ACCOMPLISHMENTS AND NEW DIRECTIONS?

The World Summit on Sustainable Development took place in Johannesburg from 26 August to 4 September 2002. Its intended purpose was to hold a ten-year review of the 1992 UN Conference on Environment and Development (Rio Summit) in order to reinvigorate the global commitment to sustainable development.[1] Perhaps attempting to duplicate the products of other international meetings, national governments agreed to negotiate and adopt two documents: the *Johannesburg Declaration*[2] and the *Plan of Implementation.*[3] However, differences emerged over the binding nature of the instruments and if so, the strength of the obligations therein. It appeared that this tension spilled over to all the negotiations. Some countries pushed for concrete timetables, reiterating other goals stipulated in previous international declarations or decisions, while other countries, weary of taking on new commitments that are unlikely to be met, preferred a more soft-law declaratory approach.

Further complicating the agenda was the proliferation of multilateral instruments on international environmental law since the Rio Summit, as well as intersecting agreements relating to trade, health, human rights, and general public international law. A need for clarification was in order. This exercise turned out to be problematic however, since some countries attempted to back away from commitments made in other international instruments. Moreover, the confluence of international meetings, including most prominently the Doha WTO Ministerial Meeting and the Monterrey Conference on International Finance, rendered negotiating all the more difficult since the outputs from those meetings imposed a benchmark restraining bargaining positions in Johannesburg.

The Johannesburg Declaration provides a historical analysis of international environmental policy-making from the first conference on the human environment at Stockholm in 1972, through the Rio Summit on Environment and Development in 1982, to the WSSD. The commitment to sustainable development is reconfirmed, along with the recognition of multilateral solution and the need for implementation. It notes that there are three pillars of sustainable development and a common resolve to eradicate poverty, change consumption and production patterns and protect and manage the natural resource base.[4] These are recognised in the *Plan of Implementation,* the second instrument agreed to at the Summit, as the 'overarching objectives of, and essential requirements for, sustainable development'.[5] Peace, security, stability and respect for human rights and fundamental freedoms are deemed to be essential for achieving sustainable development.[6] Economic development, social development and environmental protection are accepted as interdependent and mutually reinforcing pillars.[7] Overall, the United Nations General Assembly was requested to adopt sustainable

[1] United Nations General Assembly (UNGA) Resolution 55/199.

[2] *Johannesburg Declaration on Sustainable Development,* (2002) A/CONF.199/L.6, <http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc>.

[3] *World Summit on Sustainable Development, Plan of Implementation,* (2002), <http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.pdf>.

[4] Paras 5, 7, 11, and 21.

[5] Art 2.

[6] Art 4. This specifically includes the right to development and respect for cultural diversity.

[7] Art 125, *Plan of Implementation.*

https://doi.org/10.1093/iclq/52.1.256 Published online by Cambridge University Press

development as a key element of the overarching framework for UN activities.

This small summary outlines the highlights of some of the negotiating issues. Although somewhat extensive in analysis, it is not intended to exhaust all of the topics discussed at the Summit. The international law elements of the *Plan of Implementation* as they relate to the development of customary and treaty-based international environmental law are primarily examined.

I. WEHAB ISSUES

The Summit attempted to take on some of the major resource issues that underscored the need to bridge poverty eradication, development and environmental sustainability. The delegates divided up the text on the *Plan of Implementation* so that separate clusters of paragraphs would address a particular issue. The WEHAB issues (water and sanitation, energy, health and environment, agriculture, and biodiversity), were the forefront of the negotiations. The UN Secretary General on Mary 14, 2002, proposed these five themes.

(a) Water and Sanitation

Most of the parties' attention revolved around whether there should be a target for access to basic sanitation. A goal for reducing or halving, by 2015, the proportion of people lacking access to safe drinking water was reflected in the UN Millennium Development Goals.[8] It was agreed that the sanitation target of 2015 was accepted, with a programme of action launched to meet this goal.[9]

(b) Energy

One of the major issues discussed was the possibility of including timetables for energy access, energy subsidies and amounts of renewable energy in a national energy stream. Energy access was recognised as one way to facilitate the eradication of poverty.[10] Its interdependence with economic development was not challenged although there was little advancement on making any specific commitments beyond what had been agreed in the climate change regime.

The energy-related paragraphs were negotiated against the backdrop of the *Kyoto Protocol*[11] and the American, and to a lesser extent, Australian refusal to ratify. Interestingly, Russia, China, Canada and India all announced their plans to ratify the *Kyoto Protocol*, allowing it to come into force despite the American and Australian positions.[12] There was some attempt to include a call to ensure the entry into force of the *Kyoto Protocol* by 2002,[13] repeating the commitment of governments to make every effort to ensure its entry in the *Millennium Declaration.*[14] This was watered down so

[8] *United Nations Millennium Declaration,* A/RES/55/2, Art 19, <http://www.un.org/millennium/declaration/ares552e.htm>.

[9] Arts 7, 24. The parties also agreed to develop integrated water resources management and water efficiency plans by 2005, with support to be given to developing countries for this purpose. See Art 25.

[10] Art 8.

[11] 'Kyoto Protocol to the Framework Convention on Climate Change' (1998) 37 *ILM* 22.

[12] The *Protocol* comes into force after 90 days upon the deposit of instruments of ratification, acceptance, approval or accession of a minimum of fifty-five parties, including Annex I (industrialised countries and countries with economies in transition) parties that account for at least 55 per cent of the total carbon dioxide emissions for 1990.

[13] Art 36.

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that ratifying states are to 'strongly urge' States that have not to do so in a timely manner.[15] The obligations of states to invite non-ratifying parties to ratify mirrors similar commitments relating to the *Cartagena Protocol on Biosafety*,[16] perhaps reflecting the pattern necessitated by political compromise, where UN Conference documents cannot bind parties to ratify other international agreements.

Despite parallel wording of the *United Nations Framework Convention on Climate Change (UNFCCC)*, the *UNFCCC* was merely recognised as the 'key instrument for addressing climate change', which reflects some countries' intentions to undertake their own activities outside the treaty regime.[17] The *UNFCCC* objective concerning stabilising greenhouse gas concentrations in the atmosphere as well as specific requirements to meet all commitments and obligations under the *UNFCCC*, work cooperatively towards achieving the objectives of the *UNFCCC*, and provide technical and financial assistance and capacity building to developing countries and countries with economies in transition in accordance with *UNFCCC* commitments, were included in the *Plan of Implementation.*[18] Whether the *Plan of Implementation* allows for unilateral action that might violate or indirectly undermine the specific *UNFCCC* provisions will be a challenge for treaty interpretation.

Developing countries, although generally in support of the *Kyoto Protocol*, were concerned that a focus on targets would wholly meet the needs of developed countries while diverting attention away from ensuring energy access to the poor. No timetable on energy access was ultimately adopted, with agreed text on obligations to diversify 'energy supply by developing advanced, cleaner, more efficient affordable and cost-effective energy technologies, including fossil fuels, renewable energy and hydro'.[19] This was to be done 'with a sense of urgency' for substantially increasing the global share of renewable energy sources, recognising the *role of national and voluntary targets.*[20] This enshrined the flexible approach to combating climate change, accommodating the American strategy of encouraging voluntary initiatives. There was even some disagreement on the types of energy that would be included in cleaner energy supply—specifically whether this would include nuclear energy.[21] No timetable or targets were imposed on energy subsidies but only a general commitment to phase out subsidies inhibiting sustainable development.[22]

On energy access, it was agreed that countries would 'take joint actions and improve efforts to work together at all levels' to improve energy access.[23] Improving access would be done through a variety of ways including increasing the use of renew-

[14] Art 23.

[15] Art 36.

[16] Art 42(t). Some concern has been raised that the limited references to the *Biosafety Protocol* and the right of countries to assess the environment and health risks coupled with the explicit provision to promote measures for access to the results and benefits arising from biotechnology based upon genetic resources, to represent a balance towards the acceptance of GMOs in Art 42(p). See CIEL (2002), *Preliminary Comments on Trade Related Issues in the 12th June Draft Plan of Implementation of the World Summit on Sustainable Development* at 6 (Washington, DC; CIEL). It should be further noted that during the Summit, some South African countries were refusing to accept food aid contaminated with GMOs.

[17] Art 36. Similarly, the *Convention on Biological Diversity* is considered to be the 'key instrument' for the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of genetic resources. Art 42.

[18] Art 36(a)(b).

[19] Art 19(e).

[20] Emphasis added. Art 19(e).

[21] In the absence of any specific language, India stated that nuclear power is included for the purpose of interpreting Art 19(e) while Norway and Tuvalu noted that it does not.

[22] Art 19(q).

[23] Art 8.

https://doi.org/10.1093/iclq/52.1.256 Published online by Cambridge University Press

ables, cleaner liquid and gaseous fuels and enhanced energy efficiency as well as enhanced rural electrification and decentralised energy systems.[24] This was weaker than the EU proposal urging for the creation of a programme of action with financial and technical assistance to improve energy access. Moreover, the delegates agreed to supporting programmes and partnerships to ensure universal energy access to at least 35% of the African population within 20 years.[25]

(c) Health and Environment

The parties agreed to several of the Millennium Goals relating to health such as reducing infant/child mortality rates (2/3 by 2015),[26] maternal mortality rates (2/3 by 2015)[27] and global health literacy (2010), in addition to decreasing the incident of HIV prevalence amount the young by 25 per cent in the most affected countries by 2005 and globally by 2010.[28] Some of the health-environmental dialogue was fleshed out in the negotiations on chemicals. The parties agreed to a 2020 target date, calling for the 'minimization' of significant adverse effects to human health and the environment.[29] No additional money was directed towards fighting AIDS—simply a reaffirmation of the commitments to provide sufficient resources to support the UN Global Fund to Fight AIDS, Tuberculosis and Malaria, initiated in 2001.

There was some disagreement on strengthening the capacity of health-care systems to deliver basic health services to all, consistent with national laws and cultural and religious values. Some countries called for additional text ensuring conformity with all human rights and fundamental freedoms, despite the fact that the language had already been agreed to without such reference at the preparatory meetings in Bali (PrepCom IV). These countries, led by Canada, proposed introducing language relating to the delivery of basic 'health services' to all, consistent with national laws and cultural and religious values and in conformity with all human rights and fundamental freedoms.[30] Another issue was whether the wording should be health services or health care services, with the latter deemed to be broader therefore encompassing a moral and social dimension. 'Health care services' was chosen, with the human rights conformity language, but there is some scope for flexibility so that the services are to be consistent with national laws and cultural and religious values.[31] However, the US added an interpretative statement that health care services cannot be interpreted in any way as supporting abortion.[32]

(d) Agriculture

The issue that received a great deal of media attention was agricultural subsidies. During the Summit, the World Bank had called on the US and the EU to cut subsidies and open up their markets.[33] However, it appeared to be an issue that would not be

[24] Art 8(a).

[25] Art 56(J)(j), (k). The parties also agreed to mobilise resources to address African adaptation to the adverse impacts of climate change.

[26] Art 47(f).

[27] Art 47(f).

[28] Art 48.

[29] Art 22.

[30] Respecting human rights was also proposed in Art 121 listing the objectives of measures to strengthen sustainable development institutional arrangements but this was ultimately deleted from the final text. In Art 121(e), countries are generally called upon to promote the rule of law strengthen governmental institutions.

[31] Art 47.

[32] The Hole See, Ecuador, and Peru stated that the *Plan of Implementation* activities should be mindful of the inviolability of human life and dignity.

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renegotiated in light of the existing commitments under the *Doha Ministerial Declaration*.[34] The EU expressed serious difficulty with any new wording such as reducing or phasing out environmentally harmful and/or trade-distorting subsidies. At Doha, the WTO members agreed to reductions of all forms of export subsidies, with a view to phasing them out, and substantial reductions in trade-distorting domestic support.[35] This, like most of the provisions in the *Ministerial Declaration*, appeared to be the benchmark for negotiations from which no parties were consensually prepared to move forward at Johannesburg. The final text called for the completion of the Doha Work Programme on subsidies, with a commitment to undergo comprehensive WTO negotiations in this regard. Moreover, market access for goods, such as ones from Africa and LDCs, were to be done within the Doha Ministerial Declaration framework, without prejudging the outcome[36] of the WTO negotiations.[37]

The parties to the *Plan of Implementation* recognised the 'crucial role' that agriculture plays in addressing the needs of a rising global population and its inextricable links to poverty eradication.[38] The need for an integrated approach to increasing food production and enhancing food security and food safety in an environmentally sustainable way was noted.[39] The Millennium Development Goals' target is to halve the number of the world's people suffering from hunger and realising the right to a standing of living adequate for their and their families' health and well-being by 2015.[40] This is to be done consistently with the outcome of the World Food Summit that took place in 2002 and the obligations under Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*.[41] Furtherance of this goal is to be achieved by improving sustainable agricultural productivity and food security.[42]

The parties also agreed to strengthen the implementation of the *UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification (CCD)*,[43] in order to address causes of desertification and land degradation.[44] This might give some impetus to the *CCD* that suffered from lack of implementation and limited political will, aggravated by the absence of any international mechanism to fund its initiatives. A list of actions is proscribed in the *Plan of Implemenation*, including encouraging synergies with the *Climate Change Convention*[45] and the *Convention on Biological* Diversity,[46] as well as a call on the Global Environment Facility to include land degradation as a focal area of its support and make the GEF the financial mechanism of the *CCD*.[47]

[33] It was pointed out that industrialised nations currently spend about $350 billion a year assisting farmers, more than the economic output for all of Africa. World Bank, 'Agricultural Subsidies Must be Cut, Nations Say' (28 Aug 2002) <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,date: 08–28–2002~menuPK:34461~pagePK:34392~piPK:34427~theSitePK:4607,00.html#Story1>.

[34] Art 13–14, <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

[35] Art 13.

[36] The words 'without prejudging the outcome' are also present in Art 13 of the *Doha Ministerial Declaration.*

[37] This also could be done within the framework of preferential agreements. See Art 61(c).

[38] Art 38. [39] Art 38. [40] Art 38(a).

[41] (1967), 6 *ILM* 360. [42] Art 61. [43] (1994) 33 *ILM* 116.

[44] Art 39.

[45] 'United Nations Framework Convention on Climate Change' (1992) 31 *ILM* 851.

[46] 'United Nations Convention on Biological Diversity' (1992) 31 *ILM* 818.

[47] Art 39(c)(f).

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(e) Biodiversity

At the 6th Conference of the Parties to the *Convention on Biological Diversity (CBD)*, the parties agreed to a Strategic Plan that included a 2010 target date for the significant reduction of the current rate of biodiversity loss.[48] This was reiterated at Johannesburg.[49] Ultimately, the *Plan of Implementation* called for the reversal of the current trend in natural resource degradation where possible.[50] No target was attached to this objective, with adopted targets to be done at the national 'and, where appropriate' regional levels.[51]

Under the *CBD*, one of the three objectives is the fair and equitable sharing of benefits of using genetic resources.[52] Coupled with that is a requirement to ensure that access to resources are granted on mutually agreed terms and subject to prior informed consent of the party providing the resources.[53] Although there have been several legislative initiatives governing access and benefit sharing agreements at the national level, in addition to ad hoc private sector-government agreements, these were always prepared in a vacuum without international standards on the types of arrangements.[54] This fuelled the call by some countries for an international binding instrument to promote and safeguard benefit sharing. There was concern about the wording 'binding' in addition to concerns, raised mainly by the United States, about compatibility with the *WTO Agreement on Trade Related Intellectual Property Rights*. It was agreed that the parties would negotiate an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilisation of genetic resources.[55] However, disagreements are already emerging on whether this represents a binding commitment.[56]

Related to the genetic resources issue is the protection afforded to traditional knowledge. Article 8(j) of the *CBD* calls on governments to preserve and maintain indigenous and local community knowledge. This knowledge cannot be used without the approval, involvement and sharing of benefits with the traditional knowledge holders. However, there is an inherent difficulty in protecting this type of knowledge, since westernised intellectual property law regimes are not designed to afford coverage. Applicants would not be successfully in obtaining IPR protections due mainly to an inability to meet intellectual property rights (IPR) criteria such as innovation and the ideas/knowledge not being in the public domain. This issue remains on the agenda of both the *CBD* and the WTO Committee on TRIPS.[57] The *Plan of Implementation* does not clarify the relationship nor facilitate greater protection, even withdrawing from the stronger language stipulated in the *CBD*. There is only recognition that indigenous and local communities are custodians of traditional knowledge and practices and that governments are to provide the effective protection of traditional knowledge consistently with international law.[58] This fails to accommodate the national legislative

[48] Conference of the Parties Decision VI/26. Art 42, *Plan of Implementation.*

[49] Art 42. [50] Art 23. [51] Art 23.

[52] Art 1. [53] Art 15(3), (4)). See also Art 16(3).

[54] The *Bonn Guidelines on Access to Genetic Resources*, adopted at 6th Conference of the Parties (Decision VI/24), is one of the few models that have been proposed, and includes disclosure requirements.

[55] Art 42(o).

[56] The United States claimed in the closing plenary that this is not a legally binding requirement while Brazil has claimed at the WTO Committee on TRIPS that there is now an obligation on CBD parties to negotiate such an agreement. [57] Art 19.

[58] Art 47(h).

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instruments, which provide strong mechanisms for traditional knowledge preservation and benefit sharing, while placing international law at the forefront, essentially consisting of the *TRIPS Agreement.* Moreover, it does not lend any wording to the demand, emerging at both the national and international levels, that patent applicants provide information relating to the traditional knowledge and the access and benefit-sharing arrangements in the application process.

On oceans, the parties were considering whether to include language, inviting parties to ratify or accede to and *fully* implement the *UN Convention on the Law of the Sea (UNCLOS)*.[59] This was necessary since *UNCLOS* is deemed in the *Plan of Implementation* to provide the overall framework for ocean activities.[60] The parties agreed to this clause, with the exception of the word 'fully'. The US requested its deletion perhaps reflecting their concerns with several aspects of *UNCLOS* such as the provisions regarding the seabed authority.[61] In addition, the parties are to promote the implementation of Chapter 17 of *Agenda 21*, providing a programme of action to achieve the sustainable development of oceans, coastal areas and seas.[62]

Fisheries were another topic addressed by the parties. Overall, they were encouraged to apply by 2010 the ecosystem approach.[63] In order to achieve the goal of having sustainable fisheries, certain actions were accepted.[64] Some of the countries were also supporting a target date for maintaining or restoring depleted fish stocks to levels producing maximum sustainable yield.[65] Other countries opposed the targets, insisting that any target should be based on sound science. Ultimately, the parties agreed to maintain or restore depleted fish stocks to maximum sustainable yield levels 'on an urgent basis and where possible not later than 2015'.[66] The parties are also required to implement the 1995 *FAO Code of Conduct for Responsible Fisheries.*[67] Subsidies contributing to illegal unreported and unregulated fishing and to over-capacity are to be eliminated, although complementary efforts were to be directed towards clarifying and improving disciplines on fisheries subsides at the WTO.[68]

Another fisheries related issue was fishing rights of developing coastal States when allocating the share of fishery resources for straddling stocks and highly migratory fish stocks. There was a great deal of confusion on how existing international law, mainly reflected in *UNCLOS*, sets these specific rights, with some countries fearing the introduction of new language on this topic. The US and Japan wanted *UNCLOS* consistent language that gives due consideration to the rights, duties and interest of coastal States

[59] (1992) 21 *ILM* 1261.

[60] Art 29(a).

[61] The Untied States is not a party to *UNCLOS.*

[62] Art 29(b).

[63] This was agreed to in Art 29(d) with specific note of the *Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem* and *Decision 5/6 of Conference of the Parties to the Convention on Biological Diversity*.

[64] The wording in Art 30(e) did at one point include 'equitable fisheries' as part of the chapeau but this was ultimately dropped.

[65] Art 30(a). Maximum sustainable yield is taken from Art 5(b) of the *UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks*, (1995) 34 *ILM* 1542. Interestingly, the parties to the Plan of Implementation agreed to ratify or accede to and effectively implement this Agreement in distinction from the general obligation inviting states to ratify or accede to and implement *UNCLOS.*

[66] Art 30(a).

[67] <http://www.oceanlaw.net/texts/faocode.htm>. This is to be done taking note of the special requirements of developing countries noted in Art 5 of the *Code.*

[68] Art 30(f). See Art 28 of the *Doha Ministerial Declaration.*

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and the special requirements of developing states. South Korea wanted the addition of 'developing' to the words 'coastal states'. The *UNCLOS* language was maintained without the addition of the word 'developing' or any specific reference to the relevant *UNCLOS* article or the *Straddling Stocks Agreement* was deleted.[69] There was only an obligation to be 'mindful of such provisions' in those instruments.

Commitments to oceans management and marine protection were also reiterated in the *Plan of Implementation.* Such commitments included implementing the work programme arising from the *Jakarta Mandate on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity of the Convention on Biological* Diversity,[70] implementing the *RAMSAR Convention*,[71] and implementation of the *Global Programme of Action for the Protection of the Marine Environment from Land-based Activities* and the *Montreal Declaration on the Protection of the Marine Environment from Land-based Activities.*[72] States were also invited to ratify or accede to and implement all relevant instruments of the International Maritime Organisation (IMO) relating to the enhancement of maritime safety and the protection of the marine environment from pollution and environmental damage caused by ships.[73]

II. POVERTY ERADICATION

Poverty eradication is noted in the *Plan of Implementation* as the greatest global challenge. Its integral link to sustainable development formed the underlying premise of the Summit, since poverty eradication sits above environmental protection on most countries' priority lists. From a multilateral perspective, it is quite difficult to require countries to address poverty eradication since it is an area primarily under state sovereign jurisdiction and right to determine their own economic policies.

How to effect such a strategy to eradicate poverty, especially in relation to financial assistance, proved to be a burdensome task for negotiators. A World Solidarity fund was proposed by developing countries. However, the EU opposed the establishment of a new fund, since developed countries still needed to focus on achieving their existing financial ODA commitments.[74] A new fund was established, with a proviso that contributions to it are to be voluntary,[75] along with the reaffirmed commitment to halve by 2015 the number of people living on less than US$1 a day and who suffer from hunger.[76]

III. TRADE AND FINANCE

This area appeared to be the most contentious perhaps because of its overreach into

[69] Art 30 (e).

[70] Art 31(b).

[71] 'Convention on Wetlands of International Importance (Ramsar)' (1972) 11 *ILM* 963. This specifically included the joint work programme with the *Convention on Biological Diversity* and the programme of action called for by the *International Coral Reef Initiative.*

[72] Art 32. The last two instruments have particular importance for the management of municipal wastewater and preventing physical alteration and destruction of habitats and nutrients.

[73] Art 33(a).

[74] The United Nations has imposed a target for developed countries to commit 0.7 per cent of their GDP to ODA. Few countries meet this target.

[75] Art 6(b). In addition, the need to avoid duplication of existing United Nations funds was stressed.

[76] Art 6(a).

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other areas such as overseas development assistance and WTO rules. What must be remembered is that the Johannesburg Summit occurred after two international conferences that ironed out both future plans for development assistance in Monterrey and the new trade negotiating round at Doha. The obligations agreed to at these meetings were simply duplicated in the *Plan of Implementation* with very little to add, suggesting that the delegates had exhausted their negotiating potential. Although these meetings achieved some success in launching new initiatives, they may have consequently deflated the sails energising the Johannesburg Summit and even contributed to Summit fatigue.

The Doha Round calls for the enhancement of mutual supportiveness between trade and environment.[77] Considering that this has been the current parlance to qualify the trade environmental linkage, it was difficult for negotiators to move beyond this definition. However, some delegations were concerned about the hierarchical relationship that was forming in Johannesburg between trade and environment. Australia and the US were proposing text that ensured the WTO compatibility of any trade or trade-related activities. The final wording reinforced the mutually supportive language between trade, environment and development with the promotion of mutual supportiveness between the multilateral trading system and environmental agreements, consistent with sustainable development goals, in support of the WTO work programme.[78]

By agreeing to avoid deviating from agreed-to language in the *Doha Ministerial Declaration*, the parties may have missed an opportunity to operationalise mutual supportiveness. Compounding the missed opportunities was the fact that there was no mention of where these conflicts arise, suggesting an overriding presumption of consistency between trade rules and environmental protection. For instance, there is no new reference to concerns about states taking unilateral measures or using trade related environmental measures, unilaterally, arbitrarily or as disguised restrictions of trade, but just a repetition of the language used in Article XX of the *General Agreement on Tariffs and Trade* and Principle of the *Rio Declaration.*[79] Using extraterritorial and unilateral measures for environmental purposes has been ruled to be compatible with WTO rules by the Appellate Body in the *Shrimp-Turtle II* Dispute,[80] demonstrating mutual supportiveness. Ultimately, the language which had characterised the conflict between trade and environment is not present in the *Plan of Implementation*, perhaps suggesting that a mutually supportive relationship currently exists.

Other provisions on subsidies and liberalisng markets for environmental friendly goods and services did not create any new obligations.[81] The importance of the *WTO Declaration on the TRIPS Agreement and Public Health*, which provided that the *TRIPS Agreement* does not and should not prevent the taking of measures to protect public health,[82] was reaffirmed without providing any clarification whether the *Doha Ministerial Declaration* creates new rights and obligations for WTO members.[83] This goal of

[77] *Doha Ministerial Declaration*, Art 31. [78] Art 92. [79] Art 95.

[80] *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, AB-2001–4, Report of the Appellate Body.

[81] Art 91(b), 93(b). Some NGOs were calling for additional language that would recognise the use of subsidies to correct market failure and 'promote progress towards sustainable development'. See, Centre for International Environmental Law (2002).

[82] The *Declaration* also that the TRIPS Agreement 'be part of the wider national and international action to address health problems' calling for an expeditious solution to problems facing countries that lack manufacturing capacity to develop pharmaceuticals.

[83] Art 94. See F Abbott (2002), 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO'., 5:2 *Journal of Int Eco Law* 469–505.

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mutual supportiveness was also included in the provision dealing with the relationship between the *CBD* and agreements relating to international trade and intellectual property rights albeit 'without prejudging their outcome'.[84]

Overall, it appeared that the WTO concerns were a major preoccupation for negotiators. The Doha Development Round almost usurped the power from the WSSD, reflecting a tacit deference to the WTO as the fora where many of the Johannesburg Summit issues would be addressed. This was somewhat unfair for non-WTO members at Johannesburg as well as states who came to Johannesburg without the intention of negotiating trade rules. Moreover, developing countries that were aiming to get more on agricultural subsidies, additional financial assistance or the creation of an international mechanism to stabilise market prices for coping with the volatility of commodity prices left empty handed in this regard.[85]

Under the *Plan of Implementation,* corporate environmental and social responsibility and accountability is to be enhanced, although countries backed away from committing any international processes towards this goal.[86] This might reflect that lack of international consensus on the issue, perhaps in the aftermath of the failed negotiations on the *Multilateral Agreement on Investment*. Improvement in social and environmental performance was encouraged to be done through voluntary initiatives such as codes of conduct, environment management systems, certification and public reporting.[87] The was also text that called for the active promotion of corporate responsibility and accountability, based on the Rio Principles.[88]

IV. ENVIRONMENTAL PRINCIPLES

The *Rio Declaration* affirmed two principles that have become mainstays in subsequent international instruments. The Common But Differentiated Responsibility principle[89] and the Precautionary Principle[90] have been accepted as principles arguably reaching the status of customary international law. However, the Johannesburg Summit saw attempts to reduce the effectiveness of these principles by some countries, rendering it of little utility for twenty-first-century environmental governance.

[84] Art 42(r). WTO members agreed to examine in the TRIPS Council, pursuant to Art 19 of the *Doha Ministerial Declaration,* the relationship between the two agreements.

[85] Art 89 called for the parties to address the instability of commodity prices and declining terms of trade but evened this by committing themselves to facilitate the capacity building of commodity dependent countries to diversify their exports through financial and technical assistance including international assistance for economic diversification.

[86] Art 17. Several NGOs including Friends of the Earth and Oxfam were urging the delegates to establish some form of multilateral instrument on the topic.

[87] Art 17(a).

[88] Art 45ter. See also Art 122 (f). For instance, Principle 13 calls on states to develop national law regarding liability and compensation for the victims of pollution and other environmental damage

[89] Principle 7, *Declaration of the UN Conference on Environment and Development, (Rio Declaration)* UN Doc A/CONF.151/26/Rev 1.

[90] Ibid, Principle 15. Note that Principle 15 refers to the precautionary approach and not the precautionary principle, which appears in several multilateral environmental agreements (Protocol on Biosafety (Cartagena), (2000) 39 *ILM* 1027, Convention on Persistent Organic Pollutants (Stockholm), (2001) 40 *ILM* 532 as well as the WTO Agreement on Sanitary and Phytosanitary Standards. For additional thoughts on the meaning of the precautionary principle as reflected in the SPS Agreement, see the report of the WTO Appellate Body in EC Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R, Part IV, para 123.

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The existence of common but differentiated responsibilities came into question during the discussions. The United States has consistently advocated its limited effect, since US action is always more burdensome than developing country commitments. Their position was that the principle does not infer any obligations under international law. This has been one of the bases of the US opposition to ratifying the *Kyoto Protocol*. Developing countries were looking to reaffirm the principle but also enlarge its ambit to be applicable to the context of finance.

The *Plan of Implementation* mentions that the signatories are to take into account the Rio Principles, 'including in particular the principle of common but differentiated responsibilities', quoting Rio Principle 7 in its entirety.[91] There are several references to the principle throughout the *Plan of Implementation*, including undertaking actions and enhancing international cooperation,[92] commitments on energy for sustainable development,[93] initiatives to accelerate the shift towards sustainable consumption and production with developed countries taking the lead[94] and efforts to reduce transboundary air pollution, acid deposition and ozone depletion.[95] Article 75, covering the means of implementation, requires the parties to take full account of the principle. The prescribed means of implementation would include significant increases in the flow of financial resources elaborated in the Monterrey Consensus, including new and additional financial resources as well as supporting the implementation of policies and programmes to improve trade opportunities, and access to and transfer of environmental sound technologies. Although not specifically mentioned, it is arguable that considering the restatement of the common but differentiated principle in the same provision concerning requisite action that can be effected through favourable trade measures and market access opportunities, this might forge a link between the common but differentiated responsibility and the special and differential treatment stipulated in the WTO Uruguay Round and Doha Round instruments.

The Precautionary Principle or Approach has produced a great deal of misunderstanding in the international community with countries disagreeing on the meaning and its application. Some countries are concerned that by taking precautionary measures in the absence of scientific basis for such decisions, it can lead to disguised forms of trade protectionism. Alternatively, some states claim that the unknown risks associated with non-action are too high to warrant waiting until a concrete level of scientific certainty is reached.

The final text of the *Plan of Implementation* refers to the 'precautionary approach', therefore indicating a withdrawal from the language in recent MEAs.[96] Although the differences between a principle and an approach may not be decipherable from a policy perspective, there are wide disparities concerning its legal effect. A principle can be likened to the general principles or even customary international law, being sources of international law pursuant to Article 38 of the *Statue of the International Court of Justice*.[97] An approach does not encapsulate the same meaning for the

[91] Art 75.

[92] Art 2 [93] Art 19. [94] Art 13.

[95] Art 37. The proposed addition of the principle in the paragraph dealing with institutional framework for sustainable development was deleted. For ozone depletion, the parties agreed to facilitate implementation of the Montreal Protocol by ensuring adequate replenishment of its fund by 2003/2005 as well improve access by developing countries to alternatives to ODS by 2010. (Art 37(b)(d)).

[96] See above n 90. [97] (1945) 59 Stat 1055, TS No 993.

https://doi.org/10.1093/iclq/52.1.256 Published online by Cambridge University Press

purpose of interpreting international law, rendering it a consideration for national decision makers to use but not to bind regulatory action.

During the negotiations, the EU, Norway, and Switzerland, while accepting the precautionary approach language, requested that there be a reference to other international agreements to reflect the recent MEAs that included the precautionary principle. Ultimately, this reference was deleted, with the parties agreeing to reaffirm the precautionary approach as set out in Principle 15 of the *Rio Declaration*.[98] Coupled with the reaffirmation is that the governments are to promote the improvement of science-based decision-making.[99] This coupling is not present in Principle 15, suggesting that the precautionary approach lacks independent status and must be read with the aspiration to improve science-based decision-making.

Another area of contention, mainly between the EU and the US, was whether precaution is solely applicable to the protection of the environment or extends more widely, encompassing areas of decision making such as health. Ultimately, the latter assertion did not make it into the final text. Its only specific application to an environmental sector was in the sound management of chemicals although its inclusion coexists with the parties' use of 'transparent science-based risk assessment procedures and science-based risk management procedures'.[100]

V. CONCLUSION

In order to assess the outcome of WSSD, one has to be mindful of its mandate to identify to implement the Rio Agreements, accomplishments and areas where more effort and action-oriented decision is needed, as well as new challenges and opportunities.[101] What evolved was something different, with less focus on reviewing previous activities and more attention directed towards how governments will address the sustainable development challenges of the future. This created a schism with the past where the international community was quite enthusiastic to take on global environmental commitments and agree to lofty principles, without bearing in mind what the obligations might entail. Aware of the difficulties in implementation and the general lack of goodwill between parties as a result of the aggregate global degradation, the parties adopted a more realistic approach on what can be accomplished, including reviewing decisions that were made at Rio and at other multilateral environmental forums.

The Summit was intended to ensure balance among economic, social and environmental concerns and reinvigorate the global commitment to sustainable development. To do so, the parties needed to address some of the problems that have worsened in the vacuum left by limited international action and implementation. The challenges of poverty eradication, basic health and water services, as well as land degradation, needed to be placed on the same tier as concerns for global environmental problems about biological diversity, climate change and ozone layer protection.

As a result, perhaps a more proper evaluation must appreciate the novel context in which these negotiations took place. No longer a defined environmental issue, the concept of sustainable development was enlarged to include broader concerns about poverty, health and human rights. However, these linkages are still far from complete as is evidenced by government's reluctance to apply the precautionary approach to

[98] Art 103(f). [99] Ibid. [100] Art 22.
[101] UNCED (A/RES/55/199).

https://doi.org/10.1093/iclq/52.1.256 Published online by Cambridge University Press

health or proclaim an international human right to a clean environment.[102] Globalisation itself, an inherently difficult idea to define, was one of the specific issues covered and therefore moderate success can be seen in the attempt to provide some formalisation when approaching the concept. Moreover, the negotiations demonstrated that there has been a 'shift from a uni-dimensional (sic) income focus on poverty to a multidimensional approach that embraces a vision of "sustainable livelihoods" '.[103] There are now new concerns such as rule of law[104] and good governance,[105] which take sustainable development away from the realm of managing the environment and more towards improving our ability to govern ourselves.

The business community, being one of the major groups listed in *Agenda 21*, made a strong presence at the Summit. They engaged with other major stakeholders, even establishing links independent of the governments. In order to address the difficulties surrounding the implementation of *Agenda 21*, the Rio Conventions and other international instruments relating to sustainable development, the Preparatory Committee (PrepCom II) for the WSSD developed proposals for Partnerships/Initiatives to Strengthen the Implementation of Agenda 21, otherwise known as TYPE II Outcomes. These are partnerships between governments and the major groups identified in *Agenda 21*,[106] which are seen as being integral to meeting sustainable development objectives. At the Johannesburg Summit, over 220 partnerships that met the Guiding Principles set by the UN, were announced. If the Summit can be seen as producing a positive result, it will be substantiated by how far these new partnerships take the momentum from the Summit forward.

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[102] The parties were only required to give consideration to the possible relationship between environment and human rights, including the right to development. See Art 152.

[103] Earth Negotiations Bulletin, Summary of the World Summit on Sustainable Development: 26 Aug–4 Sept 2002.

[104] The parties were called upon to undertake measures to promote the rule of law and strengthen governmental institutions. See Art 121(d).

[105] Art 123 states that good governance at the international level is fundamental for achieving sustainable development. There are calls in Art 124 for a new UN Convention on corruption that would include provisions mandating the repatriation of funds illicitly acquired to countries of origin.

[106] Section 2. These groups are: women; children and youth; indigenous people; NGOs; local authorities; workers and trade unions; business and industry; scientists and technologists; and farmers.

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https://doi.org/10.1093/iclq/52.1.256 Published online by Cambridge University Press