

NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT:

From “Good Intentions” to “Good Consequences”¹

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1. Introduction; 2. The Forward Time Dimension, the Protestant Ethics and the Post-Industrial Society; 3. Some Basic Truths about “Non-Renewable” Natural Resources: Is the End of Resources Availability near?; 4. “Sustainable Development” as an Overall Description of Environmental “Good” Practices; 5. Developing Countries are in a Different Stage of Development; 5.1. Policy Implications of “Sustainable Development” for Natural Resources Development; 5.2. Efficiency and at least Pareto-Optimality; 5.3. Role of Multinational Companies; 5.6. Role of Non-Governmental Organisations (NGOs); 6. Conclusion; 7. Notes.

1. Introduction

Sustainable development meaning “development that meets the needs of the present generation without compromising the needs of future generations” – must be one of most successful, widely accepted and influential conceptual formulations of the last two decades. It has become a “mantra”, i.e. an automatically recited reference, much in the form of the famous preambles of UN General Assembly resolutions, to claim legitimacy, modernity and moral goodness for views, arguments and positions in almost every field of academic analysis, political statement and organisational self-praise and corporate propaganda. There is virtually no academic work in the field of environment and natural resources of

recent times that does not emphatically rely on this concept as a foundational reference. Its beauty lies in the fact that it is the "principle of all seasons": It does not pretend to impose insufferable deprivation of consumption on the present nor does it disregard the needs of the future. It encompasses humanity, but also nature. It appears to solve irresolvable contradictions. Everybody – from liberal advocates of the global economy to fundamental environmentalists – can fill the concept with his/her meaning³. This malleability of the concept explains why, different to other concepts advanced in the name of contemporary attitudes, there is so little opposition to it. It is suggested⁴ that the principle could be now part of customary international law, though it is not clear if sustainable development is just a collective name for general and country-specific obligations under international environmental law or if it adds substantive value. One can end the reference to sustainable development simply by suggesting that its comprehensive acceptance indicates that in effect it means nothing, and serves rather as an incantation of contemporary political correctness, with no substantive content in an essentially hollow formula devoid of practical significance. But in this study I shall attempt to identify elements of real meaning for governance of the natural resources development, with a particular eye on the special situation of developing countries.

This study examines the relevance of the concept of sustainable development for natural resources, in particular non-renewable natural resources. Natural resources, and in particular non-renewable resources, seem to be particularly relevant to the principle of sustainable development as the environmental dimension of the principle must respond to the "taking" of a "resource" of "nature" for humanity's often transient and wasteful uses. The "non-renewability" of the resources adds a particularly high sensitivity. Our investigation should show if such sensitivities have to do more with substance rather than with the association of non-renewability (and therefore possibly non-sustainability) of resource exploitation. This examination does not purport to be an exhaustive study of the concept of sustainable development in all of its meanings, configurations for use in legal and policy argument or applicability in multiple contexts. It rather intends to bring the generally lofty discussions of international environmental lawyers down to the ground of reality. My discussion is not meant to add to the overwhelming number of strongly

felt good intentions generally associated with the rhetorical use of the principle, but rather point towards effects and impact of various usages of this principle in the economy and governance of natural resources development. The particular context of my analysis is the situation of developing countries. Most natural resources industries have been migrating to developing countries, partly because reserves in industrialised countries have become scarcer due to depletion and partly because resource exploitation is no longer a priority in the ranking of conflicting options for determining land-use policy. They are particularly important in the economies of most developing (and the largest post-Soviet transition countries) not only because of the forces of geology, but also because the very fact of underdevelopment means there are few other industries and economic activities available in which developing countries have a comparative advantage. Geology is one of the very few comparative advantages which the so endowed developing countries have not as yet lost – with cheap labour and lower regulatory standards becoming less and less significant for attracting investment and developing a meaningful economic activity⁵.

The study therefore does not engage in detailed surveying the innumerable references to sustainable development in international treaties (ratified or not), in court judgments (essential or obiter dicta), and in the infinite number of instruments of greater or lesser authority on the level beneath formal international law⁶. Nor do I wish to make sense and advocate a systematic interpretation of the various aspects of sustainable development for international law. What this study proposes is to identify some aspects and possible contours of the concept of sustainable development for natural resources as it could be an authoritative “topos” or argument in the international law debate. Such a result shall be based on an exploration of the implications of natural resource developments from the perspective of economic analysis and a better understanding of the characteristics and problems raised by and for major actors, namely multinational companies and non-governmental organisations (NGOs).

A prevailing view among public international (and in particular environmental) law academics is that economic analysis is beside the point and likely to be incorrect, confusing and misleading anyway⁷. The reasons for such, often quite adamant refusal to look towards economic analy-

sis as a tool to get some idea about the likely impact of legal rules, is first, lack of education in at least basic economic analysis, and then simply ignorance and lack of familiarity with this method of rational investigation of social and economic consequences of regulatory action. Few environmental lawyers have had the inclination or opportunity to deal more closely with economics. The close affiliation of international environmental jurisprudence with traditional public international law – the law of diplomats and foreign services – implies the same relegation of economics and base search for lucre to the nether regions of law below the dignity of current and future ambassadors and treaty negotiators. International environmental law, and in particular the younger part of its academic community, is imbued with a strong sense of righteousness and high moral values. It is therefore rather the ethics of right sentiment and consciousness than the ethics of responsibility for result and impact which controls the accepted discourse in this field. This note, however, takes the opposite approach. Assuming that legal rules do not exist for themselves or for self-referential discourse within a closed community, but rather for helping to order society, I consider it inevitable for any rational analysis with some pretence at being relevant to look both at the social, political and institutional (increasingly also scientific) context of rules as to their past, present and likely future impact. An approach towards minimising environmental impact and social disruption that wishes to be more than rhetorical emphasis and preaching to the converted needs to understand how rules, systems of rules, regimes and institutions operate in reality⁸. While economics does not provide in many cases an uncontested answer, and is itself afflicted by excessive attention to theoretical modelling separated from empirical testing, it is comparatively better at providing a method of rational argument about the consequences of law, existing or proposed, than the largely unsubstantiated allegations found often, if not pervasively, in the environmentalist literature, legal or otherwise. The facile dismissal of economic analysis by environmental lawyers and activists should therefore be seen rather as an indication of intellectual laziness and unwillingness to face the facts when they challenge dearly held presumptions.

My note therefore will try to identify some concepts and insights from economic literature on natural – in particularly mineral – resources and then work at making them intelligible and relevant to the legal discussion⁹. The aim is neither being exhaustive in research nor infini-

tely balanced in the selection and presentation, but rather at countering the works in international environmental law which are very long on good intentions, but short on references to reality with the challenge to look at how the actual or proposed rules do work, or could or would work, in practice. With a better idea of how things work out in practice, it is much easier to argue rationally how rules and institutions should be structured to achieve what is intended to achieve – rather than constructing rules which produce the diametrically opposite of what they set out to do. Good intentions in rule-making have historically more often than not led to results opposite to those intended. In my view, many of the proposals made under the banner of “sustainable development” (and associates such as poverty eradication, elimination of child labour) may express the highest of human sentiments and values, but are likely to result, if implemented as made and designed in a command-control approach, rather in the opposite of what they intend. The “New International Economic Order” of the 1970s – to which, in my mind much of the philosophy of international environmental law resembles – was based on the commendable ideas to make the world economy more equitable and more equal and to create domestic prosperity within the boundaries of national sovereignty. The result of the state-led and command-control-based philosophy of the NIEO was external and internal impoverishment in all countries that pursued the NIEO strategy¹⁰. Tanzania, the model country for the precursors of today’s NGO movement, was the most aided country that in spite of all the aids and well-meaning advice it was receiving fell into the deepest poverty trap. These examples just illustrate that the way to hell is paved with good intentions and that loading rules with such intentions will often produce the opposite, something that Adam Smith¹¹ or experts on decision-making have long known¹².

2. The Forward Time Dimension, the Protestant Ethics and the Post-Industrial Society

Before delving into natural resource specifics, some observations on little or not explored aspects of the concept of sustainable development should be made. While rhetoric about contemporary values is globalist, such values, as always, are rooted in particular cultural traditions. The

main characteristic of the principle of sustainable development is the inclusion of time – forward time. While most cultures are oriented towards, sometimes almost solely, the present and traditional cultures often towards a part real, part imagined past, sustainable development puts the future on a completely equal rank as compared with the present (and takes no account of the past). This “forward-time” aspect, looking rather to the future than consumption in the present, is a particular feature of the Protestant ethics. Consumption in the present is to be curtailed in order to accumulate for the future, and God will reward those who sacrifice current needs for future gratification¹³. “Sustainable development” hence expresses, in a secularised fashion, the same critical attitude towards the present and the satisfaction of current needs as the Protestant ethics. The concept of “future generations” is equivalent to the “worker’s heaven” or the building of a secular “Jerusalem” so prevalent in 19th century socialist romanticism¹⁴. Similar elements can be found in the emphasis on self-deprivation of Monastic life or during Communism – all justified by some greater happiness in the distant future^{xv}. The depreciation of the present and its chances for pleasure and happiness in favour of some distant future is a distinct feature of these religions. It is therefore not surprising that the concept of sustainable development found so much favour, with elements of ersatz-religion, in the Western capitalist spirit still rooted, though now secularised, in the Protestant ethic. The traditional values of Protestantism imbibed throughout the Western world, and probably present in strength as well in cultures influenced by other religions, emphasise frugality, i.e. abstinence, restraint from pleasure, horror of wastage and restriction of consumption to what is absolutely essential. These values are set in contrast with the sybaritic culture of the contemporary society of mass consumption. They reject past cultural and philosophical preferences for enjoying the present rather than worrying about a future far beyond realistic sight and relation to the present. It is no wonder that the persistent need for an all-explaining religion revives in the form of present secular belief value systems deeply rooted in traditions formerly supported by religion. Sustainable development, I suggest, is so successful because it reflects and revives in existing secular format the “millenarian” aspects of the dominant tradition of the currently dominant societies in the world.

But there is another aspect of sustainable development that too has not received much attention. Sustainable development, with its empha-

sis on conservation of natural resources, mirrors as well the nature of post-industrial societies. Applying Marxist terminology, it constitutes an appropriate ideological super-structure for a fundamentally changed economic basis. Post-industrial societies are characterised by dramatically decreasing materials intensity. In post-industrial societies, economic growth is accompanied by an ever-decreasing materials input. The value-added by modern economic activities – micro-chips, software, creative and entertainment industries and the ever growing service sector – require an ever smaller materials input as compared, for example, to the heydays of the industrial revolution and the industrial societies. A railway engine which is heavy and requiring large inputs of metal represents the industrial age; a computer software may represent a much greater economic value, but with a negligible input of “hard” resources. Human ingenuity and creativity, embodied in intellectual property rights, substitute for the resource-heavy machines of our past. Sustainable development is a value system that is much more appropriate to these realities of the post-industrial age. It values less the material inputs than the modality and context of the production process and the role of human intelligence in it.

Finally, there is an inextricable link between the unequalled and pervasive prosperity – throughout all societies and classes of the Western world – and the general support for “sustainable development”. The rich do not have to care for pressing needs of the present, but can afford to worry about preserving their wealth for the future. Prosperity triggers much greater “secondary” expectations once the “basic needs” are met without effort. The environmental quality of life is therefore the need of the rich societies, and the all-encompassing prosperity (which is so taken for granted that it is not properly understood and appreciated) provides the resources to satisfy such needs.

All these factors are, though, not present in underdeveloped countries – in a more positive way the “emerging economies”, once called the “Third World”. And here is the rub.

3. Some Basic Truths about “Non-Renewable” Natural Resources: Is the End of Resources Availability near?

The qualification as “non-renewable” which attaches to resources such as oil & gas (which should be largely seen as equivalent), minerals and metals suggests *prima facie* that no exploitation is “sustainable” – in terms of leaving enough to “future generations” if the resource extracted were truly “non-renewable” and disappeared upon extraction. But that would be an uninformed view. First, from a purely physical perspective, hard minerals tend not to disappear upon extraction, but enter into a chain of human consumption, with some increasing part into recyclable, some part entering into lasting products and a decreasing part into currently no longer usable waste. Oil & gas, on the other hand, do disappear upon extraction and subsequent consumption; their extraction will tend to leave oil & gas behind in reservoirs, sometimes accessible to “secondary” and “tertiary” extraction, but with a substantial percentage remaining without prospect of extraction, at least under current technology and prices.

From a purely physical view, extraction appears therefore not sustainable, if one assumes the freezing of current conditions: technology, needs, prices, cost and substitutes. For such reasons, there has been over the last 200 years, up to the present, a recurring view that humanity is close to the ultimate exhaustion of the mineral resources it requires to function¹⁶. Malthus was the first systematic propounder of the doomsday depletion prophecy; in his forecast, the growth of population would soon outgrow the availability of resources. Current economic analysis, on the other hand, indicates that a growing population will be met by growing availability of resources; indeed population growth seems to be a condition for economic growth¹⁷.

Stanley Jevons, a prominent 19th century English economist, predicted that coal, the feedstock for the industrial revolution, would soon run out. 150 years later, coal has not run out, but the world is full of coal reserves for which there is currently no need any longer. Serious economic dislocation has not occurred because of the abundance or scarcity of coal, but because the need for coal faded away. Today’s environmental movement was more or less baptised by the then authoritative report of the “Club of Rome” in 1972. Its conclusion – that there was an ine-

vitable "resource ceiling" to economic growth, forms the credo of the green movement even today. The "Club of Rome" predicted an end of copper production by 2000 and an end to most other metals and minerals soon thereafter. But as of 2002, the world has not seen the attack of this "resource ceiling". Rather, the oil & gas and hard minerals industries have undergone a continuous period in terms of stagnating or declining prices, return on equity and other economic performance indicators over the last twenty years¹⁸. To the chagrin of the mostly public owners of large-scale metal deposits in remote areas or with high cost, there is neither a demand nor a price level justifying investment in such properties.

A review of the history of once strategic commodities – rubber in Brazilian Amazonia, silver in Bolivian Potosi, guano in the Chilean Atacama desert, jute industry in Dundee and Bangladesh – indicates that the geologic deposits or natural resources were not fully depleted, but rather demand for them superseded by more economic reserves, by substitutes in the form of other mineral resources or synthetic products, by change in societal needs and by constant technological innovation. Even with oil whose depletion is again prophesied to be close, my concern would rather be about abundant oil reserves becoming obsolete and the miracle cities of the Arabian Gulf becoming mirages of former wealth and glory than about petrol stations waiting forever on tank-wagons that never come. Sheikh Yamani is often cited in this context; he reportedly said: "The stone age ended – but not because of lack of stones" and presumably he meant the oil age will also end, but not because of lack of oil.

The Club of Rome, and current petroleum depletion alarmists¹⁹, have always seen the reserve-production ratio as an indicator of soon-to-occur depletion, with dramatic consequences for human life. In fact, in the case of most mines or oil & gas properties, proven reserves tend to be shown as depletion within a period of 8-12 years: If current production continues or grows in a predictable historic pattern, such extraction would have depleted the available proven reserves. It is only in rare cases, e.g. coal, or oil in Saudi Arabia or gas in countries with no meaningful current gas consumption, that proven reserves exceed 15 or twenty years. Does this mean that in 20 years we will really be at the "end" – with the Club of Rome forecast just moved from 2000 to 2020? Countries with an unusually long forward reserves position have acted without

commercial objectives in mind. Soviet geology, for example, identified reserves with scant regard to their economic viability; as a result, Soviet reserves may have looked as if they would last for a very long time, but they were mostly reserves that are not exploitable under the current economic conditions perhaps in 50 or 100 years. In other situations, e.g. Middle East reserves, exploration must have been comparatively easy, low-cost and low-risk. The purpose was probably not to identify reserves of oil in particular for development within a predictable future, but perhaps to reinforce the role of the Middle East in general and Saudi Arabia in particular as the world's most powerful producers, discouraging as much as possible competing exploration elsewhere.

The depletion forecast would be as much a delusion as the 1972 Club of Rome scaremongering. The mineral industries are not static. The fact that each mine carries forward about 10-15 years of proven reserves means nothing more than application of economic rationality. Spending high-risk exploration capital on reserves beyond a reasonable time-horizon is wasteful. If one watches mines over their life, one will note that they have carried forward reserves for an average 12-year of continued annual production for decades. What is more, once a mine is depleted (often to be re-started when technology and economic conditions allow it), exploration and development will move towards other mines that were hitherto not accessible.

But the main factors suggesting that depletion of minerals necessary for the global economy is not on the table are the combination of social, economic and technical change and the response of economies to price signals in a functioning market ²⁰. Humanity's economic endeavours are characterised by ingenuity, flexibility and responsiveness to incentives. There has been continuous technological change over the last 1000 years at least, and in terms of mining, this has led to the discovery of ever more remote and smaller deposits, to ever decreasing ore grades or complex oil & gas reservoirs, to ever greater rates of recovery on the supply side, but, equally on the demand side, to ever greater efficiency and intensity of use. If a particular metal seemed close to depletion, as reflected in higher prices, another usage with other material inputs was developed. Technological innovation and price signals have mutually reinforced each other. A good example is the cost for light units ("lumen") quoted by Radetzki (2002): From 1883 to 2000, the cost declined from

1000 to 1. Similar figures apply to virtually all other services with a material input, e.g. computing capacity, telecommunications, engine power, transportation and so on. There is no prospect in sight that this process would change, except if modern societies should move into some sort of static, frozen system, with change, adaptation, markets and price signals being destroyed. Individual minerals or energy resources may become at times scarcer – that will inevitably result in higher prices, search for substitutes or more efficient production or consumption methods. The problem, so far, has rather been sudden obsolescence of demand for a particular mineral – with grave social and economic disruption for its producing country and community, rather than depletion. Scarcity has in effect only been a problem for successfully embargoed countries in times of war.

What does this mean for the application of “Sustainable Development” to mineral resources? The first conclusion is that global depletion of non-renewable minerals is not a serious concern even under the perspective of the needs for future generations. Future generations are best cared of if the system for maintaining ingenuity, change and responsiveness to market signals is maintained. Future generations may or may not need the minerals currently being developed and consumed; if the past is any guide, it is likely that future generations’ needs and the methods of satisfying them will be very different from today. But this does not mean that the principle of sustainable development is of no significance for the development of non-renewable natural resources. History and insight into current production relationships indicates the concern should be not really global depletion, but the dependency of individual communities, regions and countries on individual commodities. In other words: The problem is not that minerals may vanish, but that demand for them may vanish.

While the needs and the context of future generations are far away and not accessible to us except by speculation with a bias in very contemporary political interest, the needs and the problems of the present are much easier to understand rationally. It makes therefore much more sense to deal with the challenges of the present rather than engage in quite meaningless conjecture about future generations – as the past generations may have done best when worrying about their own situation rather than sacrificing the present for some unfathomable future.

Natural resources, both renewable and non-renewable, present very real problems. The first is that commodity producers, and mainly those in developing countries, are dependent on export of their commodities and volatile world markets to a degree not understood in developed countries. Given that other comparative advantages – low labour cost, climate, transport distance, more favourable regulation and taxation – have either never existed or become less meaningful, geological endowment has now become the one major comparative advantage. It explains why natural resources figure so prominently in the economy of developing (and post-Soviet) countries' exports, foreign exchange earnings, tax receipts, employment. This dependence, e.g. of all OPEC countries on oil export, means that the economy, the state, the social and economic system, becomes dependent on the ups and downs of always volatile commodity prices. This is not the fault of markets – which respond to demand/supply, but the impact of commodity dependence combined with weak governance structures. In an ideal system, governments would skim off surplus in the "fat" years, save it for the "lean" years, and invest into reasonable diversification. People and social systems would not become lazy as mineral rentiers, but develop skills, frugality and investment habits. The mineral rent would not be wasted on huge military expenditures, luxury expenditures by political, feudal, military, religious and administrative elites; capital would be available to develop productive middle and entrepreneurial classes. In reality, though, this does not happen in any OPEC country ²¹, and probably not even in such developed countries such as Norway. The challenges of sustainable development would be to do away with the omnipresent pattern of waste, unequal wealth distribution and lack of entrepreneurial activity, to gain freedom from mineral-rent seeking and convert mineral rent into social and economic capital which sustains itself and is able to survive beyond the time when either the mineral resource is locally depleted or, perhaps more relevant, beyond the time when demand for it fades away. This is therefore in my view the true challenge of sustainable development: To conserve the resource in the ground not because otherwise future generations in need may not have access to it, but because current development, use and consumption create an unsustainable economy full of waste and suppression of innate human skills and resources. The true test of sustainability is if the resource extracted and therefore withdrawn from the "underground account" of the nation is

converted into an equivalent or higher unit of social and economic capital²².

This conclusion which is rather focused on a prudent use of the resources in the present and near future than worrying about an eschatological future of generations to come – has quite definite implications for a sustainable policy towards natural resources here and now:

The first implication is for the governance system of natural resources. The current governance system is oriented mainly at maximising mineral rent for the landowner, usually the government. This paradigm has dominated applied mineral economics and government policy²³. As a result, sophisticated systems for capturing most of the mineral rent have developed, with national and in particular foreign investors as the prime purveyors. The utilisation of such income has largely been left to the political process in the producing countries. All the focus is on how to get money, but not how the money is spent. A survey of the development impact of commodities in virtually all oil and most other commodity-dependent exporters is dismal.²⁴ As a result, mineral rent is used by the governing elites for sustaining not their countries economies, but themselves. Unproductive social consumption, luxury elite consumption and building up of great, and highly unequal wealth are the result. Military expenditures are in resource-rich countries as a rule far beyond average²⁵. To the extent the “resource curse”²⁶ prevails, it may in fact be better to produce less, or even not much bother about income, if all that mineral rent does is to create an unproductive rentier society which can not be sustained without the availability of such rent. A policy that does not sustain elites, but economies and societies, would have a more conservatory character, i.e. produce only to the extent that mineral rent can be absorbed in the domestic economy, with a surplus committed to export stabilisation funds and diversifying the economy. Very few countries, in particular Chile with its traditional dependence on copper, have been successful with such approaches; if Norway, the European case for an oil-dependent country, is managing to achieve greater independence is far from certain. A conservation policy may appeal on rational grounds, but such a policy does not have a great chance of practical success in most resource-rich countries as it is contrary the short-term interest of ruling elites, but also that of the resource-dependent importing countries, in particular the US, the EU and now the most resource-hungry large countries

in Asia. A bridge could be developed between Western environmentalists keen on higher energy prices and producer interests in higher prices for a more reduced output. In terms of international economic law, that would mean expanding the conservation exceptions in Art. XX (g) of the GATT and Art. 18 of the Energy Charter Treaty – against the interest of the two main consuming blocks arguing against export restrictions and raising competition law against producer production control. There are limits of external influence on the domestic power structure of commodity producers. But what can be done is to facilitate both conservation policies and economic diversification, mainly by integrating these countries, often explicitly left outside the institutional architecture of the global economy, into the major institutions – WTO, IMF, ECT, OECD, IEA, EU and regional economic integration institutions²⁷. Support for and defence of the international economic institutions is probably the major contribution the Western countries can make towards sustainable economic development in commodity producing countries. The effort to undermine these institutions by unholy alliances of Western protectionism and ideological NGO campaigns steered from the North is one of the worst services for the goal of re-orienting resource-dependent countries towards sustainable economic development.

4. “Sustainable Development” as an Overall Description of Environmental “Good” Practices

The reference to “future generations” in “Sustainable development” may not yield much direction for resource development policies. But the principle as currently understood in mainstream interpretation includes a number of government and corporate policy prescriptions, such as mainly, but not exclusively²⁸:

Application and early incorporation of environmental and social impact analysis into project design; continuous monitoring and decommissioning obligations at the end of the useful life of a mineral or petroleum operation; this seems by now to be established “good” and not even “-best” practice. The problems are the partisan character of EIAs commissioned by the project developer and the fact that a properly done EIA will identify environmental and related risks and mitigation measures and thereby create greater consciousness and transparency, but will not by it-

self provide an environmental cost- benefit balancing and valuation standard²⁹.

Procedures for consultation with "stake-holders" are now standard practice for development of natural resources projects, sometimes prescribed by law and sometimes by practical considerations³⁰. The "MMSD" project that has been executed from 2000 to 2002 with the sponsorship of the World Business Council for Sustainable Development (WBCSD) and with the involvement of both mining companies and NGOs was premised on elaborate procedures for consultation with stakeholders on policy recommendations³¹. Consultation with "stake-holders" is meant to bring better information into the decision processes for natural resources projects, e.g. impacts on local people. It is also probably intended as something close to "democratic" participation in a governmental and commercial decision-making process. From a practical point of view, it should also help to identify earlier serious oppositions and help to resolve such challenges by both communications, negotiations with the prospective opposition and by modifying the project design as to minimise serious oppositions. Consultation, though, can easily become an empty ritual, with formalities replacing serious communication³². The notion of "stake-holder" involves considerable ambiguity as there tend to be no formal rules – as for ownership, for legal or political rights. This is particularly so for self-formed NGOs who may or may not represent and help "voiceless" local people³³. In practical terms, stakeholder tends to mean those forces that have the resources, power and interest to make life difficult for the project developer. The more influential stakeholders, the more problematic their competition with formally legitimised holders of democratic, political, property or legal rights, and also the more relevant the question about the transparency, legitimacy and accountability of influential stakeholder participants in relevant decision processes. It is generally ignored that the more stakeholders involved in decision processes, the more such consultation turns into negotiation where everyone with power and influence will put forward its interest for consideration. This has as an inevitable consequence that the cost of projects will be driven up. The winners from such increase in costs are those with obstruction power, and not necessarily those directly affected.

Direction, by regulation, voluntary codes³⁴ or labelling³⁵, incentives, emission trading, taxes or other means towards higher environ-

mental standards incorporating "best practices", up-to-date technology and experience - can be done by "command-control" methods, mainly regulation, e.g. prescription of specific equipment or emission limits or by more market-oriented measures (labelling, incentives, permit trading, taxes). Environmentalists wish ever-higher standards, but worry about competition in markets driving a "race to the bottom" and rather prefer a "race to the top". Such a continuously upwards drive towards ever higher standards is not such an innocuous and universally "good" thing as it seems. Higher standards confer significant competitive advantages for those companies with influence over standard setting and with strong exposure to "early-regulators"³⁶. It is, like so many Western environmentalist initiatives, anti-developmental, as producers in developing countries are least capable of influencing standard setting and complying with them. The "race to the top" is good for sophisticated companies from the North, while a "race to the bottom" with standards based on developing countries capabilities rarely occurs.

"Internalisation" of external cost, in particular environmental damage, based on earlier economic concepts; it means that if there are "costs", i.e. negative effects of actions, they should be allocated to the actor. Only if true costs and benefits are part of an actor's decision-process, market-based competition will help to encourage adaptation and innovation to reduce such costs and favour activities with less damage. Internalisation occurs by allocation of civil liability, by emission charges, taxes, by trade permits and incentives³⁷. While this looks good in theory, there are serious problems in practice. The first is the valuation of external effects; there is a large judgmental element in any such valuation. The second is the allocation of external effects to a particular action or actor. As causality is not a simple act - one effect equation, but much more complex allocation of responsibility it involves an extensive subjective element.

All of these concepts and others form part of what is now considered proper environmental policy. They reflect both the cultural values and the objective economic basis of the Western, post-industrial society. They include both measures focused on the process and on the substance of decision-making for natural resources projects. Development of non-renewable (and other) natural resources takes place increasingly in developing countries. Depletion in developed countries, different land-use criteria and social and economic priorities push them away from de-

veloped countries; geology and also lack of practical alternatives pulls them into developing countries. The concept of "sustainable development", while developed in, by and for Western developed societies is therefore relevant very much, and perhaps predominantly, in developing countries. These countries had little, if any influence, on the formulation of the concept. They are, in economic parlance, rather "takers" of such contemporary policy signals than "senders" or in other words: They are mainly objects of policy concepts designed elsewhere. The appropriateness of the Western format of "sustainable development" for natural resources projects in the "South" will be discussed in the next section.

5. Developing Countries are in a Different Stage of Development

The main factor to remember is that developing countries are different from the prosperous countries of the West. As most of the influence on "sustainable development", its debate, formulation, discussion comes from the "North", and where not, is heavily influenced and usually funded (sometimes directly, almost always indirectly) and thereby intellectually "owned" from the North and spread through NGOs and their branches in the developing countries, the voice of developing countries is little heard in substance. I doubt that much of what is presented in UN and other conferences and in the NGO-world is authentically from the "South" and in particular truly representative of the South. Much "Southern" contribution seems to be paid proxies of Northern NGOs³⁸ or represent non-representative voices of an often Western-inspired idealism³⁹. It is very hard to hear the often-quoted authentic voices of the "poor" in the representation by Northern NGOs. The poor tend to be much less idealistic and much more interested in quite concrete progress in terms of income, works, incentives and education – rather than in the themes pushed by Northern NGOs⁴⁰. I also doubt that the "South" is properly represented by lecturers and academics from developing countries on fellowships in or from the North, but rather from the emerging middle class businesspeople, professionals and civil servants who try to carry out decent work under very hard circumstances. Given that developing countries universities are very badly equipped, that there is little, if any, possibility of think-tank work not dependent on Wes-

tern funding which almost always favours work in, with and for Western themes, it is very difficult for these countries to develop an independent viewpoint on their own. For an intellectual from an underdeveloped country ⁴¹ it is almost impossible to be able to make up his/her own mind independent from the funding and the direct or indirect influence and expectations that come with it, particularly as they are all clothed in a morally appealing philanthropic and friendly language. The following observations are meant to help view the underdeveloped world not as a romanticised garden of Eden ⁴² to be protected from nefarious Northern civilisation nor as a poor house requiring heart-felt giving of alms in the form of money, personal fulfilment for the Northern helpers or advice on how to better themselves, but rather as societies which are in a different economic, institutional and social context and perhaps level of development. By highlighting the difference I try to highlight to what extent Western concepts such as sustainable development have to find their own, specific and distinct meaning in the context of economic underdevelopment.

The first and significant difference is that developing countries are in a stage of materials consumption that is very different from post-industrial societies. There is a "U"-curve of materials' intensity: Consumption is very low when people are very poor and largely in subsistence mode. As societies are industrialised, they need the stock and infrastructure of industrialisation: Roads, bridges, ports, airports, buildings, power transmission lines, power stations, heavy machinery and so on. Intensity of materials' use climbs up rapidly. In post-industrial societies, infrastructure is largely available and needs rather maintenance and upgrading than "Greenfield" development. Materials' intensity decreases. GNP growth is accompanied by less and less input from materials. High-tech industries and services use an infinitesimal amount of materials per value produced compared to conventional industrial products. "Sustainable development" in terms of relative consumption of natural resources can therefore mean something very different in a post-industrial society than in an industrialising society. In a society on its way up, there is not a short cut way to a modern high-tech economy. Perhaps the full load of heavy and dirty industry of the 19th century style is no longer necessary; but one can not expect countries to economically develop and display the same amount of energy and materials efficiency per

growth unit or the same now very environmentally biased trade-off between industrial project on one hand and environmental conservation on the other. The values of the rich countries reflect, not surprisingly, the context, status and prosperity of the rich countries. They are in many cases not appropriate for societies engaged in the process of industrial development which the rich countries have long left behind, but which is the basis and still the foundation for their economies. From a fundamentalist environmental view this does not seem to be an acceptable position. Developing countries are expected to develop in some other, environmentally much friendlier way than developed countries. But this is a Northern view. People in developing countries in their large majority view the prosperity of the North as their legitimate aspiration. If this causes global environmental problems, they consider that it is the responsibility of the North to deal with it since the Northern societies have the largest per capita emissions and energy consumption, the wealth, the resources, the technology and the power to invest in global environmental challenges.

It is essential to recognise this difference, in situation, aspirations and outlook. It is far from posing insoluble problems. Industrialisation is coming at a much higher material intensity than, say, indigenous or poor people in the countryside living a life of subsistence. But the romanticism that surrounds periodically the supposed innocent, nature-loving life of the "noble savage" in Western countries – at least since the 18th century – is a projection from the North onto the South. There is nothing romantic about subsistence conditions that did prevail as well, with large-scale misery, throughout Europe until the 18th century. It is an arrogant view to demand that "primitive people" remain in their state of comparative misery, and do not have the right to aspire to the standards of living that Western societies have achieved. Given the higher state of technology, knowledge and organisation, not every damage created by 19th and 20th century industrialisation has to be repeated. There are many short-cuts for bypassing many of the woes of 19th century industrialisation. But not all-of the wretchedness associated with European, US and Soviet industrialisation process and its huge environmental degradation can be completely avoided. It should be accessible to management with much less lasting impact.

Appreciating both the difference of developing countries and the le-

gitimacy to aspirations quite similar to those in post-industrial societies leads to understanding that the standards, and much of the political discourse, about sustainable development has to be different in a situation of underdevelopment. There are other factors that are as a rule neglected by enthusiastic academics and activists with neither theoretical nor practical exposure to the situation in the developing world. Governments don't work as we expect them to work – reasonably well – in the North. Corruption is endemic, but this reflects as well the very conditions of transition and development, not that different from, say, the US in the 19th century. If corruption reflects a particular historic stage of transition and development, then all the international agency programmes and recipes for anti-corruption drives will just remain shallow scratches on the surface; perhaps they work, to some extent. But corruption is a fact of underdevelopment and transition which will go away only when these historic stages have been completed. Ethnic divisions are deep, and can be exacerbated by break-downs of traditional culture, though one should be cautious of ever assuming the existence of a harmonious world living in peace with each other before the West, colonisation, industrialisation and globalisation entered⁴³. These are all illusionary projections from the North – the illusion of a golden age in the past – without base in reality and history. Warfare between and within countries is a constant risk. Any even if superficial consciousness of say European or US history will show that the developing world grows up not much differently from those countries.

One also needs to appreciate that there is, in many if not most cases, no easy solution available in the sense of the aid projects, global programmes and readymade recipes manufactured continuously by the Western aid industry – national and international aid agencies, corporate and NGO aid suppliers and the assorted academic and other well-meaning thinkers. The “international community” consisting of agency officials and NGO activists, are ready with recipes that have been hammered out in numerous think-tank, brainstorming, and stakeholder consultation meetings. They all include “recipes” for bringing consensus and harmony to a troubled world. If only everybody was consulted, standards agreed upon, moral responsibility accepted and comprehensive codes, guidelines, treaties, programmes agreed and earnestly implemented and compliance-monitored, then, so the tenor ⁴⁴, the problems

of underdevelopment would be rapidly solved. But the last 50 years have seen a continuity of belief in such recipe with an ever-changing title and paradigm⁴⁵; but the “development distance” between the countries on top and the countries at the bottom seems not to have changed significantly since 1820. On the contrary, one can observe a “product cycle” of such “new paradigm” concepts which dominate the aid industry: A new concept comes, is first opposed, then grudgingly accepted, then universally acclaimed and pursued and then fades into gradual obsolescence as a successor – subject to the same cycle – appears on the horizon. Appreciating this and a healthy dose of scepticism towards optimistic recipes of global social engineering peddled by the aid industry think tanks leads to a greater dose of humility.

My conclusion is therefore that the often sound and solid ideas now grouped under the concepts of “sustainable development” and “good governance” – virtually by now undistinguishable, need to be formulated with a solid understanding of the specific, and different situation of developing countries. This has been recognised albeit – from the Northern perspective probably reluctantly – in references to “differentiated” standards within a “common”, “one-world” overall perspective – with the one-world view formulated, naturally, in the North. Trying to impose mechanically again Northern moral values reflected in the various anti-globalisation protests and their academic and publicity camp followers, is nothing but a revival of the 19th century missionary movement which then as now combined material superiority and political power with an ideological super-structure of paternalistic philanthropy.

5.1. Policy Implications of “Sustainable Development” for Natural Resources Development

The application of a more sober, economic-analysis based perspective leads to a considerable number of policy implications for sustainable development here, in particular, focusing on the thinking, interpretation and application of relevant international law rules and the required underlying approach. The first principle is the “law of unintended consequences”⁴⁶. Sustainable development, with its intended betterment of humanity, is not achievable by good intentions, but by positively assessable results. The discussion on sustainable development – in partic-

ular by NGOs, well-meaning younger academics, in particular in international law – is impregnated by “good intentions”. But good intentions seldom produce good results. More often, they produce the opposite of what is intended if they have any effect at all. Sustainable development is not helped by a sincere and heartfelt desire to help people in need, in particular in developing countries, not by specific moral commitment evidenced as in aid projects, moral adhortation, UN General Assembly resolutions or similar subsidiary instruments, but by a structure of incentives that is more likely than not, in an informed, rational economic and social analysis, to make people want to achieve such results⁴⁷. There are reasons why in general people prefer to be guided by “good intentions” rather than “consequences” of an action: Good intentions are relatively easy to identify, in particular by believers themselves and within self-referencing, like-minded communities. Orientation at consequences involves considerable uncertainty; the mind and the relevant discourse need to operate with the considerable complexity of uncertainty, with ways to manage uncertainty, with the application of complex skills (not available to most university graduates) in forecasting the likelihood of future consequences and their scope and magnitude. Such skills tend to be available as a rule to specialised forecasters and economic analysts. Their performance is always open to doubt. Their forecasts – if formulated in a specific, verifiable way – often wrong. The skills required to make “regulatory impact assessment” are therefore as a rule suspicious to those unfamiliar with the foundation and context of applying such skills and therefore easily dismissed. Operating purely by good intentions is, on the other hand, immeasurably simpler and more easy to communicate. Such approaches are superior by their much greater “economy of argument”. But all of this does not distract from the basic fact that operation by good intentions is of little relevance for “re-making the world” rather than just interpreting it for moral purposes.

In Western sympathisers – mainly NGOs and young lecturers – there is great sympathy for developing countries. Special sympathy for classic “Third World” positions – national sovereignty, restriction of free trade, unfettered rights to interfere into foreign (and national) private property and extensive bureaucratic regulation – is typically expressed⁴⁸. But what is not recognised is that such positions are closely associated and presumably largely causative of poverty. A comparison between the EU – with its most extensive freedom of movement and protection of prop-

erty – and developing countries is rarely undertaken. But with the EU, positions absolutely contrary to the still surviving NIEO positions now espoused by “civil society”, have been visibly associated with prosperity, civilisation and very high environmental quality. It would have to be proved that such elements of essential good governance, mainly economic freedom and property protection, are less relevant to developing countries than they were for the EU. A review of countries – e.g. North Korea, Tanzania, even India – having pursued the inward-looking option versus countries that pursued the outward-looking option – the Asian city states, but also China – suggests to the contrary that the economic drivers are the same for developing as for developed countries. Property, contract and economic (and some argue political) freedom to participate in the global economy freely are closely associated with prosperity wherever, while the opposite – i.e. the “sovereignty” elements – are associated rather with poverty and lack of growth. Sustainable development, with its combination of economic growth and economic quality, is not achievable in poverty. Poverty makes no funds available for environmental quality – they are used for immediate needs. Poverty is also not allowing the emergence of educated and more prosperous middle classes with their Western-derived higher demands for environmental quality. There are, even if rarely made fully explicit, elements of poverty-friendliness in some extreme environmentalist positions, i.e. those which oppose “nature” to “humanity” and give priority to “nature without humans” to a concept of nature which includes humans. Such thinking may be related to the 19th century notions of nature as a large pristine space empty of humans to be enjoyed by the select few able and willing to enjoy such pristine nature without leaving any traces of human contacts. There is probably a US tradition of pure and pristine wilderness to be enjoyed only by a select (and rich) elite of natural aristocrats – with little regard to humans, in particular local people. It has an element of considering humans in such pristine wilderness rather as invisibly caged denizens of a zoo than as human beings with the same aspirations and worthy of the same economic opportunities as nature lovers in the developed countries. But that is not the concept of sustainable “development” we are here looking at. An economic philosophy that tends – in economic theory and on practical evidence – to perpetuate poverty can therefore not contribute to sustainable development, nor is it going to be acceptable on a voluntary basis by the citizens of the poor countries.

Sustainable development is therefore inevitably associated with the policies of economic liberalisation which have proven their success in both generating the necessary incentives for prosperity by investment and trade and their ability in generating both resources and expectations for enhanced environmental quality.

Some guiding concepts can thus be identified. I will discuss them one by one:

Corporate profitability: Profit and efficiency are the pre-conditions for effective corporate action towards sustainable development. Impoverished companies struggle – as impoverished nations and people – for survival. They have no interest or incentive to invest into anything then very short-term, pure survival strategies. State companies, overloaded with social burdens, contradictory demands, political pressure and corruption, have traditionally been the worst environmental – as economic – performers. The largest environmental legacy damage is in almost all cases associated with state companies, in particular in command economies (e.g. Siberia, Caspian; Lake Maracaibo in Venezuela). State companies in developing countries to this day are low-quality environmental performers, as their operational surplus is devoted to satisfying the strongest political pressure. This is usually corruption, patronage, support of political parties – and not environmental demands which in developing countries usually play a secondary role. Multinational companies, on the other hand, can through operational efficiency usually generate greater resources and apply environmental skills more effectively. In addition, they are subject directly to environmental NGO pressure in their home states and indirectly to environmental reputation demands in their respective capital markets. A company that pursues the environmental component of sustainable development without sufficient attention to the “economic” element, in the form of profits, is unlikely to go on. It will have to stop its environmental support or go out of business or be taken over. There is not much to do about sustainable development or corporate responsibility with bankrupt and failing companies. To the contrary, it is likely that the most competent multinational companies will – as is evident already now, be able to successfully combine the environmental dimension (with a longer-term perspective, a need to infuse corporate decision-making with “internalisation” mechanisms) with technical and commercial competitive strength.

Resource Depletion: Quite different from the “depletion fundamentalists” (supra), depletion has to be seen in a flexible and dynamic, not a static perspective. We do not know much better than people in previous generations what the needs of future generations will be. The depletion scare has been with humanity since the start of the industrial revolution⁴⁹. What has happened is that specific resources in specific locations have been depleted, but there has not been any particular threat of scarcity in any important commodity – to the contrary, resources once considered vital and close to depletion in 1900 (e.g. salpeter in Chile, coal everywhere) have faced the opposite risk of lack of demand. The “Gastein valley” in Austria can serve as an example: Gold was mined there from the 13th century; depletion occurred at the end of the middle ages when ore grades declined, veins were too deep and the wood for smelting within economic transportation distance was used up. That was a clear locally focused, geologically, technically and economically based depletion with undoubted great adjustment pains. But the current needs in the valley are no longer gold mining, but tourism. Gold is still there. It could be mined again with modern methods profitably. But there is no interest: Local needs and expectations have changed and the depletion that occurred has no impact for “current” generations. Gold is at present available throughout the world in much larger quantities than the markets want – viz. the steep decline of gold prices from the 1970s to 2002. The conclusion to be drawn from such reasoning and example is that sustainable development means that depletion should produce value to society, best measured in the most objective efficiency measurements, e.g. commercial profits under normal taxation and under full internalisation of external costs (and benefits). The key is therefore a fully functioning system of mineral licensing, of mineral and environmental taxes (with perhaps a charge for depletion) and a system of governance which ensures that economic benefits of mining flow to those affected by mining. While one can argue for “mineral income stabilisation funds” for economies based and fully dependent on mining (e.g. Alaska, Norway, the OPEC countries), these are rather for stabilising the volatility of mineral (including petroleum) prices than to take care of generations far removed. To assess a depletion charge based on the hypothetical needs of generations far removed is bound to be speculative, based on untenable assessment of the shape of the future and never likely to reach such generations anyway.

Competitive and properly regulated and taxed markets: Sustainable development is most imperiled if exploitation of natural resources is inefficient – both commercially inefficient and environmentally efficient. This means a system of governance up to the modern (and always evolving) understanding of resource economics. Current understanding is that competitive markets will generate the most efficient results, but that environmental costs (and there is a lot of debate possible about concept and scope of such costs) need to be internalised, either by taxes or by competitive licensing. The examples of not-sustainable resource development are to be found largely in badly governed Communist, transition or developing countries, with no respect for property (which makes the owner worry about the value of his/her resource), contract and external impact. There is also a distributional impact: Generation of profit – or, in a larger sense, value – that benefits only the rich is not politically effective as such regimes are undermined by the perception of lack of justice. This is why mineral-tax regimes have to look not only at maximising fiscal income (as almost all mineral tax literature currently does), but also at how such income is used. Income that is wasted or enters into the food chains of corruption, cronyism and patronage is therefore not contributing to sustainable development, while income that is invested for the benefit of the local, regional and national people at large is much more useful. But one should also bear in mind that the dedication of mineral income only to the purpose of the dominant interests and ideologies of Western countries (e.g. only for environmental or human rights purposes in the Western NGO-paradigm) represents a distribution of income that is heavily skewed for the rich in the world and against the poor. It is not only about preferences for the developing country rich, but also for the dominant ideologies and interests in the rich countries one should be concerned about.

All evidence is that market-compatible instruments are more efficient than command-control measures. Command-control measures introduce costs and restrictions without regard to their comparative benefit; they do not incorporate incentives – which are the great lever for human behaviour. Market-compatible interests will seek to get the greatest environmental benefit at the least cost; they will therefore make it possible to achieve much greater environmental benefit at given costs; such costs are often fixed by their political palatability. Finally, market-conforming

measures will use incentives to create technological and organisational advances to achieve ever greater environmental benefit at ever lesser cost. Market-compatibility and sustainable development are therefore synonymous. The command-control approach comes easily to lawyers, and in particular lawyers from the administrative and international public law tradition where commands (often if not normally ineffectual)⁵⁰ are the familiar method and where the market is usually seen as a threatening, uncontrollable and mysterious dark force rather than what it is – the congregation of a multitude of stakeholders engaged in continuous debate. The usual attitude is to call for extensive regulation and then be quite content with the emergence of regulatory instruments which remain merely rhetorical⁵¹ – unratified conventions, disregarded resolutions, litigation that only enriches the lawyers, ineffectual and in reality unenforceable prohibitions and even less respected general commands to do something. The secret of effectiveness, in international law as in national law, is to go with the flow, to come up with rules that facilitate the exercise of incentives and which articulate rules, conventions and values which the subjects of the rule already largely adhere to.

Reasonable and Differentiated Regulation: The usual mantra from the NGO-community and sympathisers is “re-regulation” after privatisation and alleged deregulation. Deregulation largely did not occur. Privatisation – i.e. the transfer of public services to private ownership – largely led to a massive increase of regulation – regulatory rules, procedures and institutions. In the old way, public interests were supposed to be taken care of by the control conferred through public ownership. In the new way, the public interest is exercised by public regulators exercising a very close control over private operators. There are a number of myths where one needs to look behind the pretend-clothes of the new emperors: First, if markets and private operators do not achieve precisely what the public wants, or some part of the public want, re-regulation is not necessary a viable alternative. Regulation brings about vices not that different from the heavy hand of state bureaucracy in the past: inflexibility, corruption arising out of the close public-private interface and lack of suitable incentives. The cost and inefficiencies of re-regulation will often outweigh minor grievances against operations of the markets. There are, though, proper criteria to assess the need for regulation: When the costs of market failure outweigh by a significant margin the costs and benefits of regulatory solutions (which often just indicate state failure).

There is little doubt that environmental quality that is not achieved by incentives, emission charges and other internalisation methods should be a legitimate object of regulation – a regulation that is as “light” as possible and aims at nudging market actors towards the right behaviour rather than trying – often uselessly – to compel them. There are also public interests that constitute a “public good”, i.e. a state of affairs that is valued by the political community that can not, or only at prohibitive cost, be provided by the market. Here again, one can not only focus on the failure of the markets, but needs to set this in the right balance against both the risks, costs and benefits of regulatory approaches. It is the “least-restrictive”, proportionality and necessity tests we know from WTO and EU law ⁵² that should be the standard “chapeau” of any regulatory response.

Regulation is often meant to counteract an assumed “race to the bottom” where bad standards (like bad money) naturally drive out good standards, particularly so in developing countries. But factually, from an environmental point of view, economic liberalisation tends rather to lead to a race to the top, as multinational companies, with high levels of competence, exposure to home state NGO pressure and need for uniform operating guidelines, face state and national competitors without such environmental competence ⁵³. But again, while this is counter to the simplistic assumptions held by so many green activists, it is not necessarily a good thing. Worldwide uniform environmental standards (but presumably also labour and social standards) help in global competition most those multinational companies which have had a hand in the formulation of the standards, are familiar and expert in managing compliance and have a familiar working relationship with NGOs. Such standards place the competitors from developing countries into an even weaker position of comparative advantage than the one they start out in the first place. Contrary to critics of the “race to the bottom” and advocates of “race to the top”, developing countries do need to be protected from imposition of uniform global rules that impair their competitive advantage. Anything else will just have the tendency to keep poor societies poor forever, and to cement the huge competitive advantages of the West with the help of the West’s ideological auxiliaries in the contest for domination of global ideology. Environmental measures must therefore be differentiated so that developing countries can move forward while reaping the full benefits of modern technology and organisation, but without be-

ing tied to the standards prevailing in the West. Their capacity of absorption, their capacity for tolerance and their discount with respect to the future is, and should be, different. Uniform globalising regulation would otherwise just tend to perpetuate poverty – which is not compatible with sustainable development.

On the other hand, international regulation is an important pillar of a global economy oriented at sustainable development. Without international regulation, many actions that can increase efficiency – and thereby save environmental costs and set free resources for environmental quality – would not take place, for example, liberalised trade where full comparative and competitive advantage (including environmental competence and efficiencies) can be exploited to their fullest. It is much better, for example, to process hazardous waste at the technically most advanced plant with least transport costs – rather than, for protectionist reasons, send off such waste to domestic plants without such advantages⁵⁴. International disciplines are therefore necessary which, on the one hand, encourage prosperity-enhancing trade and investment⁵⁵, and, on the other hand, encourage transactions and institutions which promote environmental quality. The international economic organisations – WTO, World Bank, IMF, OECD, UN et.al.⁵⁶ – are there essential players in the effort to develop a sustainable global economy. No market economy can in the long term prosper without guarantees of security, order and a legal foundation. As national economies in the past, so the emerging global economy requires a platform of law, order and security to facilitate transactions, express public interests, internalise external negative impacts and articulate “public goods”.

5.2. Efficiency and at least Pareto-Optimality

The typical state-centred approaches towards sustainable development are inextricably, though not always consciously, linked to bureaucratic solutions: The logic of the state-centred approach to regulation is command-control, i.e. prescriptive solutions. Whatever originally the sympathy, command-control prescriptive solutions lead to bureaucratically based systems to specify such rules and then enforce, control and monitor compliance. This approach is as experience amply demonstrates, greatly weakened by the usual problems of command-control bureaucratic rule-

enforcement: Rules are inflexible. There are different worlds between the primary noble purposes and the ultimate enforcement of specific rules at the "coalface" of reality. There are no incentives to improve environmental performance by developing better technology and organisational approaches⁵⁷, but only incentives to minimise the cost of rule compliance, to forward such costs on other actors and to use influence over the setting of rules and their enforcement for competitive purposes against weaker – and typically developing country – competitors⁵⁸. The usual situation that evolves is the existence of highly rigid rules with very large non-compliance. This only obstructs sustainable development while only satisfying moral purposes of NGOs and public relations strategies of corporate and governmental actors on a very superficial level. The right solution must therefore be the opposite: To create a system whereby the natural self-interest, competitive ambition and energies of the relevant actors are mobilised to find their own way of gradually developing environmental quality in their activities. That means that the principle of efficiency must be paramount for both the setting of environmental goals and for allowing relevant players to pursue such goals within a broad and flexible regulatory setting. Efficiency means that an action should not be undertaken if, all other factors being equal, another action would achieve the same objective at lesser cost. The further refinement of Pareto-optimality means that a solution is not efficient if without further distributional consequences at least one actor can be better off. There are many criticisms of the efficiency principle: that distributional consequences are overlooked, that valuation is difficult and subjective, that a preference is exercised towards outcomes and valuation criteria that are easily to qualify – as compared to values which are less tangible and have less an easily identifiable financial value⁵⁹. But such criticism – valid as it is – is not a reason to jettison a systematic method of rational analysis as there is no persuasive alternative. Tolerating regulatory measures which clearly encourage conspicuous inefficiencies means that in the end less – always scarce – resources of a financial and political nature are available for an environmental purpose. It means that total societal environmental performance is achieved at lower levels than possible in the alternative scenario of more resources liberated by more efficient (i.e. resource-saving) approaches. Visible inefficiencies in environmental regulation constitute wastage of financial, social and environmental capital. At the same time, such inefficiencies will reduce the

political acceptance of environmental measures. While it is perfectly legitimate to refine efficiency methodology to take into account the manifold implications, it is contrary to sustainable development and in the end undermining of environmental values if proposed measures are not carefully assessed on efficiency – and realistic implementation – grounds. Efficiency should therefore constitute a key standard in any legal interpretation project. Rules should be interpreted to favour any reading which promotes inefficiency; rules with a clear inefficient impact should be discarded.

5.3. Role of Multinational Companies

Multinational companies are currently the addressees of often contradictory demands: In an older perspective dating back to the “NIEO” era, they are expected to refrain from any interference in domestic politics. In a more contemporary view, they are expected to intervene in domestic politics of developing countries in favour of international principles (treaties; soft-law rules) which in general reflect the Western-based “civil-society” expectations. A conventional way of pretending to measure the “power” of MNCs over small countries is still in use: The comparison of corporate sales versus national GNP. This comparison has little if any sense in reality – except within the group of MNCs or nation states. Corporate sales in comparison to GNP does not indicate any particular power relationship, inferiority or superiority. MNCs can not, e.g., deploy budgets reflecting their “global sales” for political purposes as nation states can. Their sales and profits are market-driven; they are earned and spent under market conditions. No corporate CEO has any unfettered freedom to use the cash flowing into a company’s network to spend for philanthropic purposes. If they do, usually for purposes of self-aggrandisement – e.g. the now fired and jailed CEO of Tyco Enterprises, they ruin the company and are quite properly sanctioned.

It is therefore necessary to appreciate the limits of what MNCs can do – and what “civil society” can reasonably ask them to do. A MNC that starts to pay more attention to a multitude of public purposes presented by “civil society” rather than its commercial core purpose will resemble the former state enterprises in socialist and communist countries. It will lose its efficiencies, be entangled in a net of patronage and poli-

tics. If it has to operate in a not protected financial market, its shares will rapidly lose value, the company will be acquired or liquidated and its leaders and staff fired. In the same vein, one can not ask MNCs to take the place of failing or absent state agencies or development aid agencies. While there is a middle ground between proper state and proper commercial functions that can be shifted one way or the other by privatisation or nationalisation, state agencies are incompetent for core commercial functions and MNCs are incompetent for core governmental functions. It is true that large enterprises in formerly communist countries used to carry out many public welfare functions – they were in fact merged with state agencies. This has also been the case of many state enterprises in developing countries. One needs to bear this function in mind when privatising enterprises in such a context and ensure that there is not suddenly a large gap not filled by the not-yet-existing or incompetently operating public agencies. But the idea inherent in the logic of most of current “civil society” demands that MNCs become the leaders of development aid and environmental policies in developing countries is unrealistic. They have no particular competence and would lose their commercial competence if they took upon themselves such functions in an extensive way. The closest historical analogy to what “civil society” now often vociferously expects of MNCs were the large and powerful pre-colonial and colonial trading companies. These interfered heavily in domestic politics; they mixed commerce with politics and exercise of military power. They were conquerors, colonisers, governments and traders⁶⁰. But an expectation that Exxon and Shell should in effect revive in a modern, 21st century shape, the function of, say, the British East India Company once governing most of India, is politically unrealistic.

This is not to deny, however, that MNCs should pay attention to the results of their conduct in their social, economic and environmental context. Law in developing countries may be underdeveloped and ineffectively enforced; MNCs should not rely here on “compliance with domestic rules” as an excuse for failings to perform at least to the level of home state and – if existing – accepted international standards. MNCs should also not exploit institutional weaknesses, but rather compensate for institutional weaknesses by making an extra effort to develop and apply modern environmental (and human rights, employment and related) standards. MNCs can be expected, within reasonable lim-

its – which includes non-interference in domestic politics and financial resources, to support and facilitate positive trends in host state governance. But they can not be held responsible for weak governance and not be expected to remedy such weak governance when the domestic political process, the host state and development aid has failed. There is a limit to what MNCs can reasonably do and be expected to do. It is only when such limits are accepted that one can come closer to reasonable expectations over the possible contribution of MNCs to sustainable development.

5.6. Role of Non-Governmental Organisations (NGOs)

NGOs are very much seen – in some sort of tenuous unity brought together as “civil society” – as the main agents for sustainable development. In my view, they are a forerunner of not yet existing political parties in the not yet formed global society. With globalisation, the significance of domestic political processes and in particular the influence of nation states over events relevant to them diminishes – though it does not disappear. In a time of crisis, the sun shines more strongly on nation states, while “civil society” recedes⁶¹. International political processes emerge, though they are not yet (as in nation states) channelled and focused on participation processes in formal international organisations. These international political processes rather operate indirectly. NGO operate in the outer sphere of formal decision-making. They are meant to influence actors who can participate directly in international (and national) decision-processes, e.g. governments, political parties, parliaments and international organisations. They very much work through, with and focused on relevant media. They are complemented by global forces which we can still not describe properly. There are global markets – in essence the aggregate of actions by the many actors participating (companies; financial institutions; financial press); globally effective media and numerous organised groups and networks which transcend national boundaries (e.g. professional, commercial, scientific and financial associations; international criminal and terror groups and networks; the loose associative relationship between people with a special interest mediated through the internet and its specialised communication fora). And there are the NGOS in the narrow sense of the word: Organisations and associations with some sort of a unifying philanthrop-

ic, religious or single-value-focused ideology and a sense of mission to influence the world and its powers and authorities to conform to their ideological mission. If we had formal constitutional set-ups and political processes in a democratic sense on the world level (which we have not), then arguably parties might form, in the model of national parties (or the still inchoate party affiliations on the EU level and in the EU parliament). NGOs are in my view a pre-cursor: without formal role in the proto-constitutional procedure in the almost exclusively intergovernmentally organised governing boards of international organisations, they build pressure and try to form political agenda "ante portas".

But one also has to appreciate the limits of NGO (and "civil society"). The first is that these are utterly unrepresentative organisations, with very little if any formal internal governance disciplines and external accountability. There are some formal requirements (with respect to NGO qualification by the UN), but in comparison to political parties in Western countries the rules on internal and external accountability with respect to transparency of funding, transparency of ultimate control and internal democracy are very weak if such controls exist at all. NGOs can easily be formed; they participate in the media processes without any legal obligation to disclose who controls them, what interests are behind their actions and where their revenues come from and how are they spent. There are many examples of NGOs fronting for religious or political groups – e.g. camouflaging partisan alliances in the Sudan civil war, but also of NGOs being formed as a cover or in hidden association and with hidden funding for protectionist interests. NGO media actions – e.g. allegations about the extent and significance of poisonous dumping in the Shell Brent-Spar case – have been subsequently revealed to have been, possibly intentionally, untruthful and deceptive. National charity law rules sometimes provide a modest extent of both rules and transparency, but that is very limited. The same applies for laws on defamation. These legal remedies are generally of little use as NGOs can vanish easily and have little constant asset or reputation base. Use of the internet for spreading rumours makes controls on truthfulness, minimum quality standards and transparency virtually irrelevant. NGOs (or pretend NGOs) spread rumours, false and tendentious information easily, without the quality control associated with serious newspapers; the damage is done, but accountability for such action virtually un-enforceable and non-existent⁶².

NGOs are it seems often easily founded to disguise special interests (e.g. in commercial and industrial protectionism against foreign competition) or to pursue religious, ethnic or special political interests through intervention into the domestic politics of other countries (e.g. Sudan civil war). In the main, we only notice at present Western NGOs, though there are many non-governmental organisations professing and pursuing, for example, religious expansion interests not only in the Christian world, but also in the Muslim world. There is often not a clear boundary between peaceful purposes and combative purposes – as the relationship between Islamic (or Christian) quasi-missionary financing vehicles and Islamic (or Christian) clandestine organisations or organisations with a harmless publicly presented purpose and an underlying much less harmless purpose illustrates.

There is another significant difference of NGOs to – national – political parties. Not only are these now usually subject to stringent, legally enforceable rules on internal party democracy, fund-raising and budgetary expenditure – with disclosure not only to members, but the public at large. Political parties are subject to intense political responsibility, usually activated in electoral competition. NGOs are primarily de-constructive – they criticise existing governance (of governments, MNCs) by using often idealised moral values. They measure the inevitable under-performance of criticised actors as compared to such high standards. But they do not focus on formulating, putting forward and fighting to implement positive policies, with the attendant risk of being called to account when such policies fail. The only risk of failure is losing out in public attention and fund-raising through membership contributions. A political party's responsibility, on the other hand, is activated in reasonably competitive elections. If the policies they propose are not accepted or if they are seen not to have delivered to the satisfaction of the electorate, they lose. No such risk, responsibility and sanction exists for NGOs. This explains why NGO action is primarily negative and de-constructive. No incentive – but also little potential – exists for NGOs to participate actively and constructively in the positive governance of the global economy. They are, in essence, a permanent opposition without the need to develop a profile as a credible government alternative.

NGOs are also primarily a Western phenomenon. While they may have branches in developing countries, the main NGOs – Friends of the

Earth, Oxfam, Greenpeace, WWF, Global Witness – are US or EU-based, funded and controlled⁶³. Naturally, they reflect values (and perhaps even more so the anxieties) and in a more disguised way, interests of significant forces, in the main the values of the educated, suburban middle-classes and (sometimes directly and often in alliance) the interests of those affected by globalisation and supporting commercial protectionism⁶⁴. The consistent opposition of most NGOs most of the time against natural resources development in developing countries reflects the “Northern” origin: Mining has largely gone away from Northern countries, by depletion and by new land-use priorities reflecting the prosperity of Northern countries. It also reflects the condescending attitude towards economic development aspirations in the South and explicitly or subcutaneously a certain sympathy for viewing the “South” as a philanthropic zoo for indigenous people, animals and nature protected from (or insulated from) forces that might make the South more similar to the North. The teeming masses of the large cities of the South play a very minor role in the visor of NGOs as compared to the comparatively very small number of “indigenous” People. Reminiscences of “northern” romanticism and the “noble savage” are present here – the projection of Northern spiritual needs and longings into a Southern, tropical, oriental, sensuous, pantheistic narrative. This projection, evidently, has little to do with Southern realities. It reflects the persistence of Northern cultural imperialism. It is consistent with such Northern romanticism that the institutional pillars of the “Global Economy”, the international trade, financial and monetary institutions are not much respected. They do not represent the underlying desire to keep the South in romanticised, but natural and spiritually harmonious poverty, but rather to raise it to the level of economic development – without romanticism, spirituality and noble savages any longer – of the North. The de-constructive approach of “civil society” married to the romanticised view of both the past, presence and future of the South therefore produce considerable peril for the continued functioning of the global economy – with the risk of the break-down of the global order and the peace, prosperity and civilisation it engendered in so far unsurpassed measure since 1950. The return to the break-down of global order, the revival of ethnic and national separation and the glorification of ethnic and communitarian values over liberal and cosmopolitan values as we have experienced it in the 20th century, from 1914 to 1945, is therefore an ever present risk. There are lar-

gely suppressed and not investigated cultural continuities and taboos present here.

From a Southern perspective, NGOs are even more problematic. NGOs may have appeared and to some extent still appear as "Third World sympathisers", but increasingly they are substantially and even formally allied with all the relevant powers of the North: captured and sympathetic government agencies (i.e. national environmental agencies now in frequent and close interaction with NGOs), multinational companies responding to pressure from NGOs and seeking competitive advantage on regulation-making in alliance with NGOs and international agencies increasingly rather responsive to the Northern NGO-MNC-government complex than to their Southern constituents. While some NGOs still seem to advocate trade liberalisation in favour of developing countries, most environmental and human-rights NGOs propagate rather strictures than new opportunities for developing countries.

Developing countries, weak in governance, in expertise, in the ability to develop their own viewpoint free from the barrage of information, advice, concepts they receive from the Northern development industry, have been dealt the weakest cards. Their ability to formulate an independent and informed view is severely hampered and handicapped. Their companies, state or private owned, have the least ability to comply with the mass production of laws, treaties, voluntary guidelines and similar standards, all emanating from the North, usually promoted by NGOs and their allies and all conferring an automatic advantage on the MNCs. The systemic advantage is against developing countries. Whatever competitive advantage there is, is rapidly ground down by the flow of rules from the North.

NGOs now exercise a growing influence on the media-based process where the relevant opinions and perceptions are being formed. This used to be the task of academic institutions, think-tanks and the educated press. The internet makes it easy and cheap to disseminate the many position papers, studies, reports and recommendations developed within the NGO-community. NGOs have here considerable advantage: They are not subject to the constraints faced by governmental (and inter-governmental) agencies: They do not have to accommodate all forces able to complain; they can therefore take much more radical, single-minded and clear positions as compared to the lowest-denominator, of-

ten stilted and anodyne character of official studies. They are equally not subject to the academic peer-control quality controls of the academic institutions where statements have to be carefully constructed to conform with available evidence, proposals to be based on available literature and conform with the publication guidelines and peer-review processes of academic journals. NGO staff tends to be young; tenure with an NGO is short-term and without long-term career perspective as in the academic or professional world. Their work is therefore not subject to the reputational, quality, professional or academic career pressures where too simplistic, too unbalanced work without full account of available literature and the rules of the art are likely to damage or kill a career from the start. NGOs represent the spirit of adolescence (at least as seen and played out in Western culture): A spirit of rebellion, of critical and de-constructive approaches without the responsibility for positive creation (and thereby visible failure). This spirit of adolescence seems also to reflect a good part of NGO staff; NGOs provide a kind of haven between university and the seriousness and the rigours of professional life. The careers there are an adolescent playing ground before the seriousness of professional careers takes over or after a professional career has come to a natural or premature end. Their dilemma seems to represent another dilemma of Western adolescence: The temptations of "integration" into adult discourse versus the self-satisfaction and pleasures of acting out public protest theatre.

This is why NGO studies are so refreshingly direct, focused, with devastating critique usually of existing activities and provide simple and easily intelligible recommendations. NGO studies have a "Manichean" character – they see the world in white and black, good and evil, with little "chiaroscuro" in between. Since such language attracts more attention, and since there is no risk of creating havoc through implementation, NGO studies can be very successful in terms of their persuasiveness. No fuzzy and self-protecting academic or governmental jargon, no bows to all sides of the governmental, political or scientific dialogue, just straight "shooting from the hip".

These working conditions in the NGO world, highly different from the normal adult world of professional, academic or governmental life, explain some of the virtues of "civil society": In the absence of global political parties, NGOs can highlight specific issues covered up by the con-

sensus politics of bureaucracies or the prudent conservatism of academic life. They can trigger debate by focusing – and without zooming on some issues in the overall complexity of life no progress is possible. They can also pressure bureaucracies to listen to voices outside the formalised constituencies of such agencies. They can enrich the debate by breaking up established consensus. These are the privileges of Western adolescence where a more radical, single-minded and idealistic attitude is both accepted – for a while, and seen to help dialectical progress along.

But given the weight now exercised by NGOs, a more constructive approach is needed. Power needs to be linked to accountability – for internal governance and for external impact. That means a movement towards good-governance concepts for NGOs not that different from MNCs or in particular national political parties. It also means that nation states do have to accept some responsibility for NGO-initiated campaigns within their regulatory power. As international law is now seen to impose a responsibility of nation states for “harbouring” the terrorist variant of non-state actors, so states should also be responsible for regulating NGO activity so that essential “quality” standards – governance, transparency, disclosure and liability for breach of normal legal rules – are complied with. One can not rely on NGOs themselves (as one does not rely on MNCs, political parties or governmental agencies alone for self-regulation). The institutions of the global economy should also review their governance concept. Their current governance concept has been developed in the 1950s – it is the concept of intergovernmental clubs hermetically closed to outsiders. Only in some agencies (ILO, OECD) do non-state actors (primarily trade unions and business) have a quite minimal consultative role⁶⁵. I suggest that it is time to consider opening up the governing boards of international agencies to participation of all relevant forces in the global society – and that includes both NGOs and MNCs. One needs to give thought to representativeness and the protection of developing countries. But as large MNCs, in particular in the US, now tend to include representatives of public-interest groups, universities, think-tanks and politicians on their board of directors, so international agencies should have a formal involvement of those forces that count. Such integrative approach would also help to link NGO-political power with responsibility and nudge them towards developing not only negative, but also constructive approaches to the problems of the globaleconomy.

6. Conclusion

This essay was intended to raise some provocative questions about the formulation of policies for sustainable development and natural resources. The foremost conclusion is that sustainable development must be based on a dynamic, not static view of human needs for natural resources. Such needs have always, as history shows, changed and are likely to keep changing. There is accordingly no place for a static approach viewing human needs for natural resources as "frozen" for eternity. Sustainable development expresses the mindset of post-industrial society, and in particular its educated, suburban and younger middle-classes, continuing the Protestant traditions of frugality and prudence in a time of widespread prosperity. It projects this mindset – of prudent, frugal and not wasteful utilisation of natural resources – onto humanity as such. But one needs to bear in mind the highly different conditions in developing countries. While natural resources play no – at least no very visible – role any longer in post-industrial prosperity, they play and can play a large role in the development process, both as a base for learning industrial skills and modes of organisation and through the much greater materials-intensity required in the process of building up industrial infrastructure. A possible synthesis is to link exploitation and development of natural resources with modern concepts of good governance, of modernising the cultural, ethical and social aspect of resource development and of injecting environmental values (which after all bear witness to Protestant ethics' emphasis on frugality and avoidance of waste) into all phases and the design of the mineral development process.

Sustainable development is in my eyes closely linked to good-governance, a both fashionable and perennial subject⁶⁶. Resources – or rent derived from resource exploitation – which are exploited in situations of weak governance are likely to be wasted. Sustainable development therefore means modern forms of mineral licensing, mineral regulation and mineral taxation, but also institutional structures which are more likely to transform the revenues from mineral development into economic and social capital with a long-term societal rate of return⁶⁷. This requires constant efforts to review current regulatory instruments and to adapt them to specific conditions in, mainly, developing countries.

Sustainable development also implies that efficiency and optimality

are much more appreciated than they are now in the discourse dominated primarily by NGOs or very state-oriented and bureaucracy-trained public lawyers with little interest, familiarity or competence in the methods of economic analysis of law or understanding of the market (rather than the bureaucratic) mechanism. Inefficient rules are likely to result in wastage and lower environmental quality than can be achieved. They destroy both the resources and the political acceptance for costly environmental policies. Efficiency should therefore be a standard, principal guideline of designing, interpreting and applying rules in both national, international and voluntary regimes.

There will be no sustainable development without a proper functioning of the institutions and instruments of global commerce. This means strengthening – rather than undermining – the role of international organisations and developing disciplines on all relevant actors – national governments with their proclivity to rather yield to domestic protectionist and anxiety-based pressure, MNCs, NGOs who currently lack proper governance and external accountability and international agencies which tend to operate in an incestuous relationship between self-propelled international bureaucracies and their inter-governmental constituencies. I advocate an opening of the governing boards of international agencies in a much more formal sense than is done today towards NGOs and MNCs.

In all, one needs to pay much more attention to developing countries. These are currently overwhelmed by structural power superiority⁶⁸ from the West, exercised through an alliance of NGOs, MNCs, national agencies and international organisations. There are elements which remind of 19 century missionary movements operating hand-in-glove with trading companies, there are expectations and demands towards MNCs which have shades of colour of the past colonial trading companies and there is a widespread cultural and ideological power imposing its values on the developing countries. Developing countries must be allowed to select a path which leads to the situation of the North. They must not be forced by Northern forces into zoo-like protection areas, reservations or protectorates. Much of today's NGO-initiated demands means if thought through to its logical conclusion that developing countries should be corralled into something that seems akin to trusteeship, protectorates or structural re-colonisation. Developing countries can in the end only develop if their natural comparative advantages are not

being continuously undermined by well-meaning environmental, human rights, social and labour policies imposed from the North for short-term interests in Northern countries.

The overall conclusion of my essay is that it is the economic consequences which count for sustainable development, rather than good intentions.

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7. Notes

1 Based on presentations at Queen Mary College, October 2001 and the University of Amsterdam, November 2001.

2 Formerly UN Interregional Adviser on Mineral and Petroleum legislation. Thomas Waelde has worked since 1978 in- and with developing and transition countries. He has advised for 25 years governments, companies and international agencies on natural resources and energy policy, with a focus on developing countries. Most of his graduate students and PhDs at CEPMLP/Dundee are from developing and transition countries. Websites; www.cepmlp.org; www.gasandoil.com/ogel; Internet journal: www.cepmlp.org/journal; email: twwalde@aol.com

3 For a critical analysis M. Pinto, in: Friedl Weiss (ed) *International Economic Law with A Human Face*, Kluwer 1998

4 For further discussion (including references in ICJ jurisprudence (e.g. Judge Weeramantry in the Gabcikovo-case): environmental protection sustainable by trade, in: K. Ginther ed *Sustainable development and good governance*, Nijhoff, Dordrecht 1995 p.; 382

5 UN/UNCTAD, *World Investment Report 2001 "Promoting Linkages"*, Sales No. E.01.II.D.12, ISBN 92-1-112523-5.

6 *A Survey of Sustainable Development Social and Economic Dimensions*, edited by Harris, J., Wise, T., Gallagher,

K. and Goodwin, N. (Washington: Island Press, 2001); Dominick McGoldrick, *Sustainable Development and human rights*, 45 ICLQ 796 (1996)

7 I remember this in particular as an argument by Philippe Sands in the October 2001 Queen Mary College seminar where this paper was first presented.

8 An approach best illustrated by the traditions of the Scottish Enlightenment, A. Herman, *The Scottish Enlightenment 2001* at 73 et seq, 361.

9 For a methodological background: T. Waelde, *Juristische Folgenorientierung*, Frankfurt, Athenaeum, 1979

10 Thomas Waelde, A requiem for the "New International Economic Order", in: *Festschrift Ignaz Seidl-Hohenveldern* (Ed. Gerhard Hafner et.al.), Kluwer International, The Hague. 1998, 771-804; William Easterly, *The Elusive Quest for Growth, Economists' Adventures and Misadventures in the Tropics* MIT Press 2001, ISBN 0-262-05065-X, 335 pages,

11 See recent work on Adam Smith's approach to law and its effect: Jerry Muller, *Adam Smith in histime and ours*, Princeton UP Princeton, New Jersey 1993; Emma Rothschild, *Economic Sentiments, Adam Smith, Condorcet and the Enlightenment* Harvard UP 2001; Adam Smith, *Wealth of Nations*, III.4. p. 400, Ed. R. Campbell/A. Skinner, Glasgow Edition, Oxford University Press, 1976,

12 Helga Drummond, *the Art of Decision Making: Mirrors of Imagination, Masks of Fate*, Wiley New York.

13 Max Weber, *The Protestant Ethic*

and the Spirit of Capitalism, 20th edn. 1890 trans. T. Parsons; see also on the cultural underpinning of the economic development notion: Francis Fukuyama Trust, the Social Virtues and the Creation of Prosperity Hamish Hamilton 1995; Wilhelm Roepke, Economic Order and International Law, II; Vol 86 Recueil des Cours 203 (1954)

14 Robert Skidelsky, *Interests and Obsessions*, Macmillan London 1994 on Beatrice Webb; also Corelli Barnett, *The Audit of War*, London: Macmillan 1986 – on the decline of Britain and the idea of a “New Jerusalem”;

15 This is not to say that other religions, in particular Islam, do not also include such elements of sacrificing the present for satisfaction in a distant future,

16 The following discussions is based on Marian Radetzki's much more extensive and lucid analysis: *Is Resource Depletion a threat to human progress?* In: CEPMLP Internet Journal, www.cepmlp.org/journal (2002); also published as: M. Radetzki, *Is resource depletion a threat to human progress*, 2002, Lulea Economics Reprint Series

17 Easterly, 2001

18 See again Radetzki, 2002; Philip Crowson, *Sustainability and the Economics of Mining*, CEPMLP Internet Journal, www.cepmlp.org/journal 2002; also: Plenty of gloom, *Economist* December 20, 1997, p. 21

19 Campbell/Laherrere, 1998, *The End of Cheap Oil*, *Scientific American* Vol. 278 March.

20 Most articulate on this: Marian Radetzki, *The Green Myth - economic growth and the quality of the environment*, Multi-science publishing 2001

21 Jahangir Amuzegar, *Opec as Omen*, 77 *Foreign Affairs* 95 (1998)

22 R. Auty and Mikesell, *Policies for Sustainable Development of Mineral Economies*, Chapter 13 in : *Policies for Sustainable Development*

23 For the most recent survey of methods and contexts of extracting mineral rent: Bernard Mommer, *Global Oil and the Nation State*, Oxford U Press, 2002

24 See the books published by authors associated with the Oxford Institute of Energy Studies on Nigeria, Algeria, Venezuela and Indonesia. George Philipps, *The Political Economy of International Oil*, Edinburgh, University Press, 1994. The World Bank is currently carrying out research on oil income: <http://www.worldbank.org/ogsimpact/mgroverview.htm>; see also on the issues surrounding the transparency of petroleum revenue use is Global Witness (<http://www.globalwitness.org/campaigns/oil/index.html>)

25 O. Noreng, *Islam and Oil*, CEPMLP Internet Journal, www.cepmlp.org/journal - 2002; idem, *Islam and Oil*, 1997(2). R.M. Auty, *The Resilience of Latin American State Mining Firms* 1991; idem, *Industrial Policy Reform in Large Newly Industrialising Countries: The Resource Curse Thesis* 1992; Adam Smith, referred to in George Phillip op.cit supra

26 Ungenerous endowments, *Economist* December 23, 1995, 107-110;

27 This theme is developed in later writings of mine, e.g. a chapter on international economic organisations for the forthcoming book by Adrian Bradbrook, 2003, on renewable energy and sustainable development (precise title not yet known) or my comment on "OPEC" published in OGEL 2 at www.gasandoil.com/ogel.

28 D. Humphries, Presentation to CEPMLP Mining Seminar 2001; also check for D. Humphries on CEPMLP Internet Journal, Auty, R. and Mikesell, RF, Sustainable Development of Mineral Economies (Oxford: Clarendon University Press, 1999; J. Tilton, On borrowed time? Resources for the Future, Washington DC; ask E Bastida for further references; For an up-to-date discussion of the concept, its background, history, implications (plus the conclusion that there is no definite meaning) see the Final Report (Chapter XI) of the MMSD-Global Mining Initiative report published in 2002. One should say that this is not a critical intellectual analysis, but rather a policy-paper aimed at a global, general, specific and all-encompassing and continuous process of infinite dynamic consensus and harmony – but it does include all the correct terms and attitudes.

29 Rethinking Cost-Benefit Analysis MATTHEW D. ADLER, University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 72; Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection By Lisa Heinzerling and Frank Acker-

man Georgetown Environmental Law and Policy Institute Georgetown University Law Center January/February 2002 at: <http://www.globalpolicy.org/socecon/envronmt/2002/Cost-Ben2002.htm>

30 Human Rights in Natural Resource Exploitation: Public Participation in the Sustainable Development of Mining and Energy Resources by Donald M. Zillman (Editor), et al (Hardcover - May 2002

31 Website: www.iiied.org/mmsd/

32 Helga Drummond, the Art of Decision Making, op. cit. supra

33 See the end of this essay on the NGO governance challenge.

34 Kernaghan Webb; Government of Canada, Voluntary Codes, A Guide for their development and Use March 1998

35 Gary Gereffi, Ronie Garcia-Johnson, The NGO-Industrial Complex, at: http://www.foreignpolicy.com/issue_july_aug_2001/gereffiprint.html

36 Naomi Roht-Arriaza, Shifting the point of regulation: The international Organisation for standardisation and global lawmaking on trade and the environment, in: 22 Ecology Law Quarterly 480 (1995);

37 Ruediger Wolfrum (ed) Enforcing Environmental Standards: Economic Mechanisms as viable Means? Springer, Berlin 1996

38 Gregory C. Shaffer, The World Trade Organization Under Challenge: Democ-

racy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters; 25 *Harv. Envtl. L. Rev.* 1 (2001). .

39 E.g. the influence of English Fabian socialism on Indian middle-class thinking.

40 See the examples in Easterly or the concept of providing private property rights to the entrepreneurial poor by Hernando del Soto (*Otro Sendero*, 1987).

41 "Sustainable development" is a world of euphemism, and false, artificial or illusionary harmony. I try therefore to revert to older terms which described the phenomenon more directly and honestly.

42 F. Fernandez-Armesto, *A History of Food*, 2001, p. 21 uses mentions the persuasive alliance of Romantic primitivism with ecological anxiety.

43 One should be very sceptical of views that it is only with contemporary globalisation that otherwise latent potential for inter-ethnic conflict gets activated, but so: 43.Chua, Amy L. *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*. *Columbia Law Review*, 95:223-303 (March 1995) and *eadem* (2002).

44 See the 2002 MMSD Final report for a sophisticated and up-to-date example.

45 Best overview: Easterly, 2001

46 Deepak Lal.; *Unintended Conse-*

quences: The Impact of Factor Endowments, Culture, and Politics on Long-Run Economic Performance (Ohlin Lectures); Richard Sher, *Adam Smith's Second Thoughts: Economic Liberalism and its*

Unintended Consequences, The Adam Smith Club Kirkaldy Paper No. 1, 1-13. 315, in: Adam Smith, Haakonssen, Knud (editor)

Ashgate 1998; M. Wolff in *FT* of 28/11/2002 commenting on 2002 Wendt-Lecture by Deepak Lal

47 This should not require any specific justification or reference, but international public lawyers in particular have a tendency to take the proclaimed "moral value" in, for example, an authoritative resolution at face value rather than try – without being trained in systematic economic analysis – to find out what social action might produce the desired result. Generally: T. Waelde, *Juristische Folgenorientierung*, Frankfurt 1979; M. Olson, Bill Easterly and Deepak Lal, *op. cit. supra*;

48 E. g. representative for many: E. Nieuwenhuys/M. Brus (Editors), *Multilateral Regulation of Investment*, Kluwer 2001 (and in particular Nieuwenhuys therein). Critically: T. Waelde, 1998, *Requiem for the NIEO*, in: *Festschrift Ignaz Seidl-Hohenveldern*,

49 Radetzki, *Green Myth*, *op. cit. supra*; M. Radetzki, *Is resource depletion a threat to human progress*, 2002, *Lulea Economics Reprint Series*, also available from [cepmlp Internet journal](http://cepmlp.org/journal) at www.cepmlp.org/journal (2001/2002)

- 50 T. Waelde, Non-Conventional Views on Effectiveness, 4 *Austrian Review of International & European Law* 164-204 (1999) - published by Kluwer in 2001
- 51 Waelde, T., 'Energy Charter Treaty and Sustainable Development', in Weiss, F. (Ed), *Economic Development with a Human Face* (Kluwer, 1998), 223.
- 52 Usher, *General Principles of EU Law*, 1998
- 53 Edward Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multi-national Enterprises*, Institute for International Economics, 2000;
- 54 The situation in the *Myers v. Canada Nafta Ch XI* case – www.nafta-claims.org
- 55 T Waelde/T Weiler, investment arbitration under the energy charter Treaty in the light of new nafta precedents, 159 in: Gabrielle Kaufmann-Koehler/Blaise Stuckie, *Investment Treaties and Arbitration*, ASA Swiss Arbitration Association, Zurich January 25, 2002 Conference,
- 56 T. Waelde, Comments on the Role of (Selected) International Agencies in the Formation of International Energy Law and Policy towards Sustainable Development, in: A. Bradbrook, *Sustainable Development and Renewable Energy*, IUCN, 2003.
- 57 D. Dudek/ R. Stewart/ J. Wiener, *Environmental Policy for Eastern Europe: Technology-based versus market-based approaches*: 17 *Columbia J. Envir. L* (1992) 1-52
- 58 Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization and Global Lawmaking on Trade and the Environment*, 22 *Ecology LQ* 479 (1995)
- 59 *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* By Lisa Heinzerling and Frank Ackerman Georgetown Environmental Law and Policy Institute Georgetown University Law Center January/February 2002 at: <http://www.globalpolicy.org/socecon/envronmt/2002/CostBen2002.htm>
- 60 John Keay, *The Honourable Company, A History of the English East India Company*, London Harper Collins, 1991
- 61 It is therefore not surprising that at the time of the writing of this essay, NGOs have virtually disappeared from the debate of the major event – the prospective Second Gulf War. A logical position would have been support for the US as the US justifies its invasion plans largely with human rights issues, but here the intellectual heritage of the NGO movement is split between forceful enforcement of human rights by extraterritorial action on one hand and the tradition of the peace marches on the other.
- 62 An example is the recent circulation by a apparently US-based NGO of a criticism of an ICSID case on water privatisation. The message contained factual errors and misunderstandings; it was circulated around the world by misuse

of entry into legitimate internet forums ("spamming"); the sender concealed his/her true identity and was unable/unwilling to respond to the debate that arose following that message (OGEMID Internet Forum, 24-28 February 2003).

63 Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 Harv. Envtl. L. Rev. 1 (2001).

64 It also seems to me that there is an element of defense of established, not-earned class and economic position involved. Not surprisingly, several NGO leaders seem to be the no longer commercially active or successful scions of wealthy dynasties. Fear of social decline may here be wedded to anxieties of Western middle-classes at large about the maintenance of a no longer earned and perhaps no longer merited prosperity far in excess of other classes and other societies. Fear of social "déclassement" may, particularly if linked with ecological anxiety, explain the intensity of emotion, distress and anger which seems to distinguish NGO voices.

65 T. Waelde, *International Agencies and Sustainable Development*, in: A. Bradbrook, forthcoming, IUCN book, 2003.

66 Note both the content and the pictorial cover of my book (edited with Ann and Robert Seidman, *Making Development Work: legislative Reform for Institutional Transformation and Good Governance*, Kluwer 1999

67 Bernard Mommer, *Global Oil and the Nation State*, Oxford U Press, 2002 discusses in great depth techniques and politics of selling national oil resources at the best price to the consumers, but virtually ignores (or suppresses) the question of what happens to tax revenues once obtained. We suggest that the real question is not how to extract as much money for the exploitation of resources, but rather of how to invest the mineral rent gained – without running the ever-present risk of any "rentier society", i.e. to become dependent on mineral rent and incapable of earning any income otherwise, the sorry state of oil-dependent economies everywhere – from Venezuela to Nigeria and all the Gulf states, Sarah Ahmad Khan, *Nigeria, The Political Economy of Oil* Oxford U Press 1994; George Philipps, *The Political Economy of International Oil*, Edinburgh University Press, 1994; Jahangir Amuzegar, *Opec as Omen*, 77 Foreign Affairs 95 (1998) and note the recent "resource curse" work of the World Bank; this work, naturally, will have to strike an uneasy balance between the Bank's major customers – resource producing developing and resource consuming developed countries on one hand, and the Bank's accommodation of the ideological pressures from Western NGOs. It remains to be seen if a World Bank analysis can circle this square without concluding nothing of any substance.

68 Susan Strange, *the retreat of the state: the diffusion of power in the world economy*, Cambridge U Press Cambridge 1996