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## Equity and the 1992 Rio Earth Summit

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## FOREWORD

### EQUITY AND THE 1992 RIO EARTH SUMMIT

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#### INTRODUCTION

The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro, Brazil, was the largest gathering ever of world leaders, dealing with possibly the most complex global challenge of the late Twentieth Century: how to achieve decent living conditions for all members of the human species without destroying the natural basis for life on earth. Complicating matters further were the parallel mega-conferences across town, which included the largest gathering of environmentalists in history ("the Global Forum"), and a variety of scientific and social movement conventions as well. All of this was taking place in a country and city facing staggering, yet ever worsening, environmental and economic crises.

Highly-educated environmentalists from northern industrialized countries debated the impacts of global warming as tens of thousands of *cariocas* (as Rio's residents are known) marched through the city, chanting "what is the use of all this ecology if our people are oppressed and massacred,"<sup>1</sup> while diplomats sped by in air-conditioned limousines under the watchful eyes of machine gun-toting soldiers guarding the major transportation arteries.

To appreciate fully what went on in Rio during those two weeks would require a phenomenal understanding of recent world history, mastery of a thousand pages of international agreements, expertise in environmental, economic, and legal issues and the ability to be in at least ten places at once. Without such omniscience, suffice it to suggest that the clue to understanding these multifarious happenings rests precisely in the tremendous clash of perspectives that occurred at the Earth Summit of 1992.

One of the key goals of "sustainability," the Summit's underlying theme linking environment with development, is reconciling the conflicting demands voiced by the thousands of envoys who came to Rio from around the world. While concerns about international economic efficiency in the face of devastating environmental destruction appeared to

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1. Benjamin A. Goldman, *Alternative Summit Echoes U.N. Conference's Problems*, *IN THESE TIMES*, June 24-July 7, 1992, at 10.

drive much of the debate at the Summit, the concept of sustainable development is fundamentally a matter of distributive justice. The key issue raised by the Summit's occurrence, even if never mentioned as an explicit agenda item, is equity

### I. DIMENSIONS OF ENVIRONMENTAL EQUITY

According to the United Nations World Commission on Environment and Development (WCED), "sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfill their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes."<sup>2</sup> The principal stumbling block at the Summit, yet key to achieving this goal, is the need for agreement on various shifts between and within nations of decision-making authority over financial, technical, and natural resources. Among the many issues specifically addressed in this regard, but ultimately left unresolved, were the needs to transfer financial aid from the North to the South, to reallocate special kinds of property rights, and to grant standing to representatives of civil and traditional societies.

At the very core of the concept of sustainable development, however, is a clash of perspectives that is even less reconcilable than the significant differences of opinion voiced in Rio. The notion of sustainability tries to incorporate the views of individuals who did not attend the Earth Summit and who can never attend such a conference. According to the WCED, "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>3</sup> In other words, so many people were brought to Brazil in the summer of 1992 by the fundamental belief that our generation as a whole has a duty to respect the preferences of future generations, which are inherently unknown to us and will likely be as varied.

Reconciling the clash of perspectives at the Earth Summit is thus not only a matter of equitably distributing life-sustaining resources and opportunities across the rather exhaustive spectrum of social groups and geographic areas represented at the various events in Rio. It is also a matter of equitably distributing such resources and opportunities across other generations and species, members of which were incapable of participating in Summit negotiations and yet are the first to face extinction if the policies of those in attendance do not work.

The intent of this Article is not to update the implications of the Earth Summit for international environmental law, but rather to indicate how the events at the Earth Summit challenge all of us, whether attorneys or not, to think about the related meanings of "sustainability" and "environmental justice."

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2. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 8 (Oxford University Press 1987).

3. *Id.* at 43.

## II. PROCEDURAL EQUITY

There are two major components to the notion of environmental justice: procedural and impact equity. The procedural component involves the distribution of influence over policy formation and implementation. The impact component involves the distribution of positive and negative effects of public policies. Clearly, these equity components are interrelated. If certain parties lack standing in the policy-making process, for example, then they are more likely to suffer disproportionately from adverse policy impacts and are less likely to benefit from positive impacts.

The decision rules at the official UNCED negotiations would appear on the surface to be remarkably equitable. Any nation could suggest text for discussion, which was then bracketed if any other nation objected. Agreement on bracketed text was sought during a series of four preparatory committee meetings, with the more complex issues left to be decided at Rio. This exhausting procedure resulted in agreement among 178 nations on the text of four documents, achieved by consensus rather than vote.<sup>4</sup> The documents include: "Agenda 21,"<sup>5</sup> a 900-page agenda covering dozens of topics relevant to sustainable development; the "Rio Declaration,"<sup>6</sup> a shorter set of principles and shared aspirations; and the Climate Change and Biodiversity Conventions,<sup>7</sup> the only legally binding agreements to come out of Rio, which must be signed by participating nations.

Yet there is a flip side to this apparent equipollence. First, the arduous process of compromise across so many competing viewpoints resulted in a marked lack of concreteness, yielding what some observers have called mere "zeppelins of moral rhetoric."<sup>8</sup> The lack of specificity and the absence even of the force of law for the vast majority of the agreed upon language precludes most opportunities for realistic enforcement.

Second, while the procedures for reaching consensus may seem fair, a key question remains: whose interests were represented at the bargaining table? The legitimacy of governments - both North and South - is a paramount issue. Why should a United States President elected by just 25% of his country's eligible voters be able to determine so much of the final outcome for the world? The presidential host of the Summit, Brazil's

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4. Nicholas C. Yost, *Rio and the Road Beyond*, 11 A.B.A. ENVTL. LAW, Summer 1992, at 1-6.

5. *Adoption of Agreements on Environment and Development: Agenda 21*, U.N. Conference on Environment and Development, 4th Sess., Agenda Item 9, U.N. Doc. A/CONF.151/4 (1992).

6. *Adoption of Agreements on Environment and Development: Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, 4th Sess., Agenda Item 9, U.N. Doc. A/CONF.151/5 (1992).

7. Department of Public Information, United Nations Conference on Environment and Development, CONVENTION ON CLIMATE CHANGE; CONVENTION ON BIOLOGICAL DIVERSITY (June 1992) (on file with the *Fordham Environmental Law Report*).

8. Susanna Hecht & Alexander Cockburn, *Rhetoric and Reality in Rio*, THE NATION, June 22, 1992, at 850.

Fernando Collor de Mello, was under imminent threat of impeachment for alleged corruption as these worldly proceedings ensued. Do the delegates of these and other administrations fairly represent the viewpoints of the majority of the world's citizens? The very sovereignty of governments in developing countries falls into question amid collapsing economies, skyrocketing debt, and the harsh austerity measures imposed by the International Monetary Fund. The rift between civil society and governmental decision-making is exemplified no better than by the simultaneous official UNCED proceedings and the massive alternative Summit called the "Global Forum," which brought tens of thousands of non-governmental organization (NGO) representatives to Rio, and which produced a very different, though equally voluminous, set of citizen treaties.

Altogether these questions of enforceability, legitimacy, and sovereignty raise the preeminent, yet largely unmentioned, issue of responsibility. Which institutions, individuals, and modes of activity are primarily responsible for the unsustainability of existing development patterns? A quick read of the United Nations resolutions suggests that rampant protectionism and overpopulation are among the principal culprits while the alternative citizen treaties blame reckless transnational corporations, overconsumption, and the military-industrial complex. These contrasting perspectives obviously imply radically different policy responses. The degree to which the policies of governments involved in the official negotiations are themselves responsible for unsustainable development (or are influenced by responsible parties in the public and private sectors) brings the entire Summit process into question, regardless of whether the decision rules are consensual or authoritarian. If the same individuals who have benefitted from unsustainable development also decide how to define and implement sustainable development, then clearly a conflict-of-interest issue arises. Is it just for a group of individuals that directly benefit from an activity deemed to be wrongful to judge whether it should proceed or how it should be altered? Would this be allowed, for example, in the American court system? The problem is exceedingly complex. Whose hands are clean or at least sufficiently cleaner than others to enable them to make relatively impartial decisions? How would such individuals be empowered to make decisions? And if they have not participated in devising and implementing existing development decisions, will they have the expertise needed to decide on sustainable options?

Without clear delineations of responsibility in the policy-making process, it is impossible either to appoint or elect decision makers that are appropriate to guide sustainable development or to allocate equitably the rights and obligations that should follow. Resolution of these issues is fundamental to the proposed establishment of a new international body called the Sustainable Development Commission. This high-level watchdog agency, modeled on the United Nations Human Rights Commission,

will reportedly rely on evidence gathered by private environmental groups to "shame" countries into respecting the pledges they made at Rio.<sup>9</sup> Yet the new commission will not be empowered to develop new policies or to impose fines or other sanctions against nations that violate the existing agreements.<sup>10</sup> Moreover, all of the issues raised here regarding legitimacy and responsibility apply to influential environmental groups, some of which have funding sources derived from existing unsustainable practices.

### III. IMPACT EQUITY

The implications of these procedural issues for the equitability of the resulting policy impacts are apparent in all of the documents prepared in Rio. Agenda 21's reliance on trade liberalization as the key to sustainable development not only sounds like hollow rhetoric in the face of economic and political realities around the world, it also reflects the interests of the most influential parties involved in the consensus represented by the official agreements. The lack of attention given to allocating responsibility is nowhere clearer than in the area of atmospheric pollution. The 1987 Montreal Protocol limiting use of chlorofluorocarbons (CFC's) that deplete the ozone layer, a major precursor to the UNCED negotiations, for example, asks southern countries to make the same reduction commitments as northern countries that currently account for nearly 90% of CFC use.<sup>11</sup>

The United Nations' frequently cited chain of causality, which blames the worst environmental problems on poverty, has led to a single-minded emphasis on population control in poor countries, or in the vague words of the Rio Declaration, the promotion of "appropriate demographic policies."<sup>12</sup> Unlike the Rio Declaration and Agenda 21, the alternative NGO poverty treaty is more explicit in identifying responsibility for the problem. The NGO treaty puts forth the following analysis: "the centralization of power to control natural resources causes, simultaneously, poverty and environmental degradation."<sup>13</sup> The NGO's alternative solution is thus not to control birth rates in southern countries where each baby consumes thirty-four times less resources than infants born in the North, but rather to democratize and decentralize political and economic decision-making. As indicated by this example, any identification of responsibility has implications not only for the substance of corrective pol-

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9. Paul Lewis, *Delegates at Earth Summit Plan a Watch Dog Agency*, N.Y. TIMES, June 7, 1992, at A20.

10. *Id.*

11. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

12. Rio Declaration, *supra* note 6, at 3.

13. NGO Poverty Treaty (1992) (on file with the *Fordham Environmental Law Report*).

icy measures, but also for the procedures by which such policies are derived.

The Biodiversity Convention provides another useful example. President Bush was castigated in the media worldwide because of his refusal to sign the convention, which had the support of nearly all of the governments represented at the official UNCED talks. Bush's opposition stems from provisions in the treaty that require sharing of benefits from products derived from biological and genetic resources with their countries of origin, which would potentially have adverse effects on United States biotechnology industry profits.<sup>14</sup> Yet Bush has some unlikely bedfellows in opposition to the treaty: representatives of indigenous peoples and others who live in developing countries with rain forests, where the widest variety of plant and animal species are thought to live. Representatives of these groups and NGO's at the Global Forum drafted an alternative biodiversity treaty that contests the privatization of biological resources altogether.<sup>15</sup> The alternative treaty states that such resources, "shall not be the object of restrictions, or in any way be considered as intellectual property," and that, "no patenting should be allowed on any living thing or a product derived from it."<sup>16</sup>

Since this goal is unlikely to be reached, the strategic issue centers on who will hold the rights to these resources. Despite Agenda 21's call for "respecting the cultural integrity and the rights of indigenous people and their communities,"<sup>17</sup> the official United Nations treaty-making process excludes native representation, and, not surprisingly, the Biodiversity Convention's proposed distribution of benefits from these biological resources fails to provide any explicit share for the indigenous inhabitants of the forests. In short, the winners in this agreement are biotechnology firms with existing stocks of germ plasms, and national governments like Brazil, which have allowed their rain forests to be destroyed at ever-increasing rates and which may benefit more in the future from whatever biological resources still remain.

Forest dwellers, who have cared for the biodiversity of their habitats for thousands of years, who often have the greatest scientific knowledge of the species within their surroundings, and who generally alerted international researchers to their potential uses in the first place, had no voice in these decisions and were not identified among the beneficiaries. Future generations were treated similarly: for all the talk of patents and benefit distributions, it remains unclear how these biological resources will be preserved over the long run. The most heated dispute over Agenda 21 involved financing the estimated costs of the proposed devel-

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14. James Brooke, *U.S. Has a Starring Role at Rio Summit as Villain*, N.Y. TIMES, June 2, 1992, at A10.

15. NGO Poverty Treaty, *supra* note 13.

16. Citizens Commitment on Biodiversity: Proposed Treaty (on file with the *Fordham Environmental Law Report*).

17. Agenda 21, *supra* note 5, Part III, at 15.

opment and environmental objectives.<sup>18</sup> Maurice Strong, the UNCED Secretary-General, estimated that for the South alone, such financing requirements would total \$625 billion per year.<sup>19</sup> Southern countries were asked to provide \$500 billion of this total; the remaining \$125 billion to come from industrialized nations in the North.<sup>20</sup> This represents \$70 billion more than the current level of overseas development aid of \$55 billion.<sup>21</sup> The Sustainable Development Commission was charged with monitoring progress toward the goal of achieving transfers from North to South comprising 0.7% of the gross national product of industrialized nations, a target that the United States has consistently resisted.<sup>22</sup> Despite these goals, the United States, Europe, and Japan only agreed to new pledges totalling \$6 to \$7 billion, or just 1% of the total annual costs of the sustainable development goals outlined in Rio for developing nations.<sup>23</sup>

These figures need to be put into context for their equity implications to emerge. The United Nations estimates that net transfers from South to North (combined with lost income from restricted access to northern markets) reach \$250 billion annually.<sup>24</sup> This is roughly double what Strong requested from the North. Therefore, even if these goals were met, nations most desperate for development initiatives to meet the basic needs of their populations will still be transferring \$125 billion to the industrialized North, an indisputably regressive net effect. Moreover, there was no accounting of the unmitigated environmental burdens created by production in the North, the global effects of which impose additional costs on the South. The North generates the vast majority of industrial pollutants, the environmental costs of which are likely to exceed by far the figures Strong advanced.<sup>25</sup> Many of these pollutants have long-term effects that will burden future generations as well as the present global population. Yet there is no compensation allocated for these voiceless victims.

In addition to the serious equity implications of financing sustainable development, the Earth Summit raised equally serious implications for the dispersal of these funds. Southern countries voiced major opposition to the proposed control of these funds by the Global Environmental Facility (GEF) of the World Bank. Decision-making at the World Bank is controlled by industrialized donor nations to the exclusion of recipient developing nations. Hence the issue of procedural equity is prominent here as well. Further, if the funding goals raised at the Earth Summit are

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18. Agenda 21, *supra* note 5.

19. Yost, *supra* note 4, at 4.

20. *Id.*

21. *Id.*

22. *Id.*

23. Robert Weissman, *Summit Games: Bush Busts UNCED*, MULTINATIONAL MONITOR, July/August, 1992, at 12.

24. Yost, *supra* note 4, at 6 n.11.

25. Yost, *supra* note 4, at 4.

ever expanded to include an environmental trust to compensate future generations for damages from unsustainable development, which would seem to be necessitated by the concept of sustainability itself, who will represent their interests in the collection and dispersal of such funds?

#### CONCLUSION

To some extent the 1992 Earth Summit represents the advance of realism over the lofty aspirations of the United Nations Conference on the Human Environment, which took place in Stockholm twenty years before and set the stage for the events in Rio.<sup>26</sup> In Stockholm there was still widespread optimism about the potential for traditional development in the South. Yet the interim twenty years of international development policies has created a world with even greater levels of inequality and human and environmental devastation. In Rio, representatives of industrialized nations were no longer encouraging developing countries to consider their natural biodiversity as part of a "global heritage." Instead, all nations present were aggressively staking out their shares of the rights in and royalties from these dwindling resources. While many may view the privatization of such natural assets with alarm and may not agree with the distributions set forth in Rio, the crucial issue of equity, both within and between generations, was indelibly brought to the forefront of public debate.

Yet for all of the rhetoric, including Agenda 21's pledge to "to make international trade and environment policies mutually supportive in favor of sustainable development,"<sup>27</sup> the Earth Summit agreements provide little guarantee that global decision-making processes and impacts will be more equitable in the future. It seems that the key issue the Earth Summit raises for legal scholars and practitioners is in defining principles of justice that should apply to the nexus of global environmental and development issues and identifying equitable procedures for translating such principles into international law

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26. United Nations Conference on the Human Environment, 11 I.L.M. 1416 (1972).

27. Agenda 21, *supra* note 5.