

INTERNATIONAL LEGAL INSTRUMENTS AND MECHANISMS

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Summary

Since UNCED 1992 there has been explicit recognition among policy makers world wide that environmental and developmental issues are inextricably linked and must be addressed within an integrated legal framework.

The international environmental legal regime consists of a broad array of instruments at the regional, international and global level, ranging from non-legally binding “soft-law” documents to documents, which commit States to enforceable obligations. Soft law documents have become particularly prominent in the last decade and, though not legally binding, are powerful and wide-ranging and may have substantial influence both

on the policy of States and the operations of international assistance and private aid agencies.

Africa's many international and regional environmental documents contain an array of obligations and commitments but frequently lack adequate institutional and enforcement arrangements. Their effectiveness depends crucially on financial resources. International documents, such as the Rio Declaration and the Convention on Biological Diversity, recognize need to channel financial resources and technology from the developed world to the developing world. However, few explicit financial commitments are involved and donor countries are increasingly reluctant to expand their financial commitments in developing countries. The transfer of environmentally sound technology to developing countries proceeds extremely slowly.

These issues are exacerbated by the nature of environmental problems in Africa. Problems such as desertification and loss of bio-diversity, both compound and are compounded by socio-economic problems such as poverty, rising population pressure, health, migration and displacement of persons. Holistic, integrated and long-term solutions are required. However, securing adequate funding is problematic as international aid is often tied to high-tech, large-scale projects offering quick financial return. While the legal framework for sustainable development in Africa today holds great promise, economic considerations will be crucial in determining the translation of ideas into practice.

1. Introduction

This article examines some of the sources of international legal obligations in the field of the environment and sustainable development with particular relevance to the African continent. International law normally comprises the body of rules that are legally binding on states in their interaction with each other. These rules derive their authority from treaties, international custom, and general principles of law and subsidiary sources. Beyond these sources of "hard law," which establish legally binding obligations, there are also so-called rules of "soft law," which are not binding per se, but which in the field of international law on environment and sustainable development, have played an important role. First, by pointing to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behavior, and by "codifying" or possibly reflecting rules of customary law. This chapter examines some of the principal treaties of particular relevance to the promotion of sustainable development in African countries. It provides an overview of their main provisions and in each case gives a brief analysis of their effectiveness. Finally the chapter concludes with a look at future directions in implementation of the elements needed for the continuing achievement of sustainable development in Africa.

1.1 Sustainable Development in Africa

Sustainable development is broadly definable as economic development that meets the needs of the present generation without compromising the ability of the future generation to meet their own needs. Since the United Nations Conference on Environment and Development (UNCED) in 1992 at Rio de Janeiro, there has been explicit recognition among policy-makers world wide that environmental and

developmental issues are inextricably linked and must be addressed within an integrated legal framework. The international environmental legal regime, which governs sustainable development in Africa today, consists of a broad array of instruments, which may be global, pan-African or regional in scope. These range from “soft-law” documents, which do not entail binding legal obligations, but may be statements of guiding principles or “aspirational” statements, to documents which commit States to specific enforceable obligations. Here the most important soft law documents are introduced and discussed, followed by major international and regional documents in the areas of bio-diversity and conservation, resource use, pollution and emissions, hazardous materials and nuclear and chemical weapons.

1.2 The Soft Law Regime

Soft law documents have become particularly prominent over the past decade in the international environmental arena, notably at UNCED. Here the Rio de Janeiro Declaration on Environment and Development (the “Rio Declaration”) and Agenda 21 were adopted (see *Rio Declaration on Environment and Development*). While not legally binding, these documents are powerful and wide-ranging ideological statements that may have substantial influence on the policy of States, and may be influential in interpretation or implementation of binding legal documents. In addition, they may influence the way in which international assistance agencies, such as the various UN development and development agencies (eg. FAO, IFAD, and UNDP) and private aid agencies operate within countries which are signatories to these agreements.

1.2.1 The Rio Declaration

The Rio Declaration represents an extension of the Stockholm Declaration formulated at the 1972 United Nations Conference on the Human Environment, and is a statement of 29 guiding principles for the achievement of sustainable development. In the Preamble the Declaration recognizes the “integral and interdependent nature” of the Earth, and calls for a new and equitable global partnership of co-operation among States, key sectors of society and people. This co-operation has certain characteristics. One of the most interesting developments of the Rio Declaration is Principle 7, which establishes the principle of “common but differentiated responsibilities” whereby developed countries acknowledge the stress their societies place on the global environment and the superior financial resources they command. Implicit in this principle is the idea of a global partnership whereby the financial resources of developed countries are mobilized for the sustainable development of developing countries, and in Principle 6 priority is specifically accorded to the special situation and needs of developing countries. Co-operation between sectors of society at different levels is emphasized in Principle 10, which calls for the participation of all concerned citizens at the relevant levels, efforts toward increasing public awareness, and participation in decision-making processes. The importance of the participation of women, youth, and indigenous people and other local communities is specifically recognized (Principles 20, 21 and 22).

Humans are placed firmly at the center of concerns for sustainable development (Principle 1), and the principle of state sovereignty is enshrined in Principle 2. The “precautionary approach” is adopted, whereby full scientific certainty should not be

used to postpone “cost-effective” measures to prevent environmental degradation (Principle 15). The importance of integrating environmental concerns into the development process, rather than being considered in isolation from it, is emphasized (Principle 4). Other important aspects of the Rio Declaration include highlighting the importance of eradicating poverty (Principle 5), equitably meeting the needs both of current and future generations (Principle 3), and trade and economic measures to further sustainable development (Principles 12 and 16).

1.2.2 Agenda 21

In Agenda 21, also adopted at UNCED, these statements of principle are embodied in a global action plan for sustainable development. Agenda 21 aims to provide guidelines for policy makers and decision makers on a very broad range of environmental and developmental issues from addressing poverty, to combating desertification (see *Combating Desertification and Drought*), to increasing the participation of women in sustainable development. Agenda 21 lays out background information, aims, objectives, activities and means of implementation in five areas which are central to sustainable development: social and economic dimensions, the conservation and management of resources for development, strengthening the role of major groups and means of implementation. Agenda 21 covers an extraordinarily broad range of topics including pollution, climate change, demographic dynamics, energy and transport issues, land use practices, health, employment, the promotion of environmental research and the impact of war.

Throughout Agenda 21, major themes include the importance of “bottom-up,” rather than “top-down,” development, in which the needs and concerns of local communities influence development priorities, the participation of many sectors of the community including women, youth and indigenous people, and the necessity for the integration of social, economic, and environmental planning.

Agenda 21 has been highly influential in some areas. Since 1992 many countries have furthered the integration of environmental planning by establishing national bodies to co-ordinate and integrate sustainable development. Agenda 21 has been successful in raising public awareness of sustainable development, and provided a framework for local communities to develop and implement “local Agenda 21s” and other sustainable development programs. On a global scale, however, effective implementation of both the Rio Declaration and Agenda 21 is critically dependent on the availability of adequate and predictable financial resources to developing countries, the transfer of environmentally sound technologies, and technical assistance and capacity-building in developing countries. In this area progress is slow. Debt, economic stagnation, and poor capital resources burden developing countries, and donor countries show an increasing unwillingness to provide financial resources for development. Despite the principle of “common but differentiated responsibilities,” for instance, subsequent years have shown no increase of official aid to developing countries.

2. Bio-diversity and Conservation

2.1 Convention on Biological Diversity

At UNCED the Convention on Biological Diversity (the CBD) was opened for signature. Unlike the Rio Declaration, which places humans firmly at the center of its concerns (see *The Rio Declaration on Environment and Development*), the Preamble to the CBD begins with a recognition of the “intrinsic value of biological diversity,” defined in the convention as “the variability among living organisms from all sources...and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems”.

The main objective of the CBD is “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of genetic resources.” Signatories have two general obligations: to develop national strategies, plans and programs for bio-diversity conservation (Art. 6(a)), and to integrate conservation and sustainable use of bio-diversity into relevant plans and policies (Art. 6(b)). Specific obligations fall into several major areas.

2.1.1 Identification and Monitoring

The CBD requires parties to identify components of biological diversity, which are important for their conservation and sustainable use (Art. 7(a)): these may be ecosystems and habitats, species or communities, or genomes and genes (Annex 1). These components and the effects of any activities likely to have significant adverse impacts on their conservation or sustainable use must be monitored (Art. 7(b)(c)).

2.1.2 In-Situ and Ex-Situ Conservation

The CBD emphasizes the primary objective of in-situ conservation (Art. 8,9), i.e. conservation within ecosystems and natural habitats (Art. 2). To this end Parties, “as far as possible and as appropriate,” must establish a system of protected areas and develop guidelines for the selection, establishment and management of these areas (Art. 8(a)(b)). Biological resources both within and outside these areas should be managed for conservation and sustainable use (Art. 8(c) and environmentally sound and sustainable development should be promoted in areas adjacent to protected areas. Parties must address rehabilitation of degraded ecosystems and recovery of threatened species (Art. 8(f)), the regulation of the use and release of living modified organisms resulting from biotechnology (Art. 8(g)), control of alien species (Art. 8(h)), legislative requirements (Art. 8(k)), and the regulation of activities which have or are likely to have a significant adverse impact on bio-diversity (Art. 8(l)). In addition and importantly, Parties must respect, preserve and maintain the knowledge, innovations and practices of indigenous and traditional communities relevant for conservation, promote their wider application with the involvement of the traditional holders, and encourage equitable sharing of benefits from their utilization (Art. 8(j)).

Ex-situ conservation is to be carried out primarily for the purpose of complementing in-situ measures (Art. 9) and Parties’ obligations include: establishment of facilities for ex-situ conservation, measures for the recovery and rehabilitation of threatened species and

for their reintroduction (9(c)), and management of collection of biological resources for ex-situ conservation (Art. 9(d)).

2.1.3 Sustainable Use

In addition to conservation measures, the CBD contains provisions promoting the sustainable use of bio-diversity (Art. 10), which is of particular importance to developing countries reliant for basic needs on biological resources. Parties agree to integrate into their decision-making consideration of the conservation and sustainable use of biological resources (Art. 10(a)), protect and encourage customary use of biological resources when compatible with conservation or sustainable use requirements (Art. 10(c)), and support local populations in remedying damage in areas of reduced bio-diversity (Art. 10(d)).

2.1.4 Environmental Impact Assessment

Parties to the CBD agree to introduce procedures to assess the environmental impact of projects (Art. 14 (1)(a)) and programs and policies likely to have significant adverse effects on bio-diversity (Art. 14 (1)(b)). Where the actions of a State may adversely impact on the biological diversity of other States, Parties must promote mutual notification and consultation by encouraging bilateral or multilateral agreements (Art. 14 (1)(c)) and must provide immediate warning to other states of any imminent damage (Art. 14 (1)(d)). Parties must promote the formation of plans for emergency responses to incidents, which present a grave imminent danger to biological diversity, and co-operation between States in this is encouraged (Art. 14 (1)(e)).

2.1.5 Access to Genetic Resources

A major concern of developing countries is to have control over access of developed country corporations to genetic resources within their territories for biotechnological purposes. Most biological resources are located in developing countries, while the technology to exploit them for commercial purposes is in the hands of developed countries. While the CBD calls for Parties to facilitate access to genetic resources for the purpose of environmentally sound uses (Art. 15 (2)), the authority to allow access to genetic resources rests with national governments. Access must be by prior informed consent (Art. 15(5)) and on mutually agreed terms (Art. 15 (4)).

2.1.6 Technology Transfer and handling of Biotechnology

Parties agree to facilitate access to and the transfer of technologies (including biotechnologies) which are relevant to promoting bio-diversity conservation and sustainable use, or that make use of genetic resources without causing significant damage to the environment (Art. 16 (1)). Transfer to developing countries must be on fair and most favorable terms, including concessional and preferential terms (Art. 16 (2)). Developing countries, which provide genetic resources, are to be provided access to technology, which makes use of these resources (Art. 16 (3)). Parties must take legislative, administrative or policy measures so that the private sector facilitates this access to, joint development of or transfer of technology for the benefit of both the

private sector and governmental institutions of developing countries (Art. 16 (4)). While technology transfer and access provisions include technology which is subject to patents and intellectual property rights (Art. 16(3)), the transfer must recognize and protect these rights (Art. 16 (2)), and Parties agree to co-operate in ensuring that intellectual property rights do not run counter to the objectives of the CBD (Art. 16 (5)).

Parties agree to take appropriate action to provide for the participation of countries that provide genetic resources, particularly developing countries, in biotechnological research activities using these resources and in the results and benefits arising (Art. 19 (1)(2)). With respect to living modified organisms resulting from biotechnology, Parties agree to consider the need for a protocol regarding safe transfer and handling. They also agree, by complying themselves or requiring private persons under their jurisdiction to comply, to provide to other Parties information regarding safety regulations required by that Party for handling of such organisms, as well as any available information regarding potential adverse impact of organisms concerned to a Party into which organisms are to be introduced.

2.1.7 Financial Resources and Mechanisms

The CBD contains an explicit recognition that the ability of developing countries to implement their agreed commitments will depend on the extent to which developed countries meet their commitments with respect to both technology transfer and the provision of financial resources (Art. 20 (4)). The developed countries agree to provide “new and additional” financial resources to enable developing countries to meet the full incremental costs of implementing their obligations under the Convention (Art. 20 (2)) and to benefit from its provisions. The official financial mechanism of the CBD established as an interim mechanism in the Convention (Art. 39) is the Global Environment Facility.

2.1.8 Other Provisions

The CBD contains provisions regarding the adoption of incentive measures for conservation and sustainable use of bio-diversity (Art. 11), research and training (Art. 12), and the promotion of public education and awareness of the importance of, and measures required for the conservation of biological diversity (Art. 13). In addition, it contains measures to encourage co-operation in sharing information and data relevant to the conservation and sustainable use of bio-diversity (Art. 17), and promote technical and scientific co-operation (Art. 18), including the establishment of a clearing-house mechanism to facilitate this (Art. 18 (3)).

2.1.9 Institutional Provisions

The CBD provides for a comprehensive institutional structure, comprising a Conference of the Parties (Art. 23), to which Parties must submit reports on implementation (Art. 26), a permanent Secretariat (Art. 24), and a subsidiary body for the provision of scientific, technical and technological advice (Art. 25). The CBD also provides for the formation of protocols to be adopted by the Conference of the Parties (Art. 28), and the

formation of annexes on procedural, scientific, technical and administrative matters (Art. 30).

While a legally binding document, the CBD contains few specific obligations, and most obligations are tempered by language restricting their force. It thus represents largely a “framework” convention, which will rely for its effectiveness on the formation of subsequent protocols and agreements, which will serve to translate its principles into specific commitments. It suffers from some ambiguity and confusing language, notably regarding intellectual property rights in biotechnology from genetic resources. In addition, its implementation will rely crucially on the extent of reliable funding which is mobilized to meet its goals.

2.2 The African Convention

Conservation in Africa (see *Planning and Management of Land Resources in Africa*) is governed by the African Convention on the Conservation of Nature and Natural Resources (the “African Convention”). The African Convention was established in 1968 by post-colonial African states, replacing the earlier London Convention (London, 1933) on conservation, which had been formulated and signed by colonial governments. It sets out a very broad range of obligations, although it suffers from a weak administrative structure and a lack of a reporting mechanism to facilitate review of enforcement of its provisions.

The major objective of the Convention is that parties undertake to adopt measures necessary to ensure the conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with regard to the best interests of the people (Art. II). Specifically, states must establish land use plans based on scientific investigation and classification of land-use capability (Art. IV (a)), improve soil conservation and control erosion (Art. IV (b)), adopt scientifically based conservation, utilization and management plans for forests and rangelands (Art. VI (1)(a)), set aside areas for forest reserves and carry out afforestation where necessary (Art. VI (1)(c)). States undertake to conserve plant species or communities, which are threatened, or of special scientific or aesthetic value by ensuring that they are included in conservation areas (Art. VI (2)), and ensure conservation, wise use and development of fauna and their environment, through scientifically-based plans for management of wildlife and aquatic habitats (Art. VII (1)). States must adopt legislation on hunting, capture and fishing, regulating the issue of permits and prohibiting unauthorized methods (Art. VII (2)).

The second objective of the Convention is to protect endangered species and their habitats (Art. VIII (1)). To this end it establishes annexes of endangered species, which are accorded protection from hunting, killing, capture or collection without authorization from relevant authorities (Art. VIII (1)). Parties are required to maintain existing conservation areas and establish others necessary to ensure conservation of listed and other species (Art. X (1)), and to manage wildlife outside of protected areas for optimum sustained yield (Art. VII (1)(a)). As much of Africa consists of tribal chieftaincies involving customary land rights, the Convention obliges parties to reconcile these interests with its objectives (Art. XI). Parties are encouraged to promote research into conservation and resource management (Art. XII), public education on the

value of conservation and rational resource utilization (Art. XIII), and must establish a single agency or a coordinating machinery to deal with matters covered by the Convention. Importantly, the Convention emphasizes that conservation and resource management should be treated as an integral part of development plans, giving full consideration to ecological, social and economic factors (Art. XIV). While the Convention contains provisions on the regulation of trade in wildlife, these are largely superseded by CITES (discussed below).

The lack of institutional, reporting and funding arrangements in the African Convention has made translation of its principles into action marginal at best. In general, few coherent national, sub-regional or regional instruments exist which integrate environmental concerns into economic and developmental planning. However, it has had more success in promoting the setting up of protected areas, influencing the formation of large wildlife reserves in many African countries. This focus on protected areas, however, may be limiting. The African Convention makes no provision for the recognition of rights of traditional landowners to use the resources of land, thus removing a potentially powerful incentive for local communities to conserve and sustainably manage species.

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