FROM DECLARATION TO IMPLEMENTATION?
– RIO + 13: AN EVALUATION OF ITS LEGAL SIGNIFICANCE IN INTERNATIONAL ENVIRONMENTAL LAW

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“Why should I care about posterity? What’s posterity ever done for me?”

ABSTRACT: The 1992 United Nations Conference for Environment and Development held at Rio was the first major conference that contained a global approach to the topic of “environment”. With the principle of sustainable development in the heart of the declaration, it outlined the best way to combine economy, society and environment. Although the Rio outcome is mostly ‘soft law’, it represents the fundamental source of international environmental law. To evaluate its legal significance, this paper focuses on the developments in international environmental law after Rio and the documents’ legal impact on other agreements in international law. However, as environmental changes can only be achieved through global compliance with international law, this paper also examines the factual implementation of three major Rio principles in different domestic legislations to evaluate the seriousness of the Heads of States’ commitment made 13 years ago.

I INTRODUCTION

It is that kind of thinking that has brought us into the current situation of environmental threat. Unfortunately, it will certainly not be that kind of thinking that will get us out of it. In the last thirteen years, human numbers have grown by roughly one billion. Global warmth increased exponentially, poles melted constantly, water and soil are nowadays more polluted than ever and poverty rose around the world. Certainly, it is not just one country that is responsible for the global problems we face today. It is not just one country that is concerned, but all. Thus, avoiding a collapse should be the top priority for all nations all over the world. But it is not. The 1992 UN Conference for Environment and Development (UNCED), also known as the ‘Earth Summit’ held in Rio de Janeiro (Rio) set hope. With 176 states represented, 10,000 participants as well as 1,400 non-governmental organisations and 9,000 journalists, it was the biggest conference ever held. The world’s attention was drawn to the ecological problems we face today. The convention ended in five agreements, two binding, three non-binding which represent the pillars of today’s international environmental law.

1 First State Examination (Berlin), Licencié en droit (Paris). This paper was written whilst the author was a Master of Laws (LLM) candidate at the University of Auckland. The author is grateful to Professor Kenneth Palmer for his helpful comments.
2 Groucho Marx.
However, the success of the Earth Summit is still heavily discussed. Some say because of its non-binding character and the lack of implementation of its principles, the commitments made at Rio were purely symbolic and without any impact. Others say that Rio has had an impact on every environmental programme ever since and influenced national environmental laws.

Various conferences have been held since the Earth Summit, such as the United Nations General Assembly Special Session (UNGASS) in New York,\(^5\), also called Rio + 5, or the World Summit on Sustainable Development (WSSD) in Johannesburg,\(^6\), known as Rio + 10. The Rio Principles were reaffirmed but not expanded. Albeit Rio’s ambitious commitment, one must observe a certain stagnancy ever since. The world has fallen short so far of achieving Rio’s central goal – an environmentally sustainable global economy. The emergence of Agenda 21 made it clear that country specific laws and regulations are the most important measures for environmental protection and regulation, as it is by these that international obligations are translated into concrete action. Thus, on the one hand, much has been written criticising the inauspicious attempts at the international level to promote environmental progress. On the other hand, very few authors have emphasised the relationship between international environmental law and national environmental law. Hence, this paper will deal with the legal influences of international environmental agreements on various national environmental laws and evaluate the progress achieved since the Rio Declaration. The first section will focus on different international agreements and examine their legal character. As international agreements have an impact on international law as well as on national law, the second section will briefly evaluate the progress made on international environmental level since 1992, and the third section will emphasise the progress made since Rio in different national laws.

II INTERNATIONAL ENVIRONMENTAL DECLARATIONS AS A LEGAL BASIS?

A FROM STOCKHOLM TO JOHANNESBURG – AN OVERVIEW

The last four decades have seen the first coordinated international commitments to solve environmental problems. In 1968, the General Assembly of the UN stated that there is “an urgent need for intensified action, at national and international level to limit, and where possible, to eliminate the impairment of the human environment”.\(^7\) In response to this cognition, the international community convened four years later in Stockholm. The 1972 UN Conference on the Human Environment (UNCHE)\(^8\) manifested the first milestone in international environmental law. With 113 States

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\(^7\) UNGA Res. 2398 (XXIII) (1968).
\(^8\) UN Doc. A/Conf. 48/14 (1972).
represented, it had immense value in drawing attention to the problem of environmental deterioration and the methods to prevent and to remedy it. In the heart of the declaration, for the first time in history, a trans-boundary responsibility for environmental harm was recognised. Principle 21 of the Declaration proclaims that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

Although the Stockholm Declaration addressed both environmental and developmental issues, without cooperation between states and coordination within and outside the UN system, no global approach could be realised. It was not until the World Commission on Environment and Development (WCED) published a report calling for a new approach, articulated as sustainable development, that a turning point was reached. The so-called Brundtland Report invited the UN to transform its conclusions into a Programme of Action on Sustainable Development and for a conference to review the implementation of this programme. The General Assembly accepted the report, affirmed it in Resolution 44/228, and established a preparatory commission (PREPCOM) for UNCED. The PREPCOM sessions proved to be very difficult due to competing views on the legal character of the convention, as well as on its contents. While industrialised countries considered the principles concerning public information, participation and precaution essential, developing countries emphasised the right to development, poverty alleviation and the recognition of common but differentiated responsibilities. Lack of consensus overshadowed the negotiations and reduced the Rio results to the least common denominator. Instead of achieving its initial goal, the proclamation of an Earth Charter, containing general environmental obligations for states, the Rio Convention adopted five documents: The Rio Declaration on Environment and Development, Agenda 21 (an 800 page programme of action with 115 specific topics such as measures of implementation), the Framework Convention on Climate Change (FCCC), the Convention on Biological Diversity, and the non-binding UNCED Forest Principles.

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11 GA Res 44/228, UN Doc A/L/553/Add. 1-4 (1968).
14 UN Doc. A/AC.237/18 (1992); 31 ILM 848.
The Rio Declaration, although without the clarity of the 1948 Universal Declaration of Human Rights, constitutes the heart of the Rio outcome. On the one hand, it reaffirms environmental principles agreed on in the Stockholm Declaration such as Principle 2 of the Rio Declaration, which endorsed Principle 21 of the Stockholm Declaration and even brought it forth by adding “and developmental”. Other legal norms can be found in Principle 10, endorsing rights of public information, participation, and remedies; Principle 13 which calls for the development of liability rules; and Principles 18 and 19 which require notifying other states of emergencies and projects that may affect their environment. The repetition of the Stockholm Principles conferred on them a stronger weight at the international level that states could not easily ignore. On the other hand, Rio also came up with some new approaches. These include the precautionary principle (Principle 15), the polluter-pays principle which requires internalisation of environmental costs (Principle 16) and the general requirement of environmental impact assessment (Principle 17). Other principles, such as Principle 3, which aims for the eradication of poverty or Principle 6 which claims special priority for the needs of developing states, are in the nature of guidelines, although the line between law and policy is not easily defined.

Although these new approaches were startling and should strongly influence environmental law, the Declaration was stigmatised by the principle of sustainable development. Even though this was not an entirely new idea, as it was redefined and promoted in the Brundtland Report before, the Rio Declaration gave it the necessary forum for its recognition as a new approach for the 21st century. Together with Agenda 21 as a concrete action plan, it aimed for sustainability to guide economic and social progress. According to UNCED, the implementation of sustainable development should be achieved through the states’ recognition of their common interests, mutual needs and common responsibilities. Agenda 21 realises that international commitment alone cannot achieve these goals. Local Agenda 21s should be implemented to enforce the principles agreed on, especially the principle of sustainable development.

In order to ensure institutional arrangements of environment and development issues, Agenda 21 also brought about the creation of the Commission on Sustainable Development (CSD). This body was created to:

17 Bosselmann, K “Rio + 10: Any Close to Sustainable Development?” (2002) 6 NZJEL 297, 314; See the Definition of Sustainable Development set up in the Brundtland Report: “Sustainable development is development that meets the needs of the present without compromising the ability to future generations to meet their own needs”.
It would be difficult to argue that the CSD has fulfilled any of these roles. Although the CSD presented an ideal discussion forum where cross-over problems were discussed and which gave a platform to economics groups to express their concerns and to give recommendations, it has no power to do anything other than make recommendations to the Economic and Social Council of the UN. The lack of importance and power given to the CSD reflects quite well the nation states’ ambiguous behaviour in this field. On one hand, they plead for progress internationally, but on the other hand, they refuse to give up sovereign rights to avoid any potential barrier to economic development. Nonetheless, to avoid the Rio results’ fall into oblivion, a consensus was quickly found that their implementation should be examined every five years in a global forum.

The first Convention was held in 1997 in New York (UNGASS). The results of Rio + 5 were not satisfactory. Progress was so insignificant that the General Assembly decided to adopt a “Program for the Further Implementation of Agenda 21” which basically summarised the Rio agreements. With the exception of an innovation towards the protection of fresh waters, the document contained no call for concrete action. More was expected from Rio + 10, the World Summit on Sustainable Development (WSSD), held in 2002 in Johannesburg with 190 nations represented. It was held in the hope of reviewing the implementation of Agenda 21 in order to assess the actual condition of the global environment, as well as to agree upon making a drastic shift toward a sustainable global community.

The summit resulted in two outcome documents: a political declaration that expresses commitments and direction for implementing sustainable development, and a negotiated programme of action, referred to as the Plan of Implementation that will guide government activities. The intent of the implementation plan was to reaffirm the output of the Earth Summit and to accomplish the goals of Agenda 21 and the Millennium Summit. Furthermore, a programme called Partnership Initiatives was initiated. These initiatives, voluntary and non-binding, include action oriented programmes between governments, business or civil society. Some authors have seen these initiatives as a possibility to deliver some results without really committing governments to hard action. The summit was unable to accelerate the slow pace of the Agenda 21 implementation, and failed to address drastic measures for the structural reform of international society and economy. Some issues were not even put on the agenda. About two-thirds of the final Plan of Implementation consists of reiterations of earlier commitments. Friends of the Earth, for example, has analysed the final text

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20 Bosselmann K supra n 17.
21 Ibid, 301.
and found precisely two new and specific targets in the whole Plan of Implementation:
To halve by 2015 the proportion of people without access to basic sanitation; and to
eliminate destructive fishing practices by 2012.24

In essence, the Johannesburg outcome was disappointing. The international community
missed the chance to strengthen the grounds of international environmental law. As the
Rio principles were mainly reaffirmed, no further development was achieved. The
repetition of the principles, however, may have had an influence on their legal
significance in international law.

B SOFT LAW EMERGING TO BINDING LAW?

1 WHAT IS SOFT LAW?

So-called “soft law” is a highly controversial subject. Generally, what distinguishes law
from other social rules is its binding character. In this sense, law is necessarily “hard”.25
The expression of “soft law” is intended to indicate that the instrument is not in fact
“law”, but its importance within international society is such that it is worthy of
attention.26 It comprises certain declarations and recommendations as well as the
resolutions of international conferences. They are used by states or international
organisations to indicate values and guidelines which are necessary, but do not find a
common binding sense. The fact that a document cannot be enforced before an
international tribunal does not mean that it cannot have effect in shaping conduct in
international society. In general, soft law focuses on a final goal permitting flexibility
and freedom to manoeuvre where events or changing circumstances so require.27 This
contains a danger that such documents may be so vague as to be meaningless. In
essence, the category of “soft law” inhabits the middle ground between binding legal
norms and simple political assertions. Despite its lack of effectiveness, it has certainly a
legal significance in so far as it announces an action which is hoped to be cast in legal
terms, later and elsewhere, at the appropriate level.

2 WAYS TO ESTABLISH HARD LAW

There are basically two ways to bind states to international law. The first method is to
conclude an agreement. The terminology is irrelevant: the variety of alternatives
includes treaty, convention, protocol, covenant, pact, act, etc.28 There are no rules

28 Birnie, P & Boyle, A International Law and the Environment 2nd ed, (Oxford University Press,
prescribing their form except for the 1969 Vienna Convention on the Law of Treaties which codifies rules applicable only to written treaties on such matters as entry into force, reservations, interpretation, termination, and invalidity.\textsuperscript{29} However, treaties just bind the contracting parties and not a third party, unless the intention to do so is clearly expressed and the state concerned expressly accepts the rights and obligations in question. This is relatively unusual. It is more common that states are bound by customary international law. As customary international law does not exist \textit{ipso facto}, there are certain requirements. First, it is essential that there is a rule of fundamentally norm-creating character which is sufficiently clear and precise to formulate a general rule of law.\textsuperscript{30} Second, it is required that this rule is adopted by a sufficiently widespread and representative number of states. Finally, the condition of \textit{opinio juris}, which establishes the legally binding character of state practice in customary law, must be satisfied.\textsuperscript{31} To establish and to provide good evidence of such an \textit{opinio juris}, repetition is a very important factor.\textsuperscript{32} While the formation of customary law is a usual process in international public law, it has to be examined if there is such an evolution in international environmental law.

3 \hspace{1cm} SOFT LAW IN INTERNATIONAL ENVIRONMENTAL LAW

Most environmental principles are first proclaimed in soft law which represents today’s typical instrument of international environmental “legislation”. Once recognised as a necessary principle, they reappear in one form or another in conventional texts, in the mandate given to international institutions, and in the practice of states. If a certain state practice is given and the evidence of a widespread \textit{opinio juris} is established, they achieve the status of customary international law. This has occurred several times. A widely accepted principle derives from general international law and in particular from the United Nations Charter: States have the obligation to cooperate in good faith, which is mentioned in Principle 24 of the Stockholm Declaration and in a different approach in Principle 7 of the Rio Declaration.\textsuperscript{33} In the same context Principle 2 of the Río Declaration also represents international binding law.\textsuperscript{34} Another example is

\textsuperscript{29}1969 Vienna Convention on the Law of Treaties 1155 UNTS 331.
\textsuperscript{30} As laid down by the ICJ in the \textit{North Sea Continental Shelf Case}, ICJ Reports (1969), 3.
\textsuperscript{31} See Brownlie, I. \textit{Principles of Public International Law} 5\textsuperscript{th} ed (Oxford University Press, Oxford, 1998), 4-11.
\textsuperscript{33} Kiss, A, Shelton, D supra 12, 55.
presented by the inclusion of principles dealing with the notification of emergencies and prior notification and consultation in cases of trans-boundary risk.\textsuperscript{35}

Due to their repetition, new environmental principles of binding character have arisen in declarations and agreements. This could be general principles of international environmental law or customary international law. For example, it is now commonly accepted that the future development of the law should reflect certain principles. These principles are: “Polluter Pays” principle, Precautionary principle, Intergenerational Equity and Non-Discrimination.\textsuperscript{36} In terms of the “Polluter Pays Principle”, this means that polluters who cause trans-boundary pollution should be treated no less severely than if the harm was caused in the polluters’ own country. Other declarations of principles have led directly to the creation of obligatory norms, such as the European Water Charter\textsuperscript{37} or the 1974 OECD recommendation containing principles relating to trans-frontier pollution.\textsuperscript{38} However, most emerging environmental principles remain non-binding. This is due to several reasons. First, some environmental principles are not clear enough to be of normative character. Although it has been adopted by a large number of states, the principle of sustainable development is neither clear nor precise enough to bind states to specific rules.\textsuperscript{39} Secondly, some principles do not find the necessary consensus, or if so, are interpreted differently so that there is in fact no common practice. Finally, some declarations are intended to draw attention to urgent global problems and to gear national policies in one direction,\textsuperscript{40} serving to guide states in adopting legislation, but not to bind states to legal instruments.\textsuperscript{41} However, even if most international environmental law is not of binding character, it is not necessarily legally irrelevant.

Over the last 30 years the judicial importance of international documents has increased, compared to the Stockholm Declaration, which was comparatively softer than Rio. Furthermore, even though there has been international critique about the weakness of international environmental law, many principles have been adopted by states, without legal obligation.\textsuperscript{42} Political pressure and common sense constitute a major motivation and may encourage the change from soft law to binding law in the future. In the meantime, the influence of the Stockholm Declaration, the World Charter for Nature,\textsuperscript{43}

\textsuperscript{38} Recommendation C(74) 224, 14/11/1974.
\textsuperscript{39} Bosselmann, K “A Legal Framework for Sustainable Development” in Bosselmann, K, Grinlinton, D Environmental Law for a Sustainable Society (Centre for Environmental Law, Auckland, 2002), 159.
\textsuperscript{40} For instance, the high targets of the Kyoto-Protocol for some states.
\textsuperscript{41} Kiss, A, Shelton, D supra n 12, 50.
\textsuperscript{42} Ibid 52.
\textsuperscript{43} UN GA Res 37/7 supp 51 (1982).
and the Rio Declaration is undeniable, at the international as well as on the national level.

III STAGNATION IN INTERNATIONAL ENVIRONMENTAL LAW?

As Gro Harlem Brundtland said in commenting on UNCED’s achievements: “Progress in many fields, too little progress in most fields, and no progress at all in some fields…” Considering the lack of progress on the Rio Principles over the last thirteen years, this observation applies to 1992 as much as it applies today. Nonetheless, international environmental law is today more advanced than ever. Although many still contest the importance of the Rio Conference’s legal texts, the UNCED outcome is a milestone in the short history of international environmental law. Several principles, such as public participation, the prior assessment of environmental impacts, precaution, notification of emergencies, and prior information and consultation on projects potentially affecting the environment of other states have been included in numerous binding and non-binding international instruments since Rio and constitute (due to their repetition) emerging customary law.

In the aftermath of Rio, nearly every major international convention includes environmental protection as one of its goals. New topics in numerous declarations on international environmental law have been dealt with since Rio. Recently, the Åarhus-Convention put public participation and the improvement of individual legal protection before courts on the international agenda. At the Rotterdam Conference states formulated new procedures for the trans-boundary trade on certain hazardous chemicals and pesticides. The results of these conferences are an infusion of environmental norms into nearly every branch of international law. Even more recently, the World Summit held in New York on 16 September 2005 with more than 150 Heads of States convened, reaffirmed the international commitment to achieve the goal of sustainable development, including through the implementation of Agenda 21 and the Johannesburg Plan of Implementation. Moreover, the outcome stresses:

[W]e commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, these efforts will also promote the integration of the three components of sustainable development — economic development, social development and environmental protection — as interdependent and mutually reinforcing pillars.

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44 As quoted by EL-Ashry, M Río Review (Centre for Our Common Future, 1992), 11.
45 See Sands, P supra n 36, 61.
48 Ibid 10.
The strength of commitment to the implementation of the Rio outcome which inhabits this document sets high expectations. So far, the real actions could not cope with the expectations set. Even though environmental concerns are recognized in negotiations, they seldom receive the necessary weight. For instance, in the area of trade relationships, the 1994 Marrakech Charter establishing the WTO and regional trade agreements, mentioned environmental cooperation. The “General Exceptions” provision of the GATT, Article XX, constitutes conditional exceptions to the GATT obligations, including those in Articles I, III, and XI. Although the word “environment” is not used, Article XX may be applied to justify certain environmentally inspired rules that affect free trade. One can state that the Marrakech Round has therefore answered to Chapter 2 of Agenda 21 which recommends “promoting sustainable development through trade liberalisation and making trade and environment mutually supportive”. Although on a first view this may be the case, a second view reveals that environmental issues are embraced more as a political concern than as a real legal limitation to free trade. Except for the Japan Shochu Case\(^49\) and the Asbestos Case\(^50\) WTO panels have always decided in favour of free trade with no limitation, under the argument that domestic law created artificial barriers to trade.\(^51\)

International politics and economics mostly deal with environmental principles as a necessary but unwelcome by-product, trying to reduce them to their minimum. This is not the intention of UNCED. Environmental concern is intended to be on the same level as social and economic concern. But as this approach has not been established as a guiding principle in the environmental field, it is condemned to be undermined in the field of international trade law. Thus, “while Rio aimed for sustainability to guide economic and social progress, Johannesburg aimed for economic and social progress to guide sustainability.”\(^52\) Although the Johannesburg Declaration attempts to enforce the principle of sustainable development, it is too feeble in its means. Simple monitoring of implementation in nation states and reaffirming existing agreements without a widespread and true *opinio juris* is not enough to engrave progressive principles in international environmental law. Considering recent developments in international environmental law, one must observe that political international commitments by heads of state represent pretty pledges without legal significance. This reveals the deficiencies of soft law, even though it may be a suitable instrument in progressive fields of law. This may change in the future as resources grow scarce and people become aware that the natural habitat diminishes. Although global progressive approaches have stagnated


\(^{52}\) Bosselmann, K supra n 17, 300.
more or less over the past thirteen years, agreements on special environmental issues emerge. Thus, the hope of a strengthened international environmental law still remains. However, currently, except for few binding agreements, international environmental law is considered as a framework of mostly moral principles that may influence nation states but has no legal significance as a law on the international level such as the *jus in bello* or the *jus ad bellum*. It achieves its recognition as a ‘law’ mainly through other international public law fields such as international economic law, international human rights law or the law of the sea\(^\text{53}\) where it is respected.\(^\text{54}\) Institutionally, international environmental law is less well developed than these other fields of international public law: there are no ‘global environmental organizations’ with competence over environmental matters like the WTO, nor a dispute settlement body like the WTO’s or the Law of the Sea Convention’s International Tribunal for the Law of the Sea.\(^\text{55}\)

In conclusion, as far as the agreement is non-binding like the 1992 Convention on Biological Diversity, international environmental law is something in between a law and a simple international principle. In many aspects it has more the status of an abstract philosophy than a concrete programme of law to tackle the environmental crises.\(^\text{56}\) This, of course, is contradictory to its evolution as an established field of international law and makes states’ lack of respect much easier.

As international environmental concern is relatively new, the legal importance of international environmental law will depend on many factors. The large number of conferences held since Rio reveals an emergence of environmental concern in the international arena. But the large number of commitments does not necessarily imply their realisation. Besides the aspect of repetition, recognition and definition of environmental principles on an international level, the legal significance of these agreements mainly depends on their widespread transposition and implementation into national laws.

## IV IMPACT ON DIFFERENT NATIONAL LAWS

### A TRANSPOSITION-MECHANISMS – AN OBSTACLE?

The issue of whether national law is part of international law or if it is an independent area has been heavily discussed. Different states apply different systems to incorporate

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\(^{53}\) See for example Art 192 of the Law of the Sea Convention which seeks to protect and preserve the marine environment (UNCLOS) UN Doc A/Conf 62/122 (1982).


\(^{55}\) Ibid.

\(^{56}\) Kiss, A, Shelton, D supra n 12, 60-63.
international law. This section focuses on the different mechanisms and examines whether national law inhibits the implementation of international environmental law.

1 THE OBLIGATION OF TRANSPOSITION

In municipal law, legal rights and duties may be created by a wide variety of legal mechanisms. Rights and duties may evolve from legislative acts, from legal agreements or in some cases from judicial decisions. It may seem obvious that a signatory party is judicially bound to its agreement. However, international law is a much less developed system than national law. It is missing a defined corpus of legislative rules, a system of prosecution and an imperative jurisdiction. Moreover, the binding character of agreements in international public law is diverse, ranging from non-binding recommendations to *jus cogens* – imperative law. Hence, an obligation of transposition or implementation is not compulsory *per se*.

In international public law basically two types of states agreements are known: bilateral and multilateral agreements.\(^{57}\) Due to the purpose of the treaty, bilateral agreements are generally binding which implies an obligation of transposition into each national law. Simple declarations of good will between two states are a rare phenomenon in international law. Multilateral agreements, on the other hand, may be binding or non-binding. The legal character of the agreement depends in principle on the legal status the member states intend to give to the agreement. Legally binding agreements such as the UN Convention on the Law of the Sea or the 1992 UN Convention on Biological Diversity fall under the legal system of the 1969 Vienna Convention on the Law of Treaties, that came into effect in 1980 and which defines by a large number of provisions the obligations of states as a party to a treaty.\(^{58}\) Article 26 of the Convention states “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” – *pacta sunt servanda*. This implies the obligation of transposition and implementation. Even though a state is not party to the Convention of the Law of Treaties, most of its provisions apply to all states because they reflect customary international law.\(^{59}\) The convention does not apply to non-binding agreements nor is there any customary international law on this matter. International public law provides no imperative legal basis for the implementation of declarations like Rio or Johannesburg as far as they do not represent customary international law. Legally, the transposition of environmental principles is entirely up to the discretion of states. This weakness puts the prevailing international environmental principles in a different light.

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\(^{57}\) Vienna Convention on the Law of Treaties, 1155 UNTS 331.

\(^{58}\) See also The Vienna Convention on the Law of Treaties among international organisations or a state and an international organisation (1986) which is not in force.

The foundation of international environmental law, the Rio Declaration, appears more as guideline for states’ legislation than law in its literal sense, because it may not legally influence states’ discretion on enacting national environmental law. Restrictions may occur due to political pressure but these are detached from obligations of legal significance.

2 MECHANISMS OF TRANSPOSITION

International environmental provisions have to be transposed into national law for their implementation, as discussed above. As municipal legislation is a question of sovereignty, the status and treatment of international law differs from state to state. There are basically two different systems of law: Monism and Dualism. In monist states like France or the U.S., international law is incorporated in national law from the moment of its ratification. No further express act of adoption is necessary. Thus, it is given direct binding effect on the citizens of the state. If there is a conflict between the convention and domestic constitutional or statutory obligations, legal norms of hierarchy determine the outcome. In contrast, the doctrine of dualism holds that the rules of international law do not become part of municipal law unless and until there has been an express act of adoption. Dualist states are legally bound to a treaty on ratification as a matter of international law. In states like the United Kingdom or New Zealand, the rule of international law must be transformed into domestic law by act of parliament. The reason for this is that otherwise it would be open to the Crown, or today to the Executive, to alter national law by means of a treaty instead of through the enactment of legislation and thus to bypass the supremacy of Parliament. Hence, an individual party cannot refer directly to the terms of a treaty or to the rules of international law.

However, no state follows the Theory of Dualism in its whole. In the UK, for instance, no act of transposition is required if the treaty does not imply changes in domestic law or if there is a rule of customary international law. Customary international law must only be transposed by act of parliament when it faces conflicting primary legislation. Moreover, developments in international law have substantial indirect effects on national law in bringing forward new legislation, assisting in its interpretation, and influencing the direction of policy. In New Zealand, it can be observed that the courts

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61 Cassese, A supra n 25, 215.
62 Denza, E supra n 62, 427.
63 Brownlie, I supra n 32, 46 – 47.
64 Denza, E supra n 62, 427.
66 Wooley, D, Pugh-Smith, J, Upton, W supra n 34, 91.
are willing to give weight to the terms of international conventions, even where they have not been introduced into the domestic law by statute, as a relevant consideration in exercising a statutory discretion or in interpreting an ambiguous statute. In Federal Farmers of New Zealand (Inc) vs New Zealand Post McGechan J decided:

I do not regard this Court as barred from interpreting treaties simply because they are not part of domestic law. [...] It amounts in substance to saying that when determining international obligations, the Court adopts principles which would be employed by the international community bound by the obligations concerned. Those principles are the general principles of international law, [...] which are within the Court’s ordinary cognisance.

However, according to New Zealand’s dualistic nature, the Courts have negated that international conventions may have a direct and binding effect in domestic law without the need for their incorporation into statutory enactments. In the same decision McGechan J stated: “I will not do indirectly something which the Court is forbidden – and for good public reasons – to do directly.” Similar observations can be made in other dualist states. In Mabo v State of Queensland an Australian court has described the ways in which international law has been influential upon domestic law. It stated that: “The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law....”

In conclusion, international law is indivisible from national state law, no matter what its legal importance may be. It has to be respected the same way in all states whether they apply international law directly or whether they have to incorporate it by legislative act. As soft law agreements represent the foundations of international environmental law, national recognition of the influence of international law is of major importance. The value being attributed to international environmental declarations by national courts as a source of interpretation for environmental issues confers on them the status of unwritten principles of national law.

B THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL PRINCIPLES IN DIFFERENT NATIONS

UNCED’s Goals and Principles are mostly soft law principles whose significance can only be measured by their acceptance in national and international practice. Therefore, after examining the importance of UNCED on an international level, this paper will

69 Ibid 390.
71 Ibid, 408.
deal with the implementation of some of the most important international environmental principles in different national laws: the principle of sustainable development, the environmental impact assessment and the precautionary principle. It will focus on a comparison between the implementation in New Zealand, considered one of the environmental world leaders; the UK and Germany, both European countries but with completely different legislative systems; the European Union, because of its role as a party to conventions and its influence on 25 Member States’ legislations; and the U.S., the world’s most powerful but also most polluting country.

1 THE PRINCIPLE OF SUSTAINABILITY

The guiding idea for global environmental governance is not environmental protection, but sustainable development. The 1987 Brundtland Report defines sustainable development as “development that meets the needs of the present without compromising the ability of the future generations to need their own needs”. This definition is still widely accepted. However, its content is neither clear nor precise. Principle 4 of the Rio Declaration states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” The implementation of this principle is upon the discretion of the states, which so enthusiastically embraced sustainable development at Rio. After Rio, the participants of the Johannesburg Summit evaluated the progress made on the implementation of sustainable development, reaffirmed it and established an enhanced plan of implementation. However, as the extent of incorporation of sustainable development in national legislation still remains unclear, this paper will analyse the progress made in this field by several states and evaluate the sincerity of the heads of state’s commitments to the principle of sustainable development.

(a) New Zealand

Prior to 1991, the New Zealand Parliament enacted environmental laws to rectify different situations separately. The result was a large body of resource-related statutes with no uniform structure. In 1991, the Resource Management Act (RMA) reformed planning law by creating a unified system of resource management, with nearly all resources being brought under the umbrella of one statute whose overriding purpose is “to promote the sustainable management of all natural and physical resources.” The RMA came into force on 1 October 1991, nearly one year before Rio, and represented the first attempt by any government to implement sustainable development policies covering the domestic environment. Thus, it has captured international attention as a

highly innovative, sophisticated and environmentally progressive law. The RMA emphasizes public participation in decision-making and refers to the Treaty of Waitangi Principles. Section 5(2)(a) deals with the issue of inter-generational equity, and thus requires ecological sustainability when particular uses are made of physical resources.

Even though at first glance it seems that New Zealand legislation is in full compliance with Principles 4 and 5 of the Rio Declaration, one must observe that New Zealand authorities have preferred to embody their own approach in the RMA. While the concept of sustainable development as defined in the Brundtland Report is concerned with sustainability in a broader global social, economic and environmental sense, sustainable management is more narrowly focused on integrating principles of sustainability into domestic environmental and resource management policy-making processes and decision-making. The term sustainable management was preferred to avoid the wider complications of sustainable development, which includes altering the global distribution of wealth. The Government sees the RMA and its focus on the sustainable management of natural and physical resources as only one component of a national strategy for implementing sustainable development. Social and economic considerations are relevant within the definition of sustainable management but are limited in their scope to ecological considerations. This contrasts with the intention of the UNCED’s view on the implementation of sustainable development, which considers economic, social and environmental aspects as equal and inseparable. The RMA fails to address environmental problems on a larger scale as it is restricted to the regulation of individual development or resource use. Another concern is the authorities’ interpretation of the RMA. Whilst discretionary power under the RMA is not to be exercised in a vacuum, section 5 does not provide a clear framework for decisions. Procedures of notification as regulated in the Act are often not respected, which has created short falls in public planning control and judicial protection.

Problems are also observed at the local government level. The New Zealand Government has strongly encouraged local governments to meet Agenda 21 standards. Many cities such as Hamilton, Christchurch, and Waitekere have successfully incorporated Agenda 21 at local level. However, local government action happens

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77 Section 5 (2) of the RMA; Grinlinton, D supra n 74, 24.
78 Bosselmann, K supra n 40, 147 – 148.
gatequality.pdf (at 28 February 2006).
mostly in isolation, without central direction or coordination with respect to the extent of consideration for economic, social and environmental factors.

In contrast to its international reputation of a green and untouched country, New Zealand has no policy document promoting sustainable development as the overriding goal. Amendments to the RMA have not led to further progress in this field. New Zealand has neither an elaborate waste-recycling system nor does the RMA influence consumption patterns satisfactorily. As it is largely dependent on its reputation as a green flourishing habitat, hope remains that New Zealand will implement socio-ecological approaches as it once did with the enactment of the RMA.

(b) The European Union

Sustainable development is a very broad objective and requires a cross cutting approach. As a result, almost all policy areas are concerned in one way or another. Particularly important for sustainable development are the policy areas of environment, employment, agriculture, trade, enterprise, fisheries, economic and financial affairs, development, transport, and energy, fields of law in which the EU is competent to enact binding measures on its Member States. As a participant and signatory party of UNCED and the following summits, the EU has several tasks. First, it has the role of ensuring EU-wide policies which reflect the commitments made internationally. European institutions have enacted numerous provisions in different fields of law to advance sustainable development in the European Member States. By examining European action programmes, one can easily assess the European will and dedication to promote sustainability through all fields of law. Secondly, article 10 of the EC Treaty expects EU institutions to monitor and evaluate Member States’ efforts to implement those commitments. Though monitoring, the EU ensures that Member States’ actions do not hinder EU-wide efforts to promote sustainable development. EU institutions are dependent on information from Member States to monitor and evaluate their efforts on the implementation of sustainable development. Given the cultural and judicial differences between the Member States on the one hand, and the global idea of sustainability on the other hand, the promotion and monitoring of sustainable development is very difficult for EU authorities. Nonetheless, the European Union has adopted further action plans such as ‘Sustainable Europe’ and seems willing to execute

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80 The legal bases for European action are widespread through the EC Treaty and are not just limited to articles 174 to 176 of the EC Treaty.
them, as Member States have been brought several times before the ECJ for breaches of EC law.\textsuperscript{84}

In conclusion, even though sustainable development is more a question of national level than of supranational level, the EU is very active in this field. Aware of its role as an international negotiator, it progressively sets the framework for the incorporation of sustainable development in its Member States according to UNCED.

(i) The United Kingdom

The United Kingdom is one of the states that have fully embraced Agenda 21. Increased public participation in decision making processes on district level has opened the discussion for improved quality of life based on sustainable development policies. The UK government issued its “Sustainable Development, the UK Strategy”\textsuperscript{85} policy in January 1994 to fulfil the commitments made at the Earth Summit. In his foreword, the Prime Minister accepted that sustainable development is hard to define, but indicated that it must be based on “good science” and “robust economics” though “sensitive to the intangibles that cannot be reduced to scientific imperatives and the narrow range of economics.” The policy reaffirmed the definition of sustainable development provided in the Brundtland Report and goes on to examine the broad implications of sustainable development, in particular, sectors such as population growth, CO\textsubscript{2} emissions, and water resources. It points out quite precisely how to achieve sustainability in different sectors. Moreover, it announces the creation of a government panel on sustainable development to give authoritative and independent advice. However, although this paper shows the right paths, trends go in another direction. Together with air transport, road transport remains a key area of concern. The indicators\textsuperscript{86} show that road traffic increased by 17 percent between 1990 and 2002. This is significant, not only in terms of air quality, noise and congestion, but also because carbon emissions from road transport are increasing – 10 percent between 1990 and 2000 and a further 9 percent between 2000 and 2010. This increase contrasts with targets to reduce greenhouse gas emissions by 12.5 percent from 1990 levels in line with the UK’s Kyoto commitment and move towards a 20 percent reduction in carbon dioxide emissions below 1990 levels by 2010. Indicators\textsuperscript{87} also show that journeys by foot fell by 26 percent between 1990 and 2002.\textsuperscript{88}

These figures support the Sustainable Development Commission’s call for urgent and radical transport solutions. Hence, the British government has issued new programmes

\textsuperscript{85} Cm 2426.
\textsuperscript{87} Ibid, p 34.
\textsuperscript{88} Ibid.
to enforce and monitor sustainable development initiatives. It endorses development of a UK framework for Sustainable Consumption and Production such as the 2003 UK Sustainable Energy Act\(^89\) to set a scope for further action and priorities for the future to bring together the economic and environmental case. Authorities review the Climate Change Programme to examine the progress made. Moreover, the British Government has launched a programme in cooperation with other EU Member States on a framework of directives which shall provide opportunities for encouraging producer responsibility, reducing resource use, and promoting the recycling and reuse of waste (for example, Packaging, End of Life Vehicles, Waste Electrical and Electronic Equipment directives). The effect of the new initiatives cannot be evaluated yet. Nonetheless, it seems obvious that the UK is in need of new approaches to comply with the goals it has set.

(ii) Germany

In the middle of the 1990s, shortly after UNCED, the official position of the German government was that existing environmental and development policies largely fulfilled the aims of Agenda 21.\(^90\) Because of the early introduction of the precautionary principle, domestic successes in raising air and water quality standards, as well as Germany’s perceived position as an international environmental frontrunner, the position was that a reorientation of German environmental policy was unnecessary.\(^91\) The German Parliament had agreed on several environmental targets such as a 25 percent CO\(_2\) emission reduction in 1990. In its progress report on the implementation of the Fifth European Action Programme the European Commission concluded that Germany did not have a sustainable development strategy at all.\(^92\) The federal government responded and launched a major campaign towards sustainable development which marked a new trend in German engagement with Agenda 21. Reflecting the high priority of environmental issues in Germany, the German Constitution (Grundgesetz) was amended in 1994 to include the protection of the environment as a national goal (Article 20a). In its 1997 report, the BMU\(^93\) has argued that this amendment has successfully anchored sustainable development in the German Constitution. It is doubtful that Article 20a expressly incorporates sustainable development in the Constitution, although it certainly draws attention to environmental issues and underscores the importance of the environment in every field of law.

\(^{92}\) Official Journal of the European Union L 275 10/10/98.  
In addition, the Chancellor founded the Council for Sustainable Development, which issues reports on progress and launches new initiatives in the field of sustainable development. Ever since, Germany has actively promoted sustainable development at the international level. It acknowledges the particular responsibility of industrialised countries to decrease their resource consumption.\(^94\) For instance, it has promoted a 25 percent CO\(_2\)-reduction target in the Kyoto negotiations in 1997 and pushed for an early EU ratification of the FCCC.\(^95\) In contrast, domestic results are inconsistent. On the one hand, a number of key activities were initiated over the last decade. Access to genetic resources, sustainable tourism and a strict refund system on bottles and cans were identified as priority issues.\(^96\) Moreover, the \textit{Federal Soil Protection Act}\(^97\) was amended to reduce the sealing-off of the land-surface. Federal government also reached for a so-called “atomic consensus” which led to the Act on the Progressive Shut Down of Atomic Energy Plants.\(^98\) On the other hand, the federal government has provided only minimal support for Local Agenda 21. In comparison to other European countries, Germany is situated in the middle field.\(^99\) Approximately just 16 percent of Germany’s 14,600 districts deal with sustainable development as mentioned in Agenda 21.\(^100\) Still, no annual report on the progress of the implementation of sustainable development exists. In addition, due to the German economic crisis, the federal government continually cuts the financial support for implementation initiatives.\(^101\) These cuts put German’s international commitments for a strict implementation of sustainable development in national law in a different light and weaken the government’s arguments internationally. Nonetheless, in an overall assessment, Germany is strongly committed to the principle of sustainable development.

\hspace{1cm}\textit{(c) The United States}

Sustainable development was practically an unknown term in the United States until UNCED. Even though President George Bush Snr signed the Rio Declaration, very little was done in this field. The political conflict over environmental law and regulation has been so divisive and time consuming that it has precluded the nation from moving

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\(^{94}\) BMU 1997a.
\(^{95}\) Softing, G \textit{Climate Change Policymaking in Germany and the USA} Cicero (March 2002) \url{www.cicero.uio.no} (at 28 February 2006).
\(^{96}\) BMU 1998e.
\(^{97}\) Bundesbodenschutzgesetz (all German acts dealt with can be found in \textit{Deutsche Gesetze, Satorius I – Textsammlung} Beck Verlag, München).
\(^{98}\) Atomausstiegsgesetz.
\(^{99}\) BMU \textit{Lokale Agenda 21 im europäischen Vergleich} (1999), Naturschutz und Reaktorsicherheit, UBA – Umweltbundesamt.
\(^{100}\) Bundeszentrale für politische Bildung \textit{Lokale Agenda 21 in Deutschland – eine Bilanz} B 31-32 \url{http://www.bpb.de/publikationen/T1PDFH.html} (at 28 February 2006).
towards the next generation of environmental laws that might incorporate the idea of sustainable development.  

In more recent years, the Clinton administration gave some attention and resources to sustainable development, primarily through the President’s Commission on Sustainable Development. Its purpose is to bring together representatives from environmental groups, industry and government to advise the President on matters involving sustainable development. The commission also supports initiatives at the local government level. Many state and local governments have initiated sustainable community efforts. New Jersey, for instance, has virtually adopted the targets of the Kyoto Protocol in its state legislation even though the federal government refuses to make any commitment to act in this field. Metropolitan areas in the Pacific Northwest have aggressively developed policies to control urban sprawl and develop mass transit. St. Louis authorities have developed a twenty year transportation plan that integrates transportation decisions with economic, environmental, and community goals. Many U.S. cities have joined the International Council for Local Environmental Initiatives’ (ICLEI) Cities for Climate Protection programme and committed to a 20 percent reduction target in CO₂ emissions. Furthermore, the U.S. Environmental Protection Agency has launched numerous initiatives. Many of these initiatives are consistent with many ideas underlying sustainable development such as making regulation more efficient and effective, engaging regulated interests in regulatory policy making, or more concrete, new clean air standards. However, approaches on the incorporation of sustainable development are mostly limited to local level. The U.S. is missing a global policy. Few American political leaders are willing to take on the broader question of American values of economic growth, consumption, technology, land use, transportation, and individual freedom. Most Americans resist strongly the idea that limits should be placed on material consumption and perceive environmental commitments as restrictions on individual property and freedom, which are fundamental American principles.  

The United States’ participation in global sustainable development efforts has been quite modest, reflecting a lack of domestic political commitment. The first Bush administration was an unenthusiastic participant at the Rio Summit, and although it supported Agenda 21 and the Earth Charter, it opposed the climate change and biodiversity accords. The Clinton administration was slightly more progressive in this

102 Bryner, G supra n 86, 276.  
103 ECO Don’t buy the U.S. Line Issue N 3 - VOL CIII 6/10/00 (Bonn).  
104 Outcome of the 9th International Conference on Urban Drainage http://www.asce.org/conferences/9icud2002 (at 28 February 2006); Byrner, G supra n 86, 282.  
105 Legacy 2025 The Transportation Plan for the Gateway Region East-West Gateway Coordinating Council; St. Louis Region (2002).  
107 Bryner, G. supra n 86, 278.
field, but the second Bush administration returned to “back to usual”.\textsuperscript{108} It received strong international criticism for withdrawing from the Kyoto Protocol and not sending the U.S. President to the Johannesburg Summit.\textsuperscript{109} At the national level, a task force led by United States Vice-President Dick Cheney issued a report in 2001 entitled \textit{National Energy Policy: Report of the National Energy Policy Development Group}.\textsuperscript{110} The central focus of the plan is to increase the energy supply using coal, oil, gas, and nuclear energy. Although it devotes a substantial proportion to renewable energy sources, efficiency, equity, and environment, the recommended actions in these areas are minor, and place all of these issues at the margins of energy policy. The plan includes neither a CO$_2$ reduction nor target, nor any reference to the Kyoto Protocol. Although responsible for about 25 percent of the world’s greenhouse gases,\textsuperscript{111} the U.S. federal government does not try to incorporate sustainable development as a guiding principle for domestic law. In contrast to a growing number of local, state, and regional governments who show interest in sustainable development as a guiding principle, at the federal level, the United States is currently not in compliance with its international commitment to sustainable development.

(d) Conclusion

Although sustainable development is a complex cross sectoral principle which influences all parts of society, an examination of the different national laws reveals that the success of the Rio outcome on this matter is ambiguous. New Zealand has lost its position as a sustainability leader. It made few efforts to further incorporate the Rio process after the enactment of the Resource Management Act. Considered a first step in the right direction by the former Minister of Environment Hon Geoffrey Palmer fourteen years ago, the RMA has remained the only step. Neither case law nor amendments nor practice have led to profound improvements. The European Union as a supranational organisation seems to be the new leader in advancing sustainable development. However, as it is not a state, the impacts of its actions must be evaluated at the member state level. In corporation with the EU institutions, the UK and Germany have each incorporated sustainable development into their domestic laws. Although both are ambitious in their actions, the UK suffers a lack of success, while Germany, despite its economic problems and pressure from industrial associations, has achieved some success in incorporating sustainability in to law and society. Surveys have shown that citizens consider sustainability an important issue.\textsuperscript{112} Hierarchically, the United States ranks last. Despite some progress at the local level, the U.S. must be

\begin{itemize}
\item \textsuperscript{108} Softing G supra n 95.
\item \textsuperscript{109} Taylor, P \textit{The Global Perspective: Convergence of International and Municipal Law} in Bosselmann, K, Grinlinton, D “Environmental Law for a Sustainable Society” (2002), 129; Ibid.
\item \textsuperscript{111} Grab, A \textit{Greenhouse gas market to slow global warming} (13 October 2005) www.CNN.com (at 18 February 2006)
\item \textsuperscript{112} BMU \textit{Umweltbewu¨ßtsein in Deutschland} (2004), 68 – 70.
\end{itemize}
seen as an overall entity. The federal government’s lack of interest in sustainable development makes it miss compliance with UNCED and questions the significance of international environmental law.

2 ENVIRONMENTAL IMPACT ASSESSMENT

Principle 17 of the Rio Declaration states:113

Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

The purpose of assessment is to ensure that the effects of these projects on the environment are taken into account as early as possible in the decision-making process. The process of Environmental Impact Assessment (EIA) has become an integral part of the planning process for large-scale development projects in many states. In most states, an assessment is mostly mandatory for certain types of projects, such as an airport, a motorway or a power station. Other types of projects such as shopping centres, ski lifts and golf courses may undergo an EIA if their impact is significant for the environment. The environmental assessment process is not an alternative process for granting development consent, but includes other law regimes. Therefore, it is interesting to observe the way Principle 17 of the Rio Declaration is applied in national legislation.

(a) New Zealand

The New Zealand Government was never reluctant to incorporate an EIA system into national law. Prior to the Rio Declaration and the 1991 Resource Management Act (RMA), New Zealand legislation included evaluation mechanisms in specific fields of law, such as mining licensing.114 Since 1991, EIA is embedded in the Resource Management Act. The RMA does not specify any particular title or precise form for an environmental evaluation or proposal. It provides provisions for applications to be made for resources consents, essentially for those activities not expressly permitted at the regional and district level. In these circumstances, section 88(4) (b) of the Act requires: “an assessment of any actual or potential effects that the activity may have on the environment and the ways in which any adverse effects may be mitigated”. The definition of the EIA in the RMA is broad. Even though section 88 (6) (b) of the RMA enlists matters that should be included in an assessment of effects on the environment, the lack of precise guidelines makes it difficult for practitioners to apply these

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113 Supra n 4.
114 Harris, R “Handbook of Environmental Law” (Royal Forest and Bird Protection Society of New Zealand, Wellington, 2004), 57.
matters. For instance, the definition’s brought social dimension of the EIA accommodates Maori considerations, but also leads to confusion about the degree to which cultural and social considerations might be included.

The RMA has purposely given the decision making authorities a very large degree of flexibility in implementation, therefore EIA practice is strongly dependent upon the discretion of local authorities and, through case law, the Environment Court. EIA are mostly administered at the local government level and applied to a wide range of, especially, small scale projects resulting in a large number of EIA reports annually. Due to the flexible set-up of the EIA system, it is well suited to local circumstances. This should imply a strong interactive relation between authorities and citizens who are directly concerned by the planning decisions. Although the RMA imposes notification for most Council consents, projects are often processed through a non-notified procedure, which puts an obstacle to public review of the EIA report. This causes judicial problems. Council’s practice of large-scale non-notification limits the citizens’ right of submission as well as public participation in the planning process, and therefore reduces the public control of the authorities’ planning discretion.

The principles of EIA developed by UNEP state that environmental effects assessment or environmental impacts report should include some specified aspects. These principles are basically reflected in the Resource Management Act. Even though it is still in overall compliance with Principle 17 of the Rio Declaration, the EIA system in the RMA is not as innovative as it had been fourteen years ago. New Zealand legislation has missed the chance to install a more transparent EIA system.

(b) The European Union

The requirement to carry out an assessment was introduced by the 1985 Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, seven years before the Rio Declaration. This directive was

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117 Ibid.
119 Schijf, B supra n 119.
120 As discussed with Prof K Palmer in the frame of the course „Resource Management Law“, University of Auckland (2nd semester 2005); see also Ibid.
121 United Nations Environmental Programme, see the principles under http://www.unep.org (at 28 February 2006).
122 These are for example: a description of the proposed activity; a description of the potentially affected environment; a description of practical alternatives, an assessment of direct, indirect, cumulative, short-term and long-term effects, etc.
substantially amended by the 1997 Directive, 97/11/EC.\textsuperscript{124} The EU’s objective in adopting environmental assessment was to prevent pollution at source by requiring environmental information to be considered as part of project authorisation procedures. Moreover, the EU has followed the statements of the Åarhus-Convention by enacting Directive 2003/35/EC on public participation and access to courts. As the Community just has the competence to set out the goals for environmental planning on member state level, it has to be examined which ways the European Member States have elected to incorporate environmental assessment into national law.

(i) The United Kingdom

The 1995 Environmental Assessment Directive was sought to be implemented in the UK by the 1988 Town and Country Planning Regulations.\textsuperscript{125} Parliamentary Standing Orders provide for environmental assessment of developments promoted by private and hybrid Bills, unless the Secretary of State directs that no environmental statement is required. A new section 71A was also inserted into the 1990 Town and Country Planning Act\textsuperscript{126} to give the Secretary of State the authority to make additional provisions about the consideration to be given to the likely environmental effects of proposed development.\textsuperscript{127} Despite the UK’s apparent compliance with the requirements of the 1985 Directive, a number of weaknesses in the UK legislation were considered in 1995.\textsuperscript{128} The Town and Country Planning Regulations 1995\textsuperscript{129} required the submission of environmental statements before permission could be granted on an enforcement notice appeal for development falling within the directive. These amendments had little practical significance because development is rarely carried out under permitted development rights or without planning permission.\textsuperscript{130} The 1997 directive has made significant changes to the UK’s Environmental Impact Assessment system. Amendments to the 1985 Directive were transposed into English law in respect of planning matters by the Town and Country Planning Regulations 1999.\textsuperscript{131} The main changes have been made to increase the number of projects that are now subject to the Environmental Impact Assessment process, and to enforce individual rights in a case to case evaluation. Developers can now obtain advice from competent authorities who must give their reasons for granting the development consent, as well as for their refusal. The decision must also be publicised. Planning authorities must inform the Secretary of State of their decision, and the public, normally by publishing a notice in local newspapers. This is a novel requirement for UK planning authorities, who have previously only been required to justify the refusal of their planning permission.

\textsuperscript{125} Burnett-Hall, R “Environmental Law” (Sweet & Maxwell, London, 1995), para 4-019.
\textsuperscript{126} Hughes, D. supra n 27, 193.
\textsuperscript{128} Wooley, D, Pugh-Smith, J, Langham, R, Upton, W supra n 35, 678.
\textsuperscript{129} SI 1995/2258.
\textsuperscript{130} Wooley, D, Pugh-Smith, J, Langham, R, Upton, W supra n 35, 678.
\textsuperscript{131} SI 1999/293.
Although the UK government has sought to implement the European directives, there have been a number of cases before the ECJ and British courts where it has been alleged that the UK has failed to implement the directives correctly.\(^{132}\) It is a general principle of European law that, if a Member State fails to implement a directive correctly, the provisions of the directive are given direct effect. Individuals may appeal on the directive directly without act of transposition, if the provision confers individual rights, and if it is unconditional and sufficiently precise.\(^{133}\) There has been a difference of views in British courts over whether the 1985 Directive does have a direct effect or not. Today, the direct effect is entirely accepted by the courts. However, the direct application of European directives should be the exception because its application is difficult for citizens as well as for authorities. At present, the European Commission has initiated an infringement procedure (Article 226 EC Treaty) against the UK before the ECJ.\(^{134}\) The Commission accuses the UK of having neglected to perform an EIA for a large project at Crystal Place, London. British authorities did not pursue any assessment although the project passed the threshold of the official screening guidelines. The outcome has to be observed.

In essence, the British legislation contains a sophisticated body of planning and pollution control which is in overall compliance with European law. Despite some problems in the field of application and some failures in compliance with European law, the progressive environmental development of EIA in the UK over the last 30 years corresponds to the goals of Principle 17 of the Rio Declaration.

(ii) Germany

The German Government started considering systematic Environmental Impact Assessment in 1971, but it was not before 1975 that the first guidelines for an EIA were enacted. Despite some methodical concepts, these guidelines were without legal significance. In 1985, article 12 of the European Directive 85/337/EEC put the obligation on Germany to incorporate an EIA system in German national law by 3 July 1988. Despite its efforts to transpose the directive, Germany did not comply with its European duties.\(^{135}\) This was due to serious problems in negotiations between the federal government and the governments of the federal states. After the expiration of the transposition deadline, as far as subjective matters of the directive were concerned, individuals could in principle, appeal directly on it. However, individual rights are a rarity in planning law which puts individuals in an unsatisfactory position. Germany finally incorporated the directive in the 1990 Act on the Transposition of the 1985


\(^{134}\) [http://europa.eu.int/rapid](http://europa.eu.int/rapid) (at 28 February 2006).

\(^{135}\) Germany did not for fill its treaty duties: *Commission v Germany* ECJ C-301/95.
European Directive on the EIA on Certain Public and Private Projects. This act influenced other acts such as the Federal Protection against Immissions Act (EIA Act) which was amended by a new paragraph 4. The parliament also amended paragraph 7 of the Federal Atomic Energy Act. Basically, these amendments made an EIA mandatory for big industrial or atomic projects. In 1997, the German government argued unsuccessfully against an enactment of the European directive that should have amended the 1985 Directive. Germany missed the transposition deadline and failed its European obligations again. It was not before 3 August 2001 that the directive was transposed.

The 1990 EIA Act is limited in its application to certain projects. The number of projects where an EIA is mandatory is analogous to those mentioned in the 1985 European directive. Every project subject which is the subject of an EIA has to respect a large number of environmental concerns such as noise, air pollution, deforestation, or basic individual rights. These subjects of protection are in the scope of different acts of German and European legislation which oblige authorities to do a cross-over examination, pondering the different interferences and individual rights. This is a highly difficult process which demands a case by case evaluation. Activities for the insertion of a separate environmental act to harmonise the procedures have occurred, but are so far, without success. The German legislation trend currently heads towards a different direction: public participation is limited to simplify the planning of traffic routes, and respites for consents and individual claims are reduced to accelerate planning procedures. There is a trend in German planning law that at some rate regional parliaments put themselves in the position of councils to give consent to major projects. As acts of parliament are more difficult to bring before court than administrative acts (Verwaltungsakte), German authorities reduce the individuals’ legal protection by substituting the authority which enacts the regulation. It is doubtful that German authorities’ initiatives to simplify planning are in compliance with European law. This matter is actually pending in different proceedings against Germany before the ECJ.

In conclusion, like many other European Member States, Germany has a highly complex and sophisticated body of planning rules which respect environmental

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136 Gesetz zur Umsetzung der Europäischen Richtlinie zur Umweltverträglichleitsprüfung von öffentlichen und privaten Projekten.
137 Bundesimmissionenschutzgesetz.
138 Atomgesetz; see also the Federal Water Household Act (Wasserhaushaltsgesetz), the Federal Nature Conservation Act (Bundesnaturschutzgesetz), or the Federal Forrest Act (Bundeswaldgesetz).
139 Scholles, F, Kanning, H Planungsmethoden am Beispiel der Projekt-UVP (Institut für Landesplanung und Raumforschung, Hannover, 2002) >http://www.laum.uni-hannover.de/ilr/lehre/Ptm/Ptm_Uvp.htm< (at 28 February 2006).
140 Verkehrswegebeschleunigungsgesetz.
141 Scholles, F, Kanning, H supra n 139.
142 >www.curia.eu.int< (at 28 February 2006).
FROM DECARATI ON TO IMPLEMENTATION?

concerns. For example, paragraph 73 of the Act on Administrative Proceedings deals with public participation in EIA and so does paragraph 7 of the Federal Atomic Energy Act.\textsuperscript{143} However, the German government has proved a strong resistance to the incorporation of European EIA directives, acting against further improvement and delaying the incorporation into German law. In conclusion, although EIA is strongly incorporated in German law, recent activities question the foundations of Germany’s commitment to Principle 17 of the Rio Declaration.

(c) The United States

EIA has its origins in the USA of the mid-1960’s. Upcoming environmental problems and growing numbers of members of environmental NGO’s prompted the U.S. government to enact a new environmental act for the assessment of environmental impacts for certain large size projects. In 1970, U.S. Congress enacted the National Environmental Policy Act (NEPA).\textsuperscript{144} In principle, NEPA is divided into two titles: Title one is little more than a declaration of environmental policy. The language in §101 suggests a number of important environmental considerations, but nothing is mandatory or enforceable. Title two establishes, on the one hand, the Council on Environmental Quality (CEQ) and outlines its duties under the act. CEQ is an agency charged with giving general advice on environmental issues, and with preparing regulations for federal agencies to implement NEPA. On the other hand, Title two requires an Environmental Impact Statement (EIS) to be prepared by each agency as part of planned action by the federal government. The key provision of Title two is §102 (2) (C) which requires federal agencies to consult with other agencies that have some jurisdiction or special expertise regarding the environmental impact.\textsuperscript{145}

This mandatory obligation seems very logical and simple, but it causes most of the NEPA case law. In \textit{Calvert Cliffs’ Coordinating Comm., Inc. v U.S. Atomic Energy Comm’n} Judge Wright decided “once an EIS has been prepared, there is a mandatory public disclosure provision which elongates the planning period for a federal agency and simultaneously permits the involvement of citizens in the NEPA”.\textsuperscript{146} These requirements are mandatory and inflexible procedural duties to every federal planning authority and cannot be brushed aside by an agency’s discretion. Judge Wright decided strongly in favour of strict compliance with NEPA requirements, emphasising the aspect of public participation to limit authorities’ powers. Although many later cases have reaffirmed this decision, the U.S. Supreme Court decided in \textit{Stryker’s Bay

\textsuperscript{143} Verwaltungsverfahrensgesetz.


\textsuperscript{145} Ibid.

\textsuperscript{146} So Judge Wright on §102 of NEPA in \textit{Calvert Cliffs’ Coordinating Comm., Inc. v U.S. Atomic Energy Comm’n} (AEC), 449 F.2d 1109 (D.C. Cir. 1971).
Neighbourhood Council, Inc. v. Karlen\textsuperscript{147} against further enforcement of citizens’ rights on EIS. The Supreme Court held that NEPA did not impose judicially enforceable substantive requirements, stating “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for the court is to insure that the agency has considered the environmental consequences”\textsuperscript{148}. In other words, NEPA can only demand a mandatory process, but does not impose any substantive requirements on agencies’ decision making. Therewith, courts will not be allowed to judge on authorities’ discretionary decision, as long as they have undertaken an EIS, unless this EIS is arbitrary or capricious.\textsuperscript{149} This decision is still controversial. Critics argue that the lack of substantive enforceable action leaves individuals to the authorities’ discretion.\textsuperscript{150} Miller considers NEPA to be a purely procedural requirement, detached from any substantive significance.\textsuperscript{151} Byrne suggests that the EIS has no direct force in any tightly strung, relatively stable system of action, so it is not clear what exactly it does, how it operates, or what its force and meaning is or should be.\textsuperscript{152}

In essence, one has to ascertain that the U.S. legislation prepared the fundamentals of international EIA by enacting NEPA in 1970, 22 years before UNCED. NEPA has been a valuable tool for expanding the U.S. public's right to know about the impacts of major transportation projects before they are built and to win consideration of impact mitigation or avoidance strategies. Many projects have been improved due to the environmental review process, such as the I-70 Highway across Vail Pass in Colorado, the Route 50 project in the northern Virginia Piedmont, or the U.S.93 project in Montana.\textsuperscript{153} However, the lack of forced action beyond the preparation of documents has not intervened strongly enough in the motives and practices of government agencies, and therefore has not produced adequate environmental protection. A 1997 CEQ study suggests that the initiation of NEPA processes is often delayed. Consequently, these projects do not have sufficient effect. Furthermore, it stresses that citizen input is often not adequate.\textsuperscript{154} In terms of progress since 1992, the U.S. government was not very active to strengthen EIA in national legislation. However, in an overall evaluation, the U.S. is in compliance with Principle 17 of the Declaration.

\textsuperscript{148} Ferrey, S supra n 147, 78.
\textsuperscript{150} Miller, C Environmental impact statements and rhetorical genres: An Application of Rhetorical Theory to Technical Communication (Dissertation, Rensselaer Polytechnic Institution, 1980), 237-246.
\textsuperscript{151} Ibid.
\textsuperscript{152} Byrne, J The Return of Reasonableness to NEPA Environmental Law Review [1996], 1287-1312.
\textsuperscript{153} For an overview see: \url{http://www.epa.gov} (at 28 February 2006).
(d) Conclusion

Environmental Impact Assessment is internationally accepted as a widely used decision tool. European Member States as well as the U.S. and New Zealand have incorporated an EIA system into their national laws. New Zealand’s RMA sets guidelines and leaves the application of the assessment to the authorities’ discretion. The New Zealand government underlines\(^{155}\) that council consents’ are mostly considered in compliance with UNCED. The UK and Germany follow a different approach. Being countries with strong and strict regulations, much less depends on the discretion of the authorities. As the European Union continuously enforces EIA in its Member States, both countries are under the obligation of compliance with Rio. But as the UK is globally willing to do so, German lobbies try to protect their national law from further influences in planning mechanisms. In doing so, Germany is violating its obligations of the EC Treaty which is a strong and cost-intensive argument to enforce the EIA in German law. The U.S. imposes strict regulations on its agencies to do an EIA. Once an EIA procedure has started, authorities have a broader margin of appreciation than their European counterparts. Nonetheless, although different approaches are chosen, all states are in compliance with Principle 17 of the Rio Declaration.

3 The Precautionary Principle

The precautionary principle is a risk analysis concept that is essential in the evaluation of environmental risk and the managing of resources. It has found its way into international recognition as it aims to “formalise the application of precaution to regulatory decision making” and yet, it still has no set definition.\(^{156}\) Principle 15 of the Rio Declaration states:

> In order to protect the environment, the precautionary approach shall be widely applied by the States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Therewith, the Rio Declaration sets no further concretion but chooses to emphasise the importance of the principle. It has been argued that the precautionary principle has become a principle of customary international law.\(^{157}\) This would mean that all states would be under the obligation to apply the precautionary principle. Considering that there is no definition which could constitute a sufficiently precise norm, no such customary international law can exist. However, it remains a general principle of international law that has to be respected.\(^{158}\)

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\(^{156}\) Merchant, G From General Policy to Legal Rule: Aspirations and Limitations of the Precautionary Principle Environmental Health Perspectives (2003), 1799.

\(^{157}\) Woolley, D, Pugh-Smith, J, Langham, R, Upton, W supra 35, p 97; DiMento, J supra n 34, 95.

\(^{158}\) See the Trail-Smelter Case 33 AJIL (1939) and the Corfu Channel Case ICJ Rep. (1949), 22.
(a) New Zealand

The precautionary principle has not yet been expressly included into New Zealand legislation, although it is incorporated in the 1994 Hazardous Substances and New Organisms Bill, and the 1994 Fisheries Bill. The former adopts a preventive approach to the introduction of hazardous substances and new organisms into New Zealand while the purpose of the latter is the sustainable utilisation of fisheries resources.\textsuperscript{159} The RMA provides no such explicit reference to the precautionary principle, but associates various concepts with precaution:

- Adverse effects of activities must be avoided, remedied or mitigated\textsuperscript{160}
- Sustainable management is defined to encompass:
  - Sustaining resources to meet the reasonably foreseeable needs of future generations\textsuperscript{161}
  - Safeguarding the life-supporting capacity of resources\textsuperscript{162}

These elements have been reflected in clause 3.3.1 of the New Zealand Coastal Policy Statement which requires authorities to adopt a precautionary approach to coastal management and granting consent for proposed activities in the coastal marine area. However, as the provisions on the application of the precautionary principle are just sectoral, the government has stated in its 1995 Environment 2010 Strategy:

> The Precautionary Principle should be applied to resource management practice, where there is limited knowledge or understanding about the potential for adverse environmental effects or the risk or serious or irreversible environmental damage.\textsuperscript{163}

Although this statement provides a certain legal mandate for the application of the precautionary principle, its content is still vague. The difficulties in the practical application are illustrated in \textit{Trans Power New Zealand Ltd v. Rodney District Council}\textsuperscript{164} In this case the Planning Tribunal had to determine whether the alleged but scientifically unproven health risks of electric and magnetic emissions from high voltage power lines should prevent the granting of consent for the installation of a new line. The court noted that scientific evidence was in conflict, and that it was not possible to prove to a scientific level of certainty that exposure to the electro-magnetic fields emitted from the proposed lines would have no adverse effects on health. It stated “[It] is not to reject the precautionary approach, but there needs to be some

\begin{itemize}
  \item Grinlinton, D supra n 74, 13.
  \item Section 5 (2) (c) RMA.
  \item Section 3 (c), (d), and (f) of the RMA.
  \item Section 5 (2) (a) and (b) of the RMA.
  \item \textit{Trans Power New Zealand Ltd v. Rodney District Council} 4 NZPTD 21.
\end{itemize}
plausible basis, not mere suspicion or innuendo, for adopting the approach."\textsuperscript{165} This statement indicates that in appropriate cases the precautionary principle may be used by the Court in evaluating evidence. The Tribunal embraced the principle again in \textit{McIntyre v Christchurch City Council},\textsuperscript{166} confirming its reasoning in the \textit{Trans Power} case. \textit{McIntyre v Christchurch City Council} involved an appeal from the grant of resource consent for a cell phone transmitter site, and evidence again revolved around the potential for adverse health effects caused by electromagnetic radiation. Even though the Tribunal found no ability to import a general concept of a precautionary approach into the specific statutory test laid out in section 104 of the RMA, it held that it could be relevant to its exercise of its general discretion whether to grant or to refuse a consent in terms of section 105 (1) of the RMA.\textsuperscript{167} This situation is not satisfying.

So far, New Zealand legislation has decided against amending the RMA to further incorporate the precautionary principle. The courts’ decisions mentioned above point out that its application is very difficult in the judicial process since the principle has no set definition.\textsuperscript{168} The Environment Court has acknowledged that the precautionary principle is a consideration under the RMA, but one which is subject to the decision-maker’s discretion.\textsuperscript{169} However, through case law, it seems to have established rules on scientific uncertainty and the use of the precautionary principle.\textsuperscript{170} In sum, although not sufficiently clear, the precautionary principle is incorporated into New Zealand domestic law, according to Principle 15 of the Rio declaration.

(b) The European Union

The EC Treaty recognizes the precautionary principle in article 174 (2) (former article 130 (r)) but mentions it neither expressly nor provides any further definition. This lack of precision does not affect its recognition in practice.\textsuperscript{171} The scope of the precautionary principle is very wide, specifically where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.\textsuperscript{172} Although many European enactments are related to the precautionary principle, only a few address it directly,

\textsuperscript{165} \textit{McIntyre v Christchurch City Council} [1996] NZRMA 289.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid 305.
\textsuperscript{168} Raea, P \textit{The Adoption of the Precautionary Principle in New Zealand} (Dissertation, 1998), 61.
\textsuperscript{169} Birdsong, B \textit{New Zealand’s Environment Court and the Resource Management Act} (Ian Axford Fellowship Reports, 1998), 42.
\textsuperscript{170} Ibid.
\textsuperscript{172} See articles 174 – 176 EC Treaty and the harmonization legal basis in article 95 EC Treaty.
among which are the Fifth Action Programme adopted in December 1992 and the Declaration of Heads of States of June 1990. The European Commission has released a communication on the application of the precautionary principle on 2 February 2000. Therewith, the Commission aims to outline the approach on using the precautionary principle, and establishes common guidelines for its application. The Communication is of non-binding character. Thus, as far as no other binding European enactments are concerned, the uniform application of the precautionary principle depends on the discretion of the European Member States. The states’ discretion is, however, limited by the ECJ which has made some important decisions in this field. In its decision on the validity of the Commission’s ban on the export of British beef, the Court ruled that:

[w]here there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks may become apparent.

Even though this decision was not very welcome by the British, it underlines the importance of the European institution’s perception regarding the precautionary principle.

Precaution is a widely endorsed idea in the European Union which has led to many trade disputes, especially with the U.S. Europe, for example, has refused the import of gene-manipulated food and strongly advises other states to do the same. Although this has created some international tensions, the EU has not changed its position.

(i) The United Kingdom

The precautionary principle entered the language of environmental policy in Britain in the mid 1980s. In those days, the British government was reluctant to the enunciation of the principle as a guide to government policy. Since then, due to international obligations, especially the 1987 North Sea Convention and the 1992 Maastricht Treaty, the precautionary principle has been adopted by British legislation. The precautionary principle receives its strongest recognition in British legislation in the 1990 White Paper: This Common Inheritance Britain’s Environmental Strategy. The White Paper

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175 COM (2000) 2/2/00 >http://europa.eu.int/eur-lex/lex/LexUriServ< (at 28 February 2006); see also Jordan, A supra n 171, 156.
176 ECJ C-180/96, ECR I-3903, 5 May 1998.
177 Jordan, A supra n 174, 149.
179 Presented to Parliament 1990, Cm 1200.
discusses precautionary action in the context of limiting the use of potentially
dangerous materials and the spread of potentially dangerous pollutants. However, it is
not limited to the field of pollution as it also mentions natural resources. The link
between sustainable development and the precautionary principle is not made explicitly
in the White Paper, though it is in one of the brochures\(^1\) as it is in the 1990 Bergen
Declaration.\(^{181}\) However, as the precautionary principle is interpreted in Britain as being
linked to sustainability, it is a widespread principle that is applied in various fields of
environmental law.\(^{182}\) The 1990 Environmental Protection Act (EPA)\(^{183}\) which
transposed EU directives 88/609 and 84/360, imposed that all new substantially altered
industrial processes require IPC authorisation – a precautionary mechanism which
meant a fundamental shift in British control philosophy.

The precautionary principle is also embodied in Part IV of the EPA which deals with
the control of genetically modified organisms, one of the areas beyond traditional
pollution control where the UK legislature was active within the last fifteen years. It
states that it is “for the purpose of preventing or minimising any damage to the
environment which may arise from the escape or release from human control of
genetically modified organisms”. In other words, the risk may not be known for
certain. Another field is biodiversity, where the government has stressed in section 1 of
its action plan that the precautionary principle should guide the decisions for the
implementation of the biodiversity programme.\(^{184}\) Moreover, the BSE scandal has
stigmatised the British view on the precautionary principle. Since the end of the 1990s,
much has been done on further implementation. The precautionary principle has been
reaffirmed in the UK Strategy on pesticides\(^{185}\) as well as in the 1999 Sustainable
Development Strategy.\(^{186}\) However, in practice, the precautionary principle is still no
intrinsic value of British legislation.

While the British courts are willing to recognize the principle and uphold precautionary
decisions they have not, in most cases, been willing to accept it as a justification for
substantive and intensive review.\(^{187}\) In \textit{R v Secretary of State for Trade and Industry, ex
p Duddridge},\(^{188}\) for instance, a case arising from allegations that the Secretary of State
should take precautionary action to prevent risks of childhood leukaemia arising from
exposure to electromagnetic fields generated by power cables, Smith J pointed out that

\(^{180}\) UK Department of Environment \textit{Sustaining our Common Future} – A Progress Report by the UK on

\(^{181}\) UN Doc. A/CONF.151/PC/10 (1990), 1 YB Intl Envtl Law 429, 4312 (1990)

\(^{182}\) Haigh, N supra n 181, 239.

\(^{183}\) Cm 4345.

\(^{184}\) Cm 2428.

\(^{185}\) Cm 2426.

\(^{186}\) Cm 4345.

\(^{187}\) Macrory, R, Havercroft, I \textit{Environmental principles in the United Kingdom} in Macrory, R \textit{“Principles
of European Environmental Law”} (European Law Publishing, Groening, 2004), 204.

there is “no comprehensive and authoritative definition of the precautionary principle”, but rejected arguments that precautionary action is needed where there is “evidence of a possible risk even though the scientific evidence is presently unclear and does not prove the casual connection”. Smith J considered that the government was perfectly entitled to formulate the much more restricted notion of precautionary action. Therewith, the threshold for taking action lies in the authority’s perception of a significant risk of harm. Denying the claim on basically the same grounds, Crane J added in the High Court *Amvac Chemical UK Ltd* case,\(^{189}\) “I am prepared to accept that on a substantive challenge to a regulatory decision, it may in some cases be relevant to take into account the precautionary principle and, more important its limitations”.\(^{190}\)

The Court does certainly not welcome the principle warmly, but it is acknowledged in practice. Given the Government’s activities on further implementation, the precautionary principle, even though still in its first steps, is slowly emerging in British law.

(ii) Germany

The origins of the precautionary principle (“Vorsorgeprinzip”) date back to the 18\(^{\text{th}}\) century when forest administrator Georg Ludwig Hartig gave out a policy on the sustainable management of forests.\(^{191}\) However, it first appeared in politics in the 1970s. In 1971, it was recognised as one of the central instruments in the first German environmental programme. Therewith, Germany was the first country world-wide recognising the precautionary principle as we understand it today.\(^{192}\) This was mainly due to national ecological problems, such as growing air pollution and dramatic forest damage. Since the 1980s, it has influenced international environmental law. Having been strongly promoted by Germany, the precautionary principle was introduced in the 1982 *Earth Charter*\(^{193}\), the 1992 *European Amsterdam Treaty* and in the *Rio Declaration*.

In 1986, the Federal government issued guidelines on ‘Vorsorge’ (precaution).\(^{194}\) Following these guidelines, the precautionary principle has to be distinguished from the pre-existing concept of ‘Gefahrenabwehr’ (protection against risks).\(^{195}\) The major difference is the identifiability of a given risk. Public authorities are clearly obliged to

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190. Ibid para 84.
191. Hartig, G *Anweisung zur Taxation der Forste oder Bestimmung des Holzertrags der Wälder* (Giessen, 1795).
192. Jordan, A supra n 174, 144.
193. GA Res 37/7, UN GAOR, 37\(^{\text{th}}\) sess, supp No 51 (1982).
194. Haigh, N supra n 181, 231.
195. Ibid.
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act against identifiable risks. The ‘Vorsorgeprinzip’ raises the need to act against risks which are not proven, or even the need to act in the absence of risk. In deciding to take action, public authorities in Germany are bound by all principles of administrative law including the principle of proportionality of administrative action to the achievement of prescribed goal, and the principle of prohibition of excessive actions.\textsuperscript{196} Action taken following the precautionary principle thus requires a balancing of risks, costs and benefits. According to the German government’s arguments, the precautionary principle is a general principle in Germany which implies environmental precaution, especially risk limitation due to scientific research and technology, environmental monitoring, setting middle- and long-term goals, systematic approaches to environmental problems and a control-system of public actions.\textsuperscript{197}

Federal government is certainly drawing a visionary picture of the implementation of the precautionary principle and not the present administrative practice. Nonetheless, the precautionary principle is a major issue in nearly every environmental situation. Most German laws with environmental aspects comprise a reference to the precautionary principle, whether directly or indirectly, due to international obligations or national initiatives. For instance, the government has enacted the 1993 Act on Gene-technology\textsuperscript{198} with the purpose to create a framework for the scientific research on genes and to protect the environment from eventual dangers, as stated in paragraph 1 of the act. Therewith, the German parliament has implemented EC Directive 90/219/ECC into national law. The precautionary principle was also incorporated in paragraph 2 (4) of the Federal Energy Management Act\textsuperscript{199} which demands \textit{inter alia} that environmental damage should be minimized at maximum. Several paragraphs of the Federal Water Management Act\textsuperscript{200} oblige authorities to ensure that every negative impact that can be avoided has to be avoided.\textsuperscript{201} In essence, Germany is very active in the promotion and implementation of the precautionary principle and is consequently in full compliance with Principle 15 of the Rio Declaration.

(c) The United States

In the United States, the precautionary principle underlay the first wave of federal environmental statutes in the 1970s. The 1970 Clean Air Act, for example, called on regulators to apply “an ample margin of safety” in setting emission limits for hazardous pollutants,\textsuperscript{202} while the 1972 amendments to the Federal Water Pollution Control Act (later renamed the Clean Water Act)\textsuperscript{203} established the goal of eliminating water

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\textsuperscript{196} Articles 1 – 19 Grundgesetz; § 114 Verwaltungsverfahrensgesetz.
\textsuperscript{197} See Beuermann, C supra n 91, 91.
\textsuperscript{198} Gentechnikgesetz.
\textsuperscript{199} Energiewirtschaftsgesetz.
\textsuperscript{200} Wasserhaushaltsgesetz.
\textsuperscript{201} for the purpose of the Act see Paragraph 1 (a) (2).
\textsuperscript{202} CAA § 112, 42 USC § 7412.
\textsuperscript{203} CWA § 101, 33 USC § 1251.
pollution altogether. While not named, it has also been implicitly incorporated into
other laws and regulations. Under the Federal Food, Drug and Cosmetics Act (FDCA)
the burden of proof is on pharmaceutical manufacturers to prove the safety and efficacy
of new drugs.204 The Delaney Clause of the FDCA prohibits the entrance of certain
categories of substances into packaged food if they are found to cause cancer in humans
or laboratory animals.205 Thus, although the United States has often questioned the
precautionary principle internationally, U.S. domestic law of the 1970s has in many
aspects respected its nature. Since then, very little has been done for the further
implementation of the precautionary principle.206 UNCED seems to have had no
influence on the U.S. perception of the precautionary principle.207 U.S. environmental
law increasingly stresses risk assessment and cost-benefit analysis, both of which,
unlike the precautionary principle, presume that we have sufficient knowledge to
measure and calculate the appropriate responses.208

Recent U.S. government attempts to undermine the principle in international
discussions regarding genetically modified organisms, persistent organic pollutants, and
international trade indicate that precaution is far from being widely accepted by the
authorities.209 Nonetheless, at the state and local level, some approaches for the
implementation of the precautionary principle are made. At the state level, under
California’s Proposition 65, firms that expose the public to substances listed as
reproductive or carcinogenic have the burden of proof to show that exposure does not
pose a risk beyond some legally specified level.210 Perhaps one of the most successful
states in implementing the precautionary principle is Massachusetts. The 1989
Massachusetts Toxic Use Reduction Act has led between 1990 and 1995 to a two-third
reduction of toxic emissions, and a 30 per cent reduction of total chemical waste.211
Moreover, Massachusetts introduced in 1997 a bill to establish the precautionary
principle as the guideline for developing environmental policy and quality standards for
the Commonwealth.212 This bill, the first to mention the precautionary principle
explicitly in the U.S., was introduced in response to industry-supported bills that would
require risk assessments and cost benefit analysis for any major regulation.

204 Bodansky, D The Precautionary Principle in US Environmental Law in O’Riordan, T, Cameron, J
205 Tickner, J, Raffensperger, C The American View on the Precautionary Principle in O’Riordan, T,
206 Ibid 188 – 190.
 (Science and Environmental Health Network, Lowell, Massachusetts, 1999), 13.
208 Ibid.
209 Tickner, J, Raffensperger, C The Evolution of the Precautionary Principle in in O’Riordan, T,
210 Tickner, J, Raffensperger, C supra n 208, 190.
211 Toxic Use Reduction Institute Massachusetts Is Cleaner and Safer [1997] Lowell, Ma.
212 Tickner, J, Raffensperger, C supra n 208, 191.
At the local level, San Francisco and Los Angeles, for example, have both adopted the precautionary principle by enacting remarkable policies on pest management and pollution prevention.\textsuperscript{213} This, however, has little impact on the overall implementation of the precautionary principle in U.S. law. Fundamental conservative perceptions make the implementation of the precautionary principle extremely difficult. Many Americans consider the precautionary principle as a barrier to free trade and property rights.\textsuperscript{214} Instead of the incorporation of the precautionary principle, they prefer a cost benefit analysis. Since the time of the Reagan administration, very little has been done in this field. Even though there are various activities at the state and local level, in an overall federal evaluation, the precautionary principle has not found its way into U.S. legislation.

(d) Conclusion

It is still not entirely clear how far the precautionary principle as found in Principle 15 of the Rio Declaration is applied by UNCEDs’ signatory parties. The comparison has shown that it is widely endorsed by most states, even though differently approached. Unlike the European perspective, where precaution is regarded as a normative principle, namely “good practice” in the face of genuine doubt, the U.S. position favours a more “reactive” position.\textsuperscript{215} This implies a feeble implementation of the precautionary principle in U.S. law. Due to German and international influences, the European Union is a strong promoter of the precautionary principle. As inventor of the principle, Germany is in strict compliance with its European and international obligations in this matter. Moreover, its regulation efforts exceed the expectations. The UK on the other hand has shown some resistance against the implementation of the principle. At the same time as UNCED, British legislation recognised its national and international responsibilities and became active in this field. New Zealand, again, has a position in between Europe and the U.S.. The principle is not strongly anchored in national legislation, but accepted as an overall principle in practice. Although being a dualist state, New Zealand courts refer to the principle as mentioned in the Rio Declaration. Thus, the embedding of the precautionary principle as a principle of international law clearly influences national legislation.

V CONCLUSION

The legal situation of the Rio Declaration cannot be assessed from a black and white perspective. As a soft law document, the significance of the Rio Declaration mainly depends on the perception of the signatory states. As seen, these perceptions are widely varied. While the U.S. has taken a conservative position over the last twenty years that

\textsuperscript{213} Ibid 191 – 192.
\textsuperscript{215} Tickner, J, Raffensperger, C supra n 209, 27.
sees environmental issues rather as a limit to free trade and property rights, the European perspective considers environmental problems as an integral part of every field of law. European Member States seldom combine environmental policies with commerce and trade politics, but politicians have started to realise that the environment is a perfectly suited field for trade and commerce which creates jobs and wealth. Thus, in contrast to the U.S., Europe is mainly trying to be in compliance with UNCED. Governments use the Rio outcome as a guideline for amending national legislation. This was the initial goal of UNCED, especially the Rio Declaration and Agenda 21. The European institutions and its Member States, such as Germany, and the Netherlands, are not tired of referring to their Rio “obligations”, despite the fact that they are non-binding. Environmental issues are the subject of every major planning project. Regulations on refund systems, waste management and energy consumption have strongly influenced law and lifestyle in the European Member States.

In contrast to the European Union, the U.S. refuses to apply the precautionary principle. While the U.S. criticises Europe of being over-regulative and of abusing environmental policies as treaty breach justifications, Europeans have accused the U.S. of failing their role as world leader. U.S. NGOs and governments are very active in the promotion of new environmental policies. However, considering the reluctance of the U.S. government to deal with environmental issues, the European accusation is certainly true. Little has been done to implement the Rio targets. The U.S. resistance to the Kyoto-protocol and President Bush’s absence at WSSD point out the U.S. government’s critical perception towards international environmental law. The U.S. as the world’s most powerful nation undermines the importance of the Rio Declaration and its successors and thwarts its legal significance.

In an overall ranking, New Zealand has situated itself in the middle between Europe and the U.S.. Being very active with its RMA in the field of sustainable management, New Zealand influenced the Rio outcome. In practice, sustainable management is an important factor in the courts’ decisions. However, since 1991, little has been done for the further implementation of UNCED. New Zealand legislation has not incorporated an efficient waste-management system, nor does it deal strongly enough with other pollution patterns. Nonetheless, compared to the U.S., New Zealand’s government is very active in complying with its international environmental commitments, whether binding or not.

In essence, the legal situation of UNCED and the following conferences is not satisfying. From a cynical point of view one could say: “there is no legal norm at all”. From a positive perspective one could say: “better than nothing”. Albeit much of the UNCED outcome has been implemented, the incorporation of the Rio Principles in the signatory states’ national laws is still too inconsistent to consider the Rio

Declaration literally as a legal document. Many states still do not entirely embrace Rio’s guiding principles although they claim so internationally.

The lack of binding character is astonishing because Rio is widely considered as the fundamental source of international environmental law. Until today, very few principles are of customary international character which leaves the implementation mainly to the discretion of the states. To create a unified environmental system, more states have to be persuaded to welcome international environmental law and not to see it as a burden. Existing international environmental agreements are good instruments to harmonise international environmental law. They draw attention to the problems and put political pressure on governments. Considering that international environmental law is a relatively young field of law, much has been achieved. The principle of sustainable development and the Johannesburg plan for the further implementation of Agenda 21 have been reaffirmed and put on the general international agenda at the World Summit held on 16 September 2005. International environmental law has also been brought forth by the emerging number of environmental agreements. The Århus-Convention, for instance, seeks for more public rights and participation in the environmental field. People do become more aware of their environment, of the effect of their actions, and of their responsibility for posterity. This is a success of international environmental law, although not in legal but in political terms.

In conclusion, even though it does not have the legal significance that it was hoped for, Rio was a success in terms of integrating the environment in the field of law to conserve the world for posterity.