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# Man or Beast: The Convention on Biological Diversity and The Emerging Law of Sustainable Development

W. Robert Ward\*

## ABSTRACT

*Mr. Ward explores the legal nature of the Convention on Biological Diversity by examining patterns in the development of international law. He considers two categories of global agreements: (1) novel issues agreements and (2) general principles agreements. The article defines these two types of agreements and then considers whether the Convention addresses a novel issue in conservation law. Mr. Ward argues that the Convention is instead a general principles agreement that marks a new development in international law. The article concludes by exploring how the Convention may influence the further evolution of the law of sustainable development.*

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President Clinton's decision to sign the Convention on Biological Diversity<sup>1</sup> and submit it to the Senate for advice and consent during the 103d Congress<sup>2</sup> provoked a lively public debate about what kind of treaty had emerged from the 1992 United Nations Conference on Environment and Development (UNCED). Opponents and supporters of United States participation in the Convention bolstered their arguments with widely divergent characterizations of the legal genus of this

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1. United Nations Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993) [hereinafter Biodiversity Convention or Convention].

2. Message from the President of the United States Transmitting the Convention of Biological Diversity, with annexes, done at Rio de Janeiro, Brazil on June 5, 1992, and signed by the United States in New York on June 4, 1993, S. TREATY DOC. NO. 20, 103d Cong., 1st Sess. 1994.

controversial international agreement. In an editorial in the *Washington Times*, the Convention was characterized as "less a formal treaty than a catalog of warm, fuzzy statements about protecting the environment."<sup>3</sup> In a rebuttal, Richard N. Mott, Deputy Vice President at the World Wildlife Fund, countered that the Convention is "the first broad commitment under international law to conserve the planet's vanishing biological wealth."<sup>4</sup>

Whether the Convention is viewed as a groundbreaking commitment or an idealistic, potentially dangerous wishlist, the terms of the debate over its legal character suggest one possible point of agreement: the Convention on Biological Diversity represents a new species of international agreement. This article will test this hypothesis by suggesting an approach to categorizing controversial agreements like the Convention on Biological Diversity according to patterns in the development of international law. In concluding that the Convention is an example of a new kind of global agreement—one based on general principles of sustainable development—this article challenges the assumption that the Convention on Biological Diversity represents the culmination of decades of international legal development in the area of wildlife, endangered species, and habitat protection law.

Establishing patterns in the development of international law is often difficult because countries conclude international agreements to address such a broad range of problems. The problems addressed in bilateral and regional agreements are particularly difficult to fit into neat categories because such agreements often address the specifics of bilateral relations, unique transboundary conditions, and regional peculiarities.

In contrast to bilateral and regional agreements, global instruments like the Convention on Biological Diversity, which reflect a consensus among countries with widely divergent views and circumstances, are more easily categorized as addressing two sets of problems. The first set of problems is comprised of novel issues that arise in an established area of international law, requiring agreement on specific steps to achieve a goal already agreed to in principle by the international community. Agreements addressing this set of problems might be called "novel issues" agreements. The second set of problems is comprised of those requiring a consensus on general principles aimed at fostering concerted action by governments and nongovernmental

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3. *Attack of the Alien Cows*, WASH. TIMES, Aug. 8, 1994, at A20.

4. Richard N. Mott, *Alien Cows are Not a Problem*, WASH. TIMES, Aug. 19, 1994, at A21.

actors around the world. Agreements addressing this set of problems might be called "general principles" agreements.

An example of a novel issues agreement in international environmental law is the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>5</sup> Building on decades of experience with environmental agreements that provide a flexible means to take account of new scientific evidence in establishing controls on production, harvesting, or use of specified species or substances,<sup>6</sup> the Montreal Protocol sets forth fairly specific terms for Parties to follow in order to phase out the production and use of chlorofluorocarbons and other ozone depleting chemicals.

The Vienna Convention for the Protection of the Ozone Layer,<sup>7</sup> the framework convention underlying the Montreal Protocol, is an example of a general principles agreement. In contrast to the Montreal Protocol, the Vienna Convention does not set precise limits for substances that deplete the ozone layer. Instead, it reflects consensus on the general principle of ozone layer protection, relying on general obligations among Parties to cooperate in this endeavor.

In addition to framework conventions, the general principles category of international agreements includes many nonbinding, so-called "soft law" instruments. Examples of such agreements that have focused on, or included sections that focused on, the environment include Agenda 21<sup>8</sup> and the programs of action adopted at recent United Nations conferences on population and development,<sup>9</sup> social development,<sup>10</sup> and women.<sup>11</sup> The United Nations is particularly hospitable as an incubator for such nonbinding, general principles agreements because it has the institutional capacity to assist governments in addressing complex, interdisciplinary issues.

General principles agreements tend to be controversial and are often nonbinding as a matter of international law. If they are

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5. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

6. An early example of this kind of agreement is the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

7. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1516.

8. *Agenda 21*, U.N. Conference on Environment and Development, Annex II, at 14, U.N. Doc. A/CONF.151/26 (vols. I-III) (1993) [hereinafter *Agenda 21*].

9. The United Nations Conference on Population and Development, Cairo, Egypt (September 1994).

10. The World Summit for Social Development, Copenhagen, Denmark (March 1995).

11. The Fourth World Conference on Women, Beijing, China (September 1995).

legally binding, they usually have very general terms. Such agreements frequently inspire further developments in international law as political, economic, and social conditions change and scientific understanding of an issue progresses. These further developments may include the negotiation of specific novel issues agreements on the same subject, such as the Montreal Protocol to the Vienna Convention. In many cases, a general principles agreement can be associated with contemporaneous and subsequently negotiated general principles agreements on related subjects that together represent a new direction in the development of international law. An example is the 1966 International Covenant on Economic, Social and Cultural Rights,<sup>12</sup> which is now associated with other human rights agreements as a distinct body of international law.

It is not always readily apparent where a new international instrument fits within these two broad categories of global agreements. Clues for making this determination can be found in: (1) the negotiating history of the agreement itself; (2) the text of the agreement; (3) the overall context of international concerns at the time the agreement was negotiated; (4) directions in implementation of the agreement, including prospects for negotiating protocols or other specific novel issues agreements as follow-up; and (5) the content of subsequently negotiated general principles agreements on related subjects.

The negotiating history of the Convention on Biological Diversity suggests that early proponents of the agreement thought they were pursuing a novel issues agreement to better preserve the variety and variability of the world's biota.<sup>13</sup> Throughout the 1980s, an endangered species protection-based approach became increasingly viewed as treating the symptoms rather than the underlying causes of biological diversity loss.<sup>14</sup> As a result, proponents of a global treaty identified a novel issue: the need for a preventive, cooperative approach to conservation. It was assumed that any such global agreement would build successfully on nearly a century of already existing international conservation and wildlife protection agreements. Such existing agreements

12. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

13. In the 1980s, scientists began recognizing huge gaps in our knowledge of biota, estimating the existence of anywhere from 10 to 100 million species, of which only a fraction have been catalogued. At the same time, extensive literature on the loss of biological diversity developed, raising scientific and policy concerns. See generally BIODIVERSITY (Edward O. Wilson ed., 1988).

14. Cf. Thomas D. Sisk, et. al., *Identifying Extinction Threats*, 44 BIOSCIENCE 592, 592 (1994) (criticizing protection-based strategies that have failed).

include the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>15</sup> and the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat,<sup>16</sup> as well as regional wildlife protection agreements such as the London Convention for the Protection of Wild Animals, Birds, and Fish in Africa.<sup>17</sup> As with any novel issues agreement, it was anticipated that such an agreement would include conservation obligations of greater scope and specificity than previously negotiated agreements in the conservation and habitat protection area.

The Convention that emerged from six negotiating sessions and was opened for signature at the UNCED fell far short of these expectations. Many environmentalists and proponents of international environmental legal development were embarrassed and disappointed by the Convention's weak conservation obligations. They perceived these obligations as toothless platitudes instead of effective, enforceable commitments to take concrete action to reduce the loss of biological diversity. Such weak conservation obligations even generated nostalgia for the terms of virtually moribund wildlife protection agreements concluded decades earlier, such as the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.<sup>18</sup>

Conservationist disappointment with the Convention on Biological Diversity holds clues about the Convention's legal genus. It indicates that, despite the intentions of its early proponents, the Convention should not be categorized as a novel issues agreement in the area of international conservation and habitat protection law. In his recent book, Professor Christopher Stone may be suggesting this when he observes that "[t]he Convention may be viewed most favorably as the basic framework for something better to come."<sup>19</sup> Professor Stone's characterization begs the question whether the Convention is not

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15. Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

16. Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. 11084, 996 U.N.T.S. 245.

17. May 19, 1900, reprinted in IV INTERNATIONAL PROTECTION OF THE ENVIRONMENT: TREATIES AND RELATED DOCUMENTS 1605 (Bernd Ruster & Bruno Simma eds., 1975).

18. Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193, reprinted in EDITH BROWN WEISS, ET. AL., INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES 212 (1992).

19. CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA 205 (1993).

in fact part of a new species of general principles agreements rather than the ultimate conservation instrument many environmentalists hoped it might be.

The Convention on Biological Diversity may be best understood as one of several recent agreements on general principles of sustainable development. This conclusion is supported by the Convention's compatibility with other sustainable development instruments concluded in preparation for UNCED. It is further bolstered by the Convention's new approach to the protection of biological diversity, which is distinct from earlier conservation and habitat protection agreements.

The emergence of sustainable development law marks a significant shift in international concerns at the time the Convention on Biological Diversity was negotiated. It is clear from the title of the meeting in which the Convention was opened for signature, the United Nations Conference on Environment *and Development* (emphasis added), that traditional environmental issues were not the exclusive focus of the international community during the negotiation of the Convention.<sup>20</sup> Instead, the establishment of linkages between two areas of international concern, environmental protection and development, was the main focus of international attention in preparing for UNCED.

The philosophical underpinnings for reconciling environmental protection and development aspirations were created a decade before UNCED by the World Commission on Environment and Development. This Commission, also known as the Brundtland Commission,<sup>21</sup> was created as a consequence of a 1983 General Assembly resolution.<sup>22</sup> This Commission developed the concept of sustainable development as a way to address the environmental, social, and economic development aspirations of present and future generations in a unified manner. In its 1987 report, the Commission concluded that:

[S]ustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that this process is easy or straightforward. Painful choices have to be

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20. Similarly, unlike previous international conferences on population policy, the 1994 meeting in Cairo was called the International Conference on Population *and Development* (emphasis added).

21. The Commission Chair was Prime Minister Gro Harlem Brundtland of Norway, and included 22 other commissioners from around the world. See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE, ANNEX 2, at 353 (1987) (hereinafter *The Report of the Commission*).

22. G.A. Res. 38/161 U.N. GAOR, 38th Sess., Supp. No. 47, at 131, U.N. Doc. A/38/47 (1983).

made. Thus, in the final analysis, sustainable development must rest on political will.<sup>23</sup>

It is generally recognized that the adoption of two general principles agreements at UNCED, the Rio Declaration and Agenda 21, represented the first steps toward codifying the emerging international consensus on sustainable development. These agreements seek to promote economic growth, alleviate poverty, further social goals, and achieve environmental protection in the short term as well as for future generations.

Linkages between environment and development are explicitly made throughout the Rio Declaration<sup>24</sup> and Agenda 21.<sup>25</sup> Principle One of the Rio Declaration, for example, states that “[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>26</sup> Similarly, the Preamble to Agenda 21 states that “integration of environment and development concerns and greater attention to them will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems, and a safer, more prosperous future.”<sup>27</sup>

The Convention on Biological Diversity further develops these linkages by emphasizing the complex web of human interactions with nature that define the challenge of biodiversity protection. The Convention can therefore be considered a third UNCED agreement on general principles of sustainable development. The Preamble to the Convention includes a statement of awareness “that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health, and other needs of the growing world population . . . .”<sup>28</sup> It also provides a recognition that “economic and social development and poverty eradication are the first and overriding priorities of developing countries.”<sup>29</sup> There are three objectives articulated in Article One of the Convention: (1) “conservation of biological diversity,” (2) “sustainable use of its components,” and (3) the “fair and equitable sharing of the benefits arising from the utilization of genetic resources.”<sup>30</sup> Of the three, the latter two are explicitly

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23. The Report of the Commission, *supra* note 21, at 9.

24. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, June 15, 1992, UNCED Doc. A/CONF.151/5/Rev.1, reprinted in 31 I.L.M. 874 [hereinafter Rio Declaration].

25. *Agenda 21*, *supra* note 8.

26. Rio Declaration, *supra* note 24, princ. 1.

27. *Agenda 21*, *supra* note 8, pmbl.

28. Biodiversity Convention, *supra* note 1, pmbl.

29. *Id.*

30. *Id.* art. 1.



focused on achieving practical human benefits from humanity's interactions with biota. Including the Convention on Biological Diversity as UNCED's third sustainable development agreement is significant because it represents the first such instrument that is binding as a matter of international law.<sup>31</sup>

Several characteristics of UNCED's sustainable development agreements distinguish them from existing international environmental instruments, further signaling a new development in international law. For example, past wildlife protection agreements have assumed that sufficient areas of natural habitat exist to adequately preserve representatives of all species and to protect them from becoming extinct "through any agency within [human] control."<sup>32</sup> By contrast, sustainable development agreements approach conservation challenges from an anthropogenic perspective, assuming that even when protected areas exist, human activities beyond their boundaries must be influenced and regulated in order to achieve conservation objectives.

The Convention on Biological Diversity, for example, assumes that human activity impacts biological diversity wherever it is located. In the Preamble to the Convention, the Parties state their general concern that "biological diversity is being significantly reduced by certain human activities."<sup>33</sup> The Preamble continues by noting that "it is vital to anticipate, prevent, and attack the causes of significant reduction of loss of biological diversity at source."<sup>34</sup>

With only a passing reference to the need for protected areas,<sup>35</sup> the Convention focuses on human activities "at source" by explicitly linking conservation endeavors with carrots and sticks for the sustainable use of the components of biological diversity. Several provisions of the Convention encourage people to act as positive agents through identification and monitoring of

31. A thorough consideration of whether the other treaty opened for signature at UNCED, the Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 851 (entered into force Mar. 21, 1994) [hereinafter *Climate Control*], might also be considered an agreement on general principles of sustainable development is beyond the scope of this article. However, it is noteworthy that as a framework convention, the Climate Convention would automatically be included in the general principles agreement category—and therefore may well meet the criteria for general principles of sustainable development agreements as set forth in this analysis.

32. Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *supra* note 18, pmbl.

33. Biodiversity Convention, *supra* note 1, pmbl.

34. *Id.*

35. *Id.* art 8(a).

the components of biological diversity,<sup>36</sup> conservation<sup>37</sup> and land-use planning,<sup>38</sup> *ex-situ* conservation,<sup>39</sup> sustainable use activities,<sup>40</sup> research<sup>41</sup> and education,<sup>42</sup> and technical and scientific cooperation.<sup>43</sup> At the same time, the Convention addresses the need to curtail human activities that threaten biological diversity, including encroachments on protected areas,<sup>44</sup> identifying and regulating activities that have or are likely to have significant adverse effects on biological diversity,<sup>45</sup> and the introduction of alien species.<sup>46</sup>

Also in contrast to earlier wildlife agreements, sustainable development agreements such as the Convention on Biological Diversity are explicitly anthropocentric. Thus, meeting human needs and rewarding human endeavor are stated objectives of the Convention and a focus of its obligations. As noted above, Article One of the Convention states that the equitable sharing of the benefits arising from the utilization of genetic resources is one of three stated objectives for the Convention.<sup>47</sup> Convention articles devoted to incentive measures,<sup>48</sup> access to genetic resources,<sup>49</sup> access to and transfer of technology,<sup>50</sup> and the handling of biotechnology and the distribution of its benefits,<sup>51</sup> detail a wide range of obligations unprecedented in earlier conservation instruments. Such obligations are aimed at ensuring that human needs are met and human endeavor is rewarded in ways that also support the conservation and sustainable use objectives of the Convention. These confusing and controversial provisions of the Convention reflect uncertainty about whether humanity's development goals and nature's needs can be harmonized.

UNCED marks the beginning of an era in which the political will to achieve sustainable development has achieved the status of international law. One of the challenges presented by any new

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36. *Id.* art. 7.
  37. *Id.* art. 6.
  38. *Id.* art. 8.
  39. *Id.* art. 9.
  40. *Id.* art. 10.
  41. *Id.* art. 12.
  42. *Id.* art. 13.
  43. *Id.* arts. 16-18.
  44. *Id.* art. 8.e.
  45. *Id.* arts. 7.c., 8.1.
  46. *Id.* art. 8.h.
  47. *Id.* art. 1.
  48. *Id.* art. 11.
  49. *Id.* art. 15.
  50. *Id.* art. 16.
  51. *Id.* art. 19.

legal development is that it is difficult to fully appreciate all its implications at inception. The unique lessons of centuries of nuisance cases involving pollution incidents, for example, were not fully appreciated until modern environmental law developed thirty-five years ago. Similarly, the full significance of the first instruments of the law of sustainable development, including the Convention on Biological Diversity, will only emerge over time.

Early indications suggest that, like the process of sustainable development itself as foretold by the Brundtland Commission, further development of the law of sustainable development will be neither easy nor straightforward. In the negotiation of programs of action at the International Conference on Population and Development, the World Summit on Social Development and the Fourth World Conference on Women, for example, several countries advanced the concept of "sustained economic growth" as a separate objective from "sustainable development." Identifying "sustained economic growth" and "sustainable development" as separate aspirations of the international community may suggest a different model of development than that agreed to at UNCED, arguably giving primacy to current levels of economic growth over long-term sustainability. The concept of sustained economic growth, if not placed squarely in the context of sustainable development or otherwise more clearly defined, risks ignoring the environmental concerns of present and future generations. It may also ignore social and economic concerns of any individual or group that does not receive the benefits of such economic growth.

Fortunately, the precedential effect of UNCED's sustainable development agreements helped ensure that more recent United Nations conferences reaffirmed the commitment to sustainable development.<sup>52</sup> Relevant text from the UNCED agreements helped negotiators clarify that in order to reaffirm the international

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52. The Copenhagen Declaration on Social Development, for example, reaffirms this commitment to sustainable development, and the role of economic growth in furthering this commitment, as follows:

We are deeply convinced that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people. Equitable social development that recognizes empowering of the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.

*Copenhagen Declaration on Social Development*, March 12, 1995, para. 6, U.N. World Summit for Social Development, Annex I, at 5, U.N. Doc. A/CONF.166/9 (1995).

consensus on sustainable development, references to economic growth must be linked to environmental protection. Principle 12 of the Rio Declaration, for example, refers to "economic growth and sustainable development" for a particular purpose, "to better address the problems of environmental degradation."<sup>53</sup> Agenda 21 refers to "sustained economic growth" in the overall context of making "economic growth and environmental protection mutually supportive."<sup>54</sup> More generally, the Convention on Biological Diversity obligates Parties to reconcile economic and environmental aspirations in a manner that ensures the conservation and sustainable use of biological diversity for present and future generations.

Despite its relevance, the Convention on Biological Diversity has not figured prominently in the post-UNCED development of the law of sustainable development. This will hopefully be remedied in the context of on-going negotiations of a platform for action for adoption at the 1996 United Nations Conference on Human Settlements (Habitat II). As the international community charts a course for the development of sustainable communities in a rapidly urbanizing world, human impacts on biological diversity deserve further consideration as a natural next step in developing the nascent law of sustainable development.

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53. Rio Declaration, *supra* note 24, princ. 12.

54. *Agenda 21*, *supra* note 8, para. 2.9.

