gas emissions reductions which stop far short of dictating sovereign energy choices as between, say, petroleum and renewables. That said, the indirect influence of climate change obligations and concerns on national and regional energy regulation have been profound.

While there are still relatively few international legal constraints on sovereign energy choices, limits are recognized in how such resources are exploited. As I have argued, such limits do not (yet) relate to the sustainable exploitation and use of energy resources,<sup>24</sup> but rather to the duty to prevent, or to mitigate, harm arising from activities that may cause significant harm to the environment.<sup>25</sup> Moreover, at the policy level, there have been significant developments in identifying the key role that energy plays in achieving sustainable

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24 For a recent proposal for a sustainable energy agreement either within, or outside of, the WTO, see M. Kennedy, *Legal Options for a Sustainable Energy Agreement*, (2012) <<http://ictsd.org>>; on sustainable resource exploitation on the continental shelf, see D. Ong, "Towards an International Law for the Conservation of Offshore Hydrocarbon Resources within the Continental Shelf?" in D. Freestone, R. Barnes and D. Ong (eds.), *The Law of the Sea: Problems and Prospects* (2006).

25 Established in the transboundary context in the seminar *Trail Smelter Case (United States of America v Canada)* (1938 and 1941), 3 RIAA 1905, and more recently reiterated in, for example, *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Reports 14 (*Pulp Mills*), at para 101. See generally C.Redgwell, "Transboundary Pollution: Principles, Policy and Practice" in S.Jayakumar, T.Koh, R. Beckman and H. D. Phan (eds), *Transboundary Pollution: Evolving Issues of International Law and Policy* (2014).

development. Energy was identified as one of seven critical issues for consideration at the 2012 United Nations Conference on Sustainable Development (Rio+20),<sup>26</sup> with an emphasis on Sustainable Energy for All (SEFA). The three elements of SEFA are to ensure universal access to modern energy services, and to double the global rate of improvement in energy efficiency and of the share of renewable energy in the global energy mix.<sup>27</sup> This is reflected in the “appropriate energy mix” outlined in the outcome document of Rio+20, *The Future We Want*, which reaffirms “support for the implementation of national and subnational policies and strategies, [ . . . ] using an appropriate energy mix to meet developmental needs, including through increased use of renewable energy sources and other low-emission technologies, the more efficient use of energy, greater reliance on advanced energy technologies, including cleaner fossil fuel technologies, and the sustainable use of traditional energy resources”.<sup>28</sup> Year 2012 was also designated the International Year of Sustainable Energy<sup>29</sup> – a period, however, in which the International Energy Agency’s World Energy Outlook concluded that, even taking all new developments and policies into account, “the world is still failing to put the global energy system onto a more sustainable path”.<sup>30</sup> Subsequently, 2014-2024 has been

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26 Rio+20 was convened with the aims of “secur[ing] renewed political commitment for sustainable development”, “assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development” and “addressing new and emerging challenges”. Resolution of the “Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development” (UNGA Res 64/236, 31 March 2010), para 20 (a).

27 See further <[http:// www.se4all.org](http://www.se4all.org)>

28 United Nations Conference on Sustainable Development, *The Future We Want* (2012) para 127, emphasis added. The IEA considers CCS part of cleaner fossil fuel technology: IEA, *G-20 Clean Energy, and Energy Efficiency Deployment and Policy Progress* (2011), 8. See further C. Armeni, “Carbon Dioxide Storage in the Sub-seabed and Sustainable Development: Please Mind the Gap” (2013) 27 *Ocean Yearbook* 1.

29 UNGA Resolution 65/151, 16 February 2011. In addition to recalling the 2000 Millennium Development Goals, the preamble “reiterates the principles” of the 1992 Rio Declaration and Agenda 21, and “recalls the recommendations and conclusions” of the 2002 Johannesburg Plan of Implementation of the World Summit on Sustainable Development, concerning energy for sustainable development.

30 International Energy Agency (IEA), *World Energy Outlook 2012* (OECD/IEA, Paris, 2012) <[http:// www.oecd-ilibrary.org/energy/world-energy-outlook\\_20725302](http://www.oecd-ilibrary.org/energy/world-energy-outlook_20725302)>



designated the “United Nations Decade of Sustainable Energy for All” in further acknowledgement of the importance of energy issues for sustainable development, an importance underscored by its incorporation in the goals of the 2030 Agenda for Sustainable Development.<sup>31</sup>

But, clearly, more than policy is applicable here: even where activities take place wholly within the territory of the State, international law remains relevant for at least two reasons. First, there is the potential for the transboundary effects of energy activities which cannot ultimately be wholly contained or encapsulated with one State; and second, there is the penetration through national (and regional) implementation of international rules intended to govern matters within State sovereignty, such as procedural and substantive environmental and human rights norms and international rules on trade and investment.<sup>32</sup> A perennial hot topic is the appropriate balance between the facilitation of energy trade and investment on the one hand, and the protection of the environment and of human rights on the other. This nexus was clearly recognized by the ILA Committee on the Legal Aspects of Sustainable Development with its subcommittees on environmental protection, good governance, and the NIEO.

In terms of substantive customary law rules of importance to energy resources and activities, three in particular may be noted: permanent sovereignty over natural resources as already discussed;<sup>33</sup> the obligation not to cause significant harm to the territory of other States or to areas beyond national jurisdiction;<sup>34</sup> and the duty to notify and cooperate

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31 See further <<http://www.se4all.org/decade/>> and <<https://sustainabledevelopment.un.org/sdg7>>

32 On the “internationalization” of national law, see K. Talus, “Internationalization of Energy Law” in id. (ed) *Research Handbook on International Energy Law* (2014), ch 1 and S.W. Schill, “The Interface between National and International Energy Law” in *ibid.* 44-78.

33 See further N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997), 377.

34 The first contentious case before the ICJ after World War II, the *Corfu Channel* Case (1949) ICJ Reports 1, established the principle that States may not permit their territory to be used in such a manner as to cause harm to other States. The “no harm” principle was also famously elaborated upon in the interstate arbitration between the United States and Canada in *Trail Smelter Arbitration* (1941) 35 AJIL 684 and has been reiterated in many instruments subsequently, including Principle 21 of the non-binding Stockholm Declaration on the Human Environment and Principle 2 of the non-binding 1992 Rio Declaration on Environment and Development. See further Redgwell, n. 25.

with other States regarding risks arising from hazardous activities, including accidents.<sup>35</sup> These legal developments underscore my point that the cardinal principle of PSNR is not absolute, given the limitations imposed both by environmental and sustainability concerns<sup>36</sup> and by other voluntarily assumed treaty obligations.<sup>37</sup> State practice further supports the customary law obligation to consult and to notify of potential transboundary harm where there are shared resources or hazardous activities being carried out, and the requirement to conduct a prior transboundary environmental impact assessment. In the *Pulp Mills* case, the ICJ found the requirement to conduct a transboundary EIA to be a distinct and freestanding obligation in international law where significant transboundary harm is threatened. Although the specific content of such an EIA is left to the State's discretion, international law requires that an EIA is conducted and that it bears a relation to the "nature and magnitude of the proposed development and its likely adverse impact on the environment".<sup>38</sup>

However, as a matter of international law, the capacity for other principles to blunt the sharper edges of the PSNR principle is rendered more difficult because of their normative status. Other principles have not achieved independent customary international law status, though they may bind as a treaty obligation if embedded in a treaty text, and may exert considerable influence over the interpretation of existing rules of international law, including PSNR.<sup>39</sup> Such principles, concepts,

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35 This duty to notify has been well-established in both hard and soft law: P. Birnie A. Boyle and C. Redgwell, *International Law and the Environment* (3rd edn, 2009), p. 58.

36 Schrijver, n. 33.

37 For discussion of PSNR in the WTO context, see *China – Measures Related to the Exportation of Various Raw Materials – Appellate Body Report* (30 January 2012) WT/DS395/AB/R paras. 7.124-129, where China's commitments under its Accession Protocol prevailed over the "previously sacred" general international law principle of PSNR: A. Marhold, "The World Trade Organisation and Energy: Fuel for Debate" ESIL editorial volume 2(8) <<http://www.esil-sedi.eu>>.

38 Op. cit. n. 25, para.205.

39 For analysis of the principle of sustainable development in this regard, see A.V. Lowe, "Sustainable Development and Unsustainable Arguments" in A. E. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (1999).

or approaches include the principle of sustainable development;<sup>40</sup> the precautionary principle or approach;<sup>41</sup> the polluter-pays principle;<sup>42</sup> and intergenerational equity.<sup>43</sup> Arguments range from lack of normative content to the absence of a uniform understanding of the meaning of the principles, and widely varying consequences of their application depending on the specific context.

While such principles may lack legally binding force as customary international law, their impact may nonetheless be considerable when further crystalized in a treaty text or used as a “general guideline” or aid to judicial interpretation of treaty obligations between the parties (e.g., the concept of sustainable development and the bilateral agreement between Hungary and Slovakia in the *Gabcikovo-Nagymaros* case<sup>44</sup>). In terms of their potential interpretative impact, the ICJ observed in an oft-quoted passage from the *Gabcikovo-Nagymaros Case*:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done

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40 Not uncontestedly part of customary international law: the *concept* of sustainable development was recognized by the ICJ in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997), ICJ Reports 7 and in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Advisory Opinion* (1996) ICJ Reports 226, although it stopped short of recognition of the principle of sustainable development as a matter of customary international law. Equivocal treaty support is found in Art 19 of the Energy Charter Treaty.

41 For analysis of the varying definitions of precaution and its consequent lack of customary law status, see Birnie Boyle and Redgwell, above n. 35, at 146.

42 First articulated in a 1973 OECD non-binding instrument on “The Polluter Pays Principle”, the absence of consistent state practice, including its equivocal articulation in soft law instruments (e.g. “the polluter should, in principle, pay” in Principle 22 of the non-binding Rio Declaration and similarly in Art 19 of the binding Energy Charter Treaty) further undermines its potential as a customary international law norm.

43 While concern for future generations has been expressed in the non-binding preamble to a number of treaty instruments (and, exceptionally, in the text of the 1992 Framework Convention on Climate Change, Art 4), and has been noted in the judgments of the ICJ, most particularly in the judgments of Judge Weeramantry, the principle of intergenerational equity is not recognized at customary international law: see French, above n. 23 and C. Redgwell, above n. 20.

44 Above, n. 40, para 85. As indicated above, the concept of sustainable development was then used by the Court to provide the bilateral treaty between the parties with the evolutionary interpretation its wording suggested. See also the *Iron Rhine Arbitration Belgium v Netherlands* (PCA 2005).

without consideration of the effects upon the environment. Owing to new scientific insights and a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.<sup>45</sup>

Similarly, in a wide-ranging assessment of the environmental impact of deep seabed mining activities, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in an Advisory Opinion affirmed the obligation of sponsoring States to apply a precautionary approach, relying inter alia on provisions of the Nodules and Sulphides Regulations.<sup>46</sup> It was prepared to go further, however, in noting that “the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations”.<sup>47</sup>

### **3.0 HUMAN RIGHTS AND “ECOLOGICALLY SUSTAINABLE DEVELOPMENT” IN AN ENERGY CONTEXT**

In addition to seeking to add a “sustainability gloss” to the principle of PSNR, “ecologically sustainable development” may also be secured via the human rights route. Substantive human rights may be invoked to challenge energy production or consumption as impairing a substantive human right to private life or to a clean/healthy/satisfactory

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45 Above n. 40, para 85. Note the reference to “instruments”, thus embracing soft law instruments for example, and to “norms and standards”, not “rules”. The concept of sustainable development was then used by the Court to provide the bilateral treaty between the parties with the evolutionary interpretation its wording suggested.

46 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports 2011, paras 125-7 (2011), 50 ILM 458.

47 Id, para 131. For detailed comment see French, above n. 23.

environment; but this is a double-edged sword, as rights may also be invoked to defend such activities as the legitimate enjoyment of a substantive right such as the right to property. Such rights may be individual or collective.<sup>48</sup> Procedural human rights are also of increasing relevance in securing, inter alia, access to information, participation in decision-making, and access to justice.

Surveying the international landscape, there are relatively few examples of human rights challenges to the sustainability of energy projects, and which invoke the principle of sustainable development. Yet despite the “normative uncertainty highlighted above and an absence of standards for judicial review”, sustainable development is nevertheless found invoked in judicial review challenges to the sustainability of economic development, including energy projects.<sup>49</sup> Specifically in the energy context in the Ogoniland Case, the African Commission on Human and Peoples’ Rights found that the right of peoples to dispose freely of their own natural resources had been violated, as had their right to “ecologically sustainable development”,<sup>50</sup> a right enshrined in the African Charter of Human and Peoples Rights. Given the environmental impact of energy activities, a potentially even more fertile source of case law is human rights challenges to energy activities on the basis of impairment of the right to a particular quality of environment. However, under general human rights law, there is limited express recognition of a substantive right to environment and thus far only at the regional level.<sup>51</sup> Such recognition is, of course, found in Article 24 of the African Charter on Human and Peoples’ Rights which provides that “[a]ll peoples shall have the right to a generally satisfactory environment favourable to their development”. Indeed, Article 24 of the African Charter combines recognition of the substantive right with recognition of an *actio popularis*, thus reducing the obstacle of standing to enforce the substantive right. But this is a rare example,

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48 See, eg, Triggs, above n. 18.

49 Birnie Boyle and Redgwell, above n. 35, at 126.

50 The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, ACHPR Communication 155/96 (2002), paras 52-55.

51 See, generally, A.E. Boyle and D. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996); J. Merrills, “Environmental Rights” in D. Bodansky, J. Brunnee, and E. Hey (eds) *Oxford Handbook of International Environmental Law* (2007); and A. Boyle, “Human Rights and the Environment: Where Next?” in Boer (ed), above n. 22.

and the recognition of a direct “right” to a clean and healthy environment remains both relatively rare and controversial. Merrills, for example, questions whether the recognition of new rights such as the right to a healthy/clean/satisfactory environment is needed when account is taken of what is already in place. He even notes that “the violation of the collective right to a “general satisfactory environment” found by the African Commission on Human and Peoples’ Rights in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* was accompanied by so many other individual and collective rights as to add relatively little to the decision”.<sup>52</sup> Recognition of indirect environmental rights is certainly more prevalent, i.e., through existing rights such as right to private, home, and family life or the right to life and to the preservation of health and well-being. Moreover, as demonstrated by the 2005 *Fadeyeva* case before the ECtHR (which involved major long-term air pollution from an adjacent factory complex), the nature of the obligation upon the State is not merely a negative obligation of non-interference but a *positive* obligation to act to enforce e.g., zoning legislation and emission limit requirements.<sup>53</sup>

It is also in the human rights context that we see a significant role for non-State actors. While this is principally observable in the vertical enforcement by individuals of rights against the State, increasingly there are attempts to apply human rights in a horizontal manner. An example is the UN Sub-commission on the Promotion and Protection of Human Rights’ “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with respect to Human Rights”<sup>54</sup> and, more recently, the adoption in 2011 of the Guiding

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52 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (2003), 10 IHRR 282, discussed by Merrills, *ibid*, text accompanying n. 8. See also A.E. Boyle, “The Role of International Human Rights Law in the Protection of the Environment”, in Boyle and Anderson, *ibid*; and “Human Rights and the Environment: Where Next?” (2012), 23 EJIL614.

53 *Fadeyevav Russia*, ECtHR Case 55723/00, 9 June 2005.

54 E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003 <<http://www.unhchr.ch>> See also Chapter II of the OECD’s revised Guidelines for Multinational Enterprises (2000) <<http://www.oecd.org>> and the UN Global Compact (2000) <<http://www.unglobalcompact.org>> both of which require respect for human rights based on existing international standards. Such soft instruments reflect the input of one category of non-State actor – NGOs – in seeking to regulate the conduct of another category of non-State actor-MNEs.

Principles on Business and Human Rights.<sup>55</sup> However, notwithstanding claims as to their international legal effect,<sup>56</sup> these are non-binding instruments and thus far attempts internationally to apply human rights standards directly to MNEs have remained at the hortatory level.<sup>57</sup> Domestically the picture is rather different of course, and will vary from State to State. For example, litigation under the United States Alien Tort Claims Act has been pursued by NSAs seeking to challenge the activities of, inter alia, energy companies as violating customary principles of [international] environmental and human rights law – the example of *Kiobel* springs to mind – albeit none has succeeded in surmounting obstacles to the exercise of jurisdiction by the US courts.<sup>58</sup> Such attempts are also an example of the various transnational and international conduits that litigants may pursue in their quest for environmental justice.

Human rights standards may also be enforced indirectly through loan conditionality, often in the context of large energy infrastructure projects. In its lending practices, and as set forth in its Operational Guidelines, the World Bank requires conformity with certain International Labour Organization (ILO) conventions, including the

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55 Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework (2011) A/HRC/17/31, endorsed by the Human Rights Council by HRC Res 17/4 (16 June 2011); in the energy context see the analysis by R. Lindsay, R. McCorquodale, L. Blecher, J. Bonnitcha, A. Crockett and A. Sheppard, “Human Rights Responsibilities in the oil and gas sector: Applying the UN Guiding Principles” (2013) 6:1, *Journal of World Energy Law and Business*, 2-65.

56. E.g. with respect to the 2003 norms, D.Weissbrodt and M. Kruger, “Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights” (2003) 97 AJIL 901.

57 S.D. Murphy, “Taking Multinational Corporate Codes of Conduct to the Next Level” (2005) 43 Columbia Journal of Transnational Law 489 and C. Vasquez, “Direct vs Indirect Obligations of Corporations under International Law” in *ibid*, 927; E. Morgera, *Corporate Accountability in International Environmental Law* (2009).

58 Most recently, in *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013). See further Agora: Reflections on *Kiobel* (2013) 107:4 AJIL 829 and P. D. Mora, “The Alien Tort Statute After *Kiobel*: The Possibility for the Unlawful Assertions of Universal Civil Jurisdiction Still Remains” (2014) 63:2 ICLQ 699 and, more generally, H.H.Koh, “Separating Myth from Reality about Corporate Responsibility Litigation” (2004) 7(2), *Journal of International Economic Law*, 263.

one on forcible resettlement of populations.<sup>59</sup> Additionally, non-state actors (NSAs) in the borrower country may seek internal review by the Inspection Panel of the Bank's failure to comply with its own policies and procedures on environmental and human rights protection, and general project oversight. An example is the West African Gas Pipeline Project where requesters in Ghana and Nigeria<sup>60</sup> alleged non-compliance by the Bank with a number of operational guidelines.<sup>61</sup> "Standing" for the complaint flowed from an investment guarantee to Ghana through the IDA and political risk insurance to WAPCo through MIGA. Particularly of note is the damning context for operations which the Panel sets forth at the outset of the Report in outlining how development of the oil industry in Nigeria has had positive and negative effects, bolstering economic development but with "adverse effects on the livelihood and environment of communities living in the production areas and near the pipelines" and with social and political conflict rooted in the "inequitable social relations that underlie the production and distribution of profits from oil, and its adverse impact on the fragile ecosystem of the Niger Delta."<sup>62</sup> Numerous instances of non-compliance by the Bank were found by the Panel – indeed, one wonders how far the Panel was influenced by the context of petroleum developments in Nigeria, set out in damning terms at the outset of the Report, in examining the diligence of the Bank in adhering to its own policies and procedures. The Bank's Board of Directors responded (including

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59 Operational Guidance on Environment Impact Assessment 4.0; see also the discussion in Triggs, above n. 18.

60 From Nigeria, the Ifesowapo Host Communities Forum of the WAGP Project through their representatives from Olorunda Local Government Area of Lagos.

61 Investigation Report: Ghana: West African Gas Pipeline Project, World Bank Inspection Panel, Report No. 42644-GH, 25 April 2008. The Panel assessed compliance with Operational Policies and Procedures on: environmental assessment; involuntary resettlement; poverty reduction; economic evaluation of investment operations; project supervision; and World Bank Policy on Disclosure of Information. GP 4.12 on Involuntary Resettlement, for example, requires for the avoidance of displacement-induced displacement and has as one of its objectives that "resettlement activities should be conceived and executed as *sustainable development programmes*, providing sufficient investment resources to enable persons displaced by the project to share in the project benefits" (emphasis added).

62 Ibid. For recent assessment of the benefits that can accrue from petroleum exploitation against the backdrop of the Nigerian experience, see Omorogbe above n. 21, at p. 259. ("For several years, Nigeria has been an example of how *not* to manage a petroleum industry.")



measures to improve resettlement and compensation and to improve transparency through information disclosure). However, the Inspection Panel is not an adjudicative body and its role is neither to propose remedial measures nor does it have the power to issue an injunction or stop the project or to award financial compensation for any injury suffered.

#### 4. CONCLUSION

As I have sought to demonstrate, even if customary international law has not yet emerged requiring sustainable use of non-living resources, many development decisions will be “sustainability constrained” owing to *other* requirements of international law such as carrying out environmental impact assessments or cooperation in the conservation of natural resources. Indeed, these constraints are evident in the settlement of disputes between States with an observable shift in focus in the cases involving natural resources brought by States before the International Court of Justice “from disputes about concessions and control of natural resources to disputes about sustainability and the limits of resource use”.<sup>63</sup> They are also evident in other dispute settlement fora such as the Appellate Body of the WTO which has recognized clean air as an exhaustible natural resource and the ability of states to regulate, *inter alia*, reformulated gasoline in order to reduce harmful pollutants.<sup>64</sup> Such limits are all the more urgent and important given the strong linkages between sustainable energy resources exploitation and combating climate change, safeguarding food production and ensuring access to secure energy supplies as part of

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63 R. Higgins, “Natural Resources in the Case Law of the International Court”, in A. Boyle and D. Freestone, n. 39 above, at 111; see also Schrijver, n. 33 above. See also *Pulp Mills*, above n. 25. <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=135&code=au&p3=4>>, at 49, paras. 75-77, and at 74, para. 177, and the Separate Opinion of Judge CancadoTrindade at Part X; and its Order 13 July 2006, found at: <<http://www.icj-cij.org/docket/files/135/11235.pdf>>, at 133, para. 80.

64 WTO, *Report of the Appellate Body in United States – Standards for Reformulated and Conventional Gasoline (Treatment of Imported Gasoline and Like Products of National Origin)*, 20 May 1996, reproduced at 35 ILM (1996) 603.

sustainable development.<sup>65</sup>

Let me end by congratulating the organizers on the conference, and for bringing renewed focus to energy concerns within the ILA. As I have already observed, energy – unlike natural resources more broadly – has seldom come within the purview of the ILA internationally.<sup>66</sup> This is not to suggest that other areas of ILA activity are irrelevant to the international regulation of energy resources and activities, but only to underscore that specific consideration of the energy context, for example, the formation of customary law, has been scant or absent. My hope is that conferences such as this will stimulate a welcome trend in “mainstreaming” international energy law.

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65 This weds issues of access to energy, principally a developing state concern, with access to secure energy supplies, a more widely shared concern and one of the *raison d'être* of the International Energy Agency.

66 See n. 5 above.