While 2012 is the international year of 'sustainable energy for all' there has in fact been little progress to date in achieving it. One reason for the lack of progress is the failure to reconcile permanent sovereignty over natural resources with sustainable development. Discuss.

The 'Sustainable Energy for All - A Framework for Action' refers specifically to the United Nations (UN) programmatic paper of that title, dated January 2012 by the Secretary-General's High-Level Group. The three main objectives to be achieved by 2030 are to: ensure universal access to modern energy services[1], double the global rate of improvement in energy efficiency and double the share of renewable energy in the global energy mix. Such diverse objectives highlight the need for any discussion on this topic to include a broad interdisciplinary approach[2]. The process of distinguishing the emergence of rules by looking at UN Sources of law is no easy task. However, trends can be identified.

As Rosalyn Higgins, former President of the International Court of Justice (ICJ), noted '*changing economic contexts and changing political perceptions condition legal answers*'. Those drafting UN resolutions need to balance carefully the interests of industrialized and developing nations, between anthropocentrics[3] and eco-centrics[4], and the stability and protection needs of foreign investors and increasingly IFIs (lenders) in relation to host States. This applies to any material sources of custom, the UN or other international or intergovernmental organizations produce, including reports, press releases etc.[5]

The UN is an intergovernmental organization of member States; as such it requires consensus among States to support its initiatives. The greater the number of parties involved and the level of acceptance (if almost unanimous or in "all states" form) the more likely it will be considered a "law-making treaty". As Crawford stated, in addition to its declaratory character, the existence of these factors can "combine to produce a powerful law-creating effect".[6]

Crawford has noted that although not binding in themselves (other than on the parties), UN materials, activities, resolutions, declarations and conferences (even Multilateral and BITs) can be influential as evidence in expressing or codifying existing principles. This applies to a greater extent when there has been a 'final act'[7]. Certain norms can become rules of international customary law impacting on non-parties. Higgins advocated how

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[1] In CERDS (Chapter II Economic Rights and Duties of States 1974 at Art 6 the reference is focused on access and regular flow of goods in relation to States and Art 14 'conditions of access

[2] While international energy litigation cuts across public international law, international investment law, environmental law, human rights law, economic law, and others; international law is distinct in its focus on (i) development needs (ii) the economic aspect of permanent sovereignty over natural resources (iii) environmental protection which overlaps with sustainability and the environmental aspect of permanent sovereignty. (Schrijver).

[3] primarily concerned with development

[4] primarily concerned with environmental protection

[5] James Crawford, Brownlie's Principles of Public International Law 8th Edition pg 24

[6] James Crawford, Brownlie's Principles of Public International Law 8th Edition pg 31/McNair (1961) 216-18 Art 2, section 3-4 of the Charter as the 'nearest approach to legislation by the whole community of States that has yet been realised'

[7] Crawford's Brownlie's Principles of Public International Law (8th eds pg 42 (A) and (B) including (Art 38 1 (a))

UN operates to give legal significance as evidence of customary law in this context[8]. This distinction between treaties and custom is an important consideration with the perceived lack of progress associated with non-parties to the Energy Charter Treaty 1994 (ECT) such as US, China and Russia (withdrawn) especially given their observer status. Although they differ in value, Rio Declaration 1992 and Rio Conference 2012 '*The Future We Want*' and ICJ and Arbitral Awards (subsidiary) are all material sources of law influencing the progression of 'Sustainable Energy For All' (SEFA).

Satisfying the diverse needs and interests of different States during the drafting of UN Resolutions is difficult. The current trend is towards development and reducing "energy poverty".[9] The SEFA Framework main objective[10] originates from a pattern of UN resolutions. These goals have been largely attained by the establishment of WTO 1995 and ECT 1994. In a dispute settlement context relating to universal access to energy, GATT V and ECT Art 7 have created rules to progress the State-sensitive right to freedom of transit across States.

The principle of Permanent Sovereignty over natural resources ("Permanent Sovereignty") was established with GA Res 1803 (1962) specifically for the economic development of newly-independent States, to give them greater access to, control over, and management of their own natural resources. Permanent Sovereignty was a reaction to the colonization of other nations' assets. The principle emerged in the 1960s for the specific benefit of 'developing' States. In 2012, these objectives include modern energy products, materials and services; in this sense, SEFA Framework relies on the principle's continued existence. The principle also emphasized the rights of emerging States' peoples[11] which has been enshrined in Human Rights' law[12].

Historically, whether the right to permanent sovereignty was asserted by means of expropriation by Libya in the 1970's[13] to recover control of oil fields; or, more recently via a tax liability by the Russian Federation in regard to the Yukos Oil Company[14]; or latterly operating as an obstacle to the principle of freedom of transit ("for all") involved in the "gas wars" between Russia and Ukraine; permanent sovereignty can be perceived as a nationally applied principle operating as a check or barrier rather than a progressive tool for universal access to energy resources[15].

However, in line with Schrijver, such a view of permanent sovereignty is too simplistic for the following reasons; first, it fails to focus on the consensus rather than the objectors' (persistent or subsequent) States; second, it fails to understand the true

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[8] Applying Article 38 Statute PICJ (d) Higgins stated: "*the UN is a very appropriate body to look for indications of developments in international law, for international custom is to be deduced from the practice of States, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and view of States have come to have legal significance as evidence of customary law…collective acts of States, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the UN – and especially its accelerated trend towards universality of membership since 1955 – now provides a very clear, concentrated focal point for state practice*". (Pg 193 Brownlie's Principle of Public International Law, James Crawford 8th Edition 2012)

[9] (Preface Sec Gen Ban Ki-Moon SEFA Framework 2012).

[10] to achieve universal access to modern energy services

[11] as evidenced by the earlier 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, in GA Res 1514 (VX), (89-0.9)

[12] such as the 2007 UN Declaration on the Rights of Indigenous Peoples GA res (61)/295 (144:11)

[13] over post-colonial oil concession agreements with US oil companies

[14] here crucially the main complainant in the ECHR case was himself a Russian although alongside other foreign investors. Also Russia's nationalization of Sakhalin liquefied natural gas project (Niebruegge, note 235)

[15] as prioritized in SEFA Framework 2012

function of the principle by assuming that it cannot act as a bridge between the development of national and international law; third, it fails to appreciate how the principle crucially involves a State acting as a national legislator.

Significantly, as to the principle of permanent sovereignty holding ius cogens status as a preemptory norm capable of defeating a binding treaty or contractual obligation, Schrijver has stated the principle cannot be accorded this status. The implication being, "*it does not override principles of international law and cannot evolve in the light of new rules and new practices, thereby allowing it to encompass new duties*."[16]

'SEFA' can also be described as the latest incarnation of the concept of sustainable development, defined in the Brundtland Report 1987[17]. As evidenced by Rio Declaration 1992, UNECOSOC Draft Declaration 2012, Rio Conference 2012, however, this author argues that as a result of the continuing world recession emphasis is now on the development needs of the present generation[18].

SEFA Framework's main objective: universal access to energy services[19] is not aimed just at States but people[20]. UNECOSOC Draft Declaration 2012[21] lays clear emphasis on the human rights of individuals as evidenced at 6; "*we recognize that people are at the centre of sustainable development…thereby to benefit all*". Similarly, at 9, it states, "*the importance of Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law*". At 32 while the associated *full* right to self determination (from which permanent sovereignty has emerged) is recognized, it is limited to "*peoples…living under colonial and foreign occupation*". Significantly, against the pattern of 1960's and 1970's UN Resolutions, nowhere in the UNECOSOC Draft Declaration 2012 is the term "permanent" sovereignty included. Although not a UN multilateral treaty, ECT Article 18 reflects this diluted version with its redefinition of "*national sovereignty over energy resources*".

In the context of international law, the relevant sources of law or 'starting points' are set out in *Brownlie's Principles of Public International Law*[22]. This paper discusses the origin of 'SEFA' and the issue of progress or lack of it. It then continues with a general

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[16] The main elements have been included in Human Rights Covenants (1966); the African Convention on Human an Peoples' Rights (1981); the two Vienna Convention on Succession of States (1978) and 1983) and UN Convention on the Law of the Sea (1982), Biodiversity Convention and ECT 1994. In addition to Arbitral Awards, Dupuy in *Texaco v Libya* (1977) concluded the UN Declaration (1962) expressed the opinio juris communis on nationalization of foreign property under international law. Despite its complicated genesis the principle has achieved a firm status in international law and is widely recognized as a principle within it. Both Judge Weeramantry in Nuclear Weapons appeared to claim the principle had jus cogens character while Judge Arechaga before him when he stated in 1979, "*The description of this sovereignty as permanent signifies that the territorial State can never lose its legal capacity to change the destination or the method of exploitation of those resources, whatever arrangements have been made for their exploitation and administration."*

[17] Most famously defined in the Brundtland 1987 Report (World Commission on Environment and Development (WCED), *Our Common Future* 1987 as, "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*."

[18] Demonstrated by the latter Conferences' headline at Chapter III, entitled, "*Green economy in the context of sustainable development and poverty eradication*"

[19] before objective 2) energy efficiency and 3) renewable energy

[20] The references along the pattern of UN resolutions have differed in different Articles; 'people and nations' were specifically included in UN Resolution 1803 (1962) and UN Resolution 3201 Declaration on the Establishment of a New International Economic Order (NIEO), while in CERDS (Chapter II Economic Rights and Duties of States 1974 at Art 6 the reference is focused on access and regular flow of goods in relation to States. But at Art 7 (CERDS) it provides, "*every State has the primary responsibility to promote the economic, social and cultural development of its people*'.

[21] Annual Ministerial review July 2012 "Draft Declaration".

[22] James Crawford 8th Edition, OUP 2012

discussion of how the UN 'SEFA' Framework[23] has recently been expressed, reaffirmed and refined to meet the priorities of the day through a pattern of influential UN resolutions and law-making multilateral treaties[24]. This paper aims to highlight how the activities of intergovernmental organizations, UN declarations and multilateral treaties of the UN, WTO and ECT, in particular, have consistently informed the progressive development of one another. It will refer to the relevant judicial and arbitral decisions and writings of 'highly qualified' publicists[25] to discuss the state of the law and the progressive legal values attached to the main concepts cited above. The final discussion will specifically address the relationship between permanent sovereignty over natural resources[26] and sustainable development in addition to their alleged irreconcilability.

Importantly, SEFA Framework[27] is specifically referred to in Rio 2012. This demonstrates the recent pendulum swing towards economic development[28], as opposed to environmental protection, to address the issue of 'energy poverty'; at 1.2 The Framework notes that; "*one of out of five people on Earth lives without access to electricity*"[29]. The reference of "little progress" as viewed in 2012 can be found throughout SEFA Framework as the reasoning behind the ambitious objectives to be achieved by 2030 to alleviate "energy poverty".[30] Notably, in the Brundtland Report 1987 Chapter 7 on Energy, the priority focus thirty five years ago[31] was less on access to energy resources, services and markets (also core objectives of the ECT 1994) but rather on the rapid depletion of fossil fuels and the issue of exhaustion of natural resources.[32] A significant shift today is demonstrated by the inclusion in the recommendations at the back of the Rio Conference Report 2012 that fossil fuel subsidies be eliminated.[33]

This shows that much progress has been made (albeit only in a norm-evolving way) by governments towards addressing SEFA Framework's second objectives. Also included within those 2012 recommendations at (2) is to, "*establish ambitious targets for moving towards renewable energy*". [34]

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[23] now referred to as UN SEFA Framework

[24] from CERDS 1974, The Stockholm Declaration 1972, The Brundtland Report 1987, The Rio Declaration 1992, GATT, ECT 1994, The Rio Conference (Report) 2012 and lastly UNECOSOC 2012 (Draft Declaration)

[25] Known as 'subsidiary' sources of law (Art 38 (1) (d) Statute PICJ). Art 59 provides that decisions 'have no binding force except between the parties and in respect of that particular case'.

[26] now referred to as permanent sovereignty

[27] as specifically referred to in Rio Conference 2012 Report at pg 24 A/CONF.216/XX Energy at 125-129

[28] as opposed to environmental protection although both goals co-exist alongside each other in provisions

[29] By the WCED Experts on Environmental Law

[30] Most significantly at 1.2; in the context of universal access to modern energy services it notes that; "*one of out of five people on Earth lives without access to electricity*" (IEA) (2011): World Energy Outlook 2011 (WEO). This fundamental concern is reiterated at (1.10) that, "*on energy access, 1 billion people are expected to remain without electricity in 2030*."

[31] by the WCED Experts on Environmental Law

[32] *Notably, similar projections for 2030 were addressed in 1987 Brundtland Report "Our Common Future" Chapter 7 with regards to Energy but thirty five years ago the priority concern was expressed in terms of rapid depletion of fossil fuels . "By 2030 a 3.5TW Future would involve producing 1.6 tonnes as much natural gas as in 1960. This increase in fossil fuel implies bringing the equivalent of a new Alaska Pipeline into production every one to two years … even if developing countries were to acquire the liberated primary resources, they would still be left with a shortfall … unlikely to be realized by most governments … the following primary supply is projected; oil 4.2TW, coal 2.4,, gas 1.7, renewables 1.7 and nuclear 0.2. The question is – where will the shortfall in primary energy supply come from?*

[33] Rio Conference 2012 "Sustainable Energy For All" Recommendations (1) Take concrete steps to eliminate fossil fuel subsidies (A/CONF.216/XX).

[34] promoting energy efficiency and strengthening investment in renewables – see also Rio Conference 2012 Recommendations (2) Establish ambitious targets for moving towards renewable energy (A/CONF.216/XX)

Additionally, in the SEFA Framework at (1.13) the High-Level Group[35] state that the best option to achieve energy efficiency is to lower consumption which has been achieved; '*in countries and regions [who] have implemented ambitious energy efficiency programmes, such as EU, Korea, Japan and US State of California*'. However at 1.17 it also states '*energy efficiency is an objective where several barriers need to be addressed before substantial results can be expected*." As the SEFA Framework highlights in High-Impact Area 3, progress is dependent on "*promoting and sharing sustainable energy standards and policies across countries…governments should promote the development and introduction of energy efficiency standards*, *while also sharing best practices on renewables*' (pg 20 SEFA Framework for Action 3.12 and 3.14).

Regarding SEFA Framework's third objective to strengthen investment in renewables (by "de-risking"), and specifically its High-Impact Area 4 ('*encouraging financial innovation for sustainable energy investment*'), evidence of progress is not only found with the inclusion of '*concrete steps to eliminate fossil fuel subsidies*'[36] but more comprehensively alongside addressing all three SEFA Framework objectives, at 127[37] the Group's emphasis on national implementation of renewable energy, energy efficiency technologies and promotion of modern energy services including electrification[38]. At 128, energy efficiency has a whole paragraph dedicated to its promotion[39].

As expressed in provision 127, the principle of national sovereignty over energy resources (defined by ECT Art 18) while adapted from its former "full", "free" and "permanent" form (GA Res 1803 (1962)) has nevertheless survived and operates today as the major vehicle of change to achieve SEFA Framework's objectives through its "leading" role as implementer.[40]

This last point leads to an explicit reference in the UN Rio Conference 2012 which defines the headline's meaning of "little progress", subchapter B (A/CON.216/XX pg 4).[41] At para 20[42], the UN specifically measures progress against the 1992 UN Conference on Environment and Development, stating, "*we acknowledge that since 1992 there have been areas of* ***insufficient progress*** *and setbacks in the integration of the three dimensions of sustainable development"*[43]*.*

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[35] including President of World Bank Dr Jim Yong Kim, Chad Holliday and Kandeh Yumkella, Director-General UNIDO

[36] (at (1) Rio Conference 2012 Recommendations A/CONF.216/XX)

[37] (Energy Rio Conference Report 2012 A/CONF.216/XX pg 25)

[38] "*We affirm support for the implementation of national and subnational policies and strategies…using an appropriate energy mix to meet developmental needs, including through increased use of renewable energy sources and other low-emission technologies, the more efficient use of energy, greater reliance on advanced energy technologies, including cleaner fossil fuels technologies, and the sustainable use of traditional energy resources…we commit to promoting sustainable modern energy services for all through national and subnational efforts, inter alia, on electrification*"

[39] (Rio Conference 2012 A/CONF.216/XX pg 25)

[40] 127 pg 25 A/CONF.216/XX AND PG 10 III Green Economy in the context of sustainable development and poverty eradication provision 67 (pg 12) Rio Conference Report June 20-22 2012

[41] "*Advancing integration, implementation and coherence; assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges*"

[42] pg 4 A/CON.216/XX pg 4

[43] It continues; *"aggravated by multiple financial, economic, food and energy crises, which have threatened the ability of all countries, in particular developing countries, to achieve sustainable development. In this regard, it is critical that we do not backtrack from our commitment to the outcome of the United Nations Conference on Environment and Development.*"

These problems of implementation by national government are summarized by Schrijver to include; '*duty to observe international agreements, grant fair treatment to foreign investors, pursue sustainable development at national and international levels and to respect human and people's rights – and in this way to serve best the interests of present and future generations'*[44].

In light of para 20's sole emphasis on UN Rio Declaration 1992 it is important to identify the series of rights and duties most relevant to SEFA Framework's objectives being achieved. It should be noted that UN Stockholm 1972 did much at Principle 1, to recognize "*man's fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and responsibility to protect and improve the environment for present and future generations*"[45], alongside Principle 2 which focuses on the intergenerational equity '*through careful planning or management, as appropriate'*[46] in addition to Principle 5's emphasis on *'non-renewable resources of the earth must be enjoyed…to guard against the danger of their future exhaustion'*. Principle 14 addressed planning as '*an essential tool for reconciling'.* While in terms of Permanent sovereignty, Principle 21 reaffirmed that '*States, in accordance with Charter UN and principles of international law, have sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction*.' As addressed in *Armed Activities (2005)* and state responsibility invoking wrongful conduct.

Moving on to the all-important Rio Declaration 1992, while Principle 1 (human beings), Principle 2's addition of "*developmental policies*" to Stockholm's Principle 21, signifies a significant reaffirmation of the primary role played by national policy and strategies. As evidenced alongside every SEFA Framework High-Impact Area, national governments and other "stakeholders" (including indigenous peoples, Civil Society Organizations, lenders etc), are told in mandatory terms at (3.8) they, "*must own and lead the development of national energy access plans*" (creating transformative national programmes for energy access). While at 3.14 "*governments should promote the development and introduction of energy efficiency standards, labels for consumers, while also sharing best practice on renewables policies and supportive instruments*". In line with High-Impact Area 4 governments are; "*encouraging financial innovation for sustainable energy investment"* and, *"should work with the private sector, particularly investors and banks, to adapt and strengthen relevant policy, instruments, best practices should be shared across developed and developing countries*."

Principle 3 of Rio Declaration 1992 highlights the right to "*equitably meet development and environmental needs of present and future generations*". Principle 4 emphasizes need for sustainable development and environmental protection to be integrated into the development process, while Principle 9 provides that "*States should cooperate to strengthen endogenous capacity-building for sustainable development…through exchanges of scientific and technological knowledge, and by enhancing the development, adaption, diffusion and transfer of technologies, including new and innovative technologies*".[47] Significantly, this latter objective is addressed at 128 and 129 in 'Energy'

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[44] Nico Schrijver pg 380 Balancing Rights and Duties 'Sovereignty Over Natural Resources' CSICL Cambridge University Press 1997.

[45] (meeting a human's most basic needs by addressing 'energy poverty' is the core theme of SEFA Preface written by UN Sec Gen Ban Ki-Moon)

[46] addressing SEFA's High Impact Area 1 and High Impact Area 3

[47] SEFA Framework at 1.9 emphasizes "existing technologies, business models and regulatory best practices can produce substantial progress…innovation and new technologies will bring us even closer"

subchapter of Rio Conference 2012. For the current purpose under discussion, it is this latter Principle 9 (Rio Declaration 1992) which arguably has most relevance.

CERDS Art 6 1974 affirmed the duty of States to contribute to the development of international trade of goods, particularly by means of arrangements and conclusion of long-term multilateral commodity agreements. Art 14 reiterated the need for substantial improvement in the conditions of access for the products of interest to developing countries "*…to attain stable, equitable and remunerative prices for primary products*." These dated provisions demonstrate that since adoption by virtue of the UN process, substantial progress has been made with the establishment of GATT[48] and the ECT 1994. The latter is of greater relevance to the SEFA Framework objectives because SEFA has emerged as a prioritized part of the ECT Framework and because its dispute settlement mechanism (DSM) offers more by covering investment as well as trade. *The sector-specific ECT fills in many problematic gaps that GATT and GATS failed to address in way to capture modern energy services and particularly electricity services. Notably ECT includes: Annex EM*[49]. In relation to pipelines and grids, both crucial to access to energy resources, ECT Art 7 (10) (b) covers ETFs as consisting of high-pressure gas transmission pipelines, oil product pipelines and other fixed facilities. SEFA Framework emphasizes the need for access strategies for electrification (3.6) and crucially at 1.1 it states, "*universal access by 2030 could be achieved with an increase of just 3% of global investment in energy infrastructure*". Importantly, from a constraint on permanent sovereignty perspective, at 1.7 it also calls for '*quick and early traction, with rapid electrification achieved in some countries through strong national intervention*'. This guideline has subsequently been included in UNECOSOC's Draft Declaration[50]: "*Recognizing the need to strengthen the productive capacity of developing countries, in particular the least developed countries, including to address their infrastructure deficits*."

It should be noted that in Rio Conference 2012 (Energy subheading) the two leading provisions (in sync with SEFA Framework objective 1) at 125 first recognize '*the critical role that energy plays in the development process, as access to sustainable modern energy services contributes to poverty eradication*'[51] and, similarly at 126[52].
Contained in Preamble of the ECT 1994 emphasis is laid on implementing the following principles i) liberalizing investment and trade energy (ii) effective implementation of full national treatment and most favoured nation treatment (iii) principle of avoidance of discrimination in international trade (iv) determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and related equipment, technologies and services (v) recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy. The last two objectives are most in line with the three objectives set out in the SEFA Framework. While Art 18 deals specifically with national sovereignty over

[48] now WTO 1995
[49] It should be noted that as Azaria's paper *Energy Transit under the ECT and the GATT* by Danae Azaria/Journal of Energy & Natural Resources Law Vol 27 No 4 2009 (Conclusion pg 595)) argues GATT V and ECT Art 7 can be interpreted[49] through a process of cross-fertilization, i.e. which covers electricity, pipelines and grids, ECT Art 7 (10) (b) EFT's consisting of high-pressure gas transmission pipelines, oil product pipelines and other fixed facilities specifically for handling EMP's. i.e. the term 'fixed infrastructure' is used to describe the trade facilitation referring to 'pipeline and grids'.
[50] under the subheading 'Promoting Productive Capacity Sustainable Equitable Economic Growth at all levels for achieving the Millennium Development Goals E/2012/L.10 2-27 July 12-40746
[51] saves lives, improves health and helps provide for basic human needs…we commit to facilitate support for access to these services by 1.4 billion people worldwide who are currently without them. We recognize that access to these services is critical for achieving sustainable development"
[52] "We need to address the challenge of access to sustainable modern energy services for all…by mobilizing adequate financial resources, so as to provide these services in a reliable, affordable manner in developing countries."

natural resources, Art 19 deals with Environmental Aspects. Most significantly Energy Efficiency and Related Environmental Aspects PEERA cover SEFA's Framework objective 2. As expressed in '*Why An Energy Treaty'* the intention to create a power law-making effect is indisputable. It states the role of the Charter as a legally binding foundation "remains very significant"[53].

Demonstrating how closely aligned the ECT is with SEFA Framework, The Charter emphasizes five fundamental aims, the most relevant include; (2) free trade in energy material, products and energy related equipment, based on WTO rules and (3) freedom of energy transit through pipelines and grids (SEFA Framework main objective); *(4) reducing the negative environmental impact of the energy cycle through improving energy efficiency* (SEFA Framework second objective); *(5) and mechanisms for the resolution of State-to-State or Investor-to-State disputes*'.[54]

Permanent Sovereignty can operate to thwart energy security as demonstrated by the state practices of Russia and the Ukraine. This obstacle to 'SEFA' comes to light with Transit. Asceva summarizes how the ECT is a unique multilateral regime focusing on, "*the freedom of transit principle, backed up by a specific dispute resolution mechanism dedicated solely to energy transit…with the Treaty's primary purpose to secure East-West exchanges in the energy field."* She continues, "*the success of European energy investment initiatives in Russian oil and gas fields will depend on investors' ability to ensure freedom of energy transit. As was supposed to be regulated under the ECT rule*s". [55] Russia's withdrawal from the ECT is a setback to the SEFA Framework's objective of universal access to modern energy services. However, the pattern of UN resolutions[56] addressing the latter and its trade related[57] issues, in addition to the increased use of the ECT 1994 will be the keys that unlock the "*open door"*.[58]

When considering the relationship between treaties and custom, the issue of non-parties becomes relevant. As Crawford explains non-parties are not bound if they are not party to Conventions or Multilateral Treaties but can find themselves "in an awkward position" to new rules and unable to rely on old ones[59]. States who invoke

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[53] In a world of globalization and interdependence between net exporters of energy and net importers, the value of multilateral rules providing a balanced and efficient framework for international cooperation… rules based on the principles of open, competitive markets and sustainable development.

[54] "*the fundamental aim of the ECT is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimizing the risks…the focus on five broad areas: (1) the protection and promotion of foreign investments based on the extension of national treatment, or most favoured nation treatment; (2) free trade in energy materials, products and energy related equipment, based on WTO rules; (3) freedom of energy transit through pipelines and grids; (4) reducing the negative environmental impact of the energy cycle through improving energy efficiency; (5) and mechanisms for the resolution of State-to-State or Investor-to-State disputes*'.

[55] "EU-Russia Energy Relations: The Role of International Law from Energy Investment and Transit Perspective" (Mme Anna Asceva Geneve October 2010/ Concluding remarks pg 100

[56] Pattern of UN Resolutions: Originally to be found in CERDS Art 6 (free flow and access to commodity goods) and Art 14 (improvement in conditions of access for the products and stability of prices). The codified provisions throughout ECT are directly reflective of the SEFA first Framework objective; (1) access to and development of energy resources and (2) Access to Markets (3) liberalization of trade in energy (pg 217 ECT 1994). More recently this emphasis on universal access to modern energy services has been affirmed in UNECOSOC Draft Declaration and The UN Rio Conference 2012.

[57] The energy crisis in Ukraine has been triggered mostly by low energy prices (Towards Cost-Effective Energy Pricing in Ukraine by Hi-chun Park pg 15 International Association for Energy Economics) and the associated trade deficit imposed onto the Ukraine by Russia. Despite Russia's ongoing dispute with the EC, their accession to the WTO should help improve this trade and price related instability by imposing international conditions of fair treatment onto both WTO acceded parties.

[58] I. *Brownlie, Legal Status of Natural Resources in International Law: Some Aspects, RCADI (1979-I) 162*)/ Chapter 1 (pg 253)

[59] Brownlie's Principles of Public International Law 8th Edition/(pg 33)

reservations as either persistent or subsequent objectors (as with Russia and the Transit Protocol) run the risk of providing evidence of opinio juris which can paradoxically further cement a rule or principle. Brownlie discussed the effect of votes, reservations and[60] evolving norms created by law-making treaties, ICJ decisions or UN resolutions - (especially if the latter are backed by large numbers of States and "accepted" with mandatory language) - if affirmed by qualified persons - can enter into the corpus of general customary international law and potentially apply to non-parties if general state practice is recognized. Finding "duration of custom" can include rules that have emerged fairly quickly[61]. As Permanent Sovereignty was quickly adopted by States to access their resources, arguably the same should apply to "*SEFA*"[62].

Russia's withdrawal from the ECT appears aimed at avoiding the ECT's intrusion into its State sovereignty[63] and is driven by its economic development objectives. However, Russia may still run foul of WTO obligations through the organization's long-established dispute settlement mechanisms (DSM). In this context, Azaria has argued that not only is the ECT's own DSM utilized by an increasing number of States but the rules of this

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[60] I. *Brownlie, Legal Status of Natural Resources in International Law: Some Aspects, RCADI (1979-I) 162.* In his 1979 Article Brownlie highlighted how by publically resisting CERDS Art 2 (2) (c) the US and others were simultaneously giving evidence of opinio juris. His discussion of reservations in relation to permanent sovereignty refers to NEIO 1974 and CERDS Chapter II (2) legal implications of reservations and persistent objectors. ***NEIO 1974***: "*The Declaration has a certain normative content alongside the proposal of very broad principles of economic policy and international co-operation. Moreover, the US, the Fed Rep of Germany, France, Japan and the UK took care to formulate "reservations" concerning specific aspects of the Declaration. Apart from the intrinsic importance, the need for such reservations indicates the significance for the development of the law of such GA resolutions. A part of the speech of the US representative reads as follow: "perhaps the most difficult subject which the Declaration of Principles addresses is that of permanent sovereignty over natural resources. It will be recalled that this problem was successfully dealt with by the GA in 1962, when, in a meeting of minds of developing and developed countries, widespread agreement was achieved on the terms of resolution 1803 (XVII). The US delegation regrets that the compromise solution which resolution 1803 (XVII) embodies was not reproduced in this Declaration. If it were, on this count the US, would gladly lend its support.*

CERDS 1974

The UN Conference on Trade and Development had initiated a separate but related enterprise in 1972, the prep of a draft Charter of Economic Right and Duties of States. The Charter was approved by the GA as part of resolution 3281 (XXIX) adopted on 12 Dec 1974. The voting was 120 in favour and 6 against and 10 absentions. Chapter II of the Charter - "Economic rights and duties of States". Art 2: exceptions from Art 1 Economic Rights and Duties of States):

Art 2 (c) 16 States voted against para 2 (c). Thus the US and its fellows in opposition will have the status of persistent objectors in case the provision of Art 2 para 2 (c) should crystallize as new principles of customary international law.

It is worth noting that the making of reservations as happened in relation to resolution 3201 (VI), may have the paradoxical effect of implying or confirming the existence of an opinio juris attaching to provisions which would otherwise have a very uncertain effect. However, this situation probably did not arise in the case of the Charter of Economic Rights and Duties since the opposition voted against the resolution as a whole.

[61] In *North Sea Continental Shelf (Federal Republic of Germany/Netherlands*; ICJ Reports 1969 pg 3, 43 found that the duration of custom can include rules that emerge through State practice rapidly

[62] "Sustainable Energy For All" 129 (pg 25) Energy/UN Rio Conference Report 2012 (A/CONF.216/XX)

[63] "*EU-Russia Energy Relations: The Role of International Law from Energy Investment and Transit Perspective*" (Mme Anna Asceva Geneve October 2010). Asceva's highlighted related sovereignty issues; (i) in order to withstand the gathering Russian energy weight, the EU member States who currently retain a high degree of sovereignty – must finally accept some mitigation of their sovereignty to be competitive. Russia prefers avoiding gas transit routes through "unfriendly" governments. The Nord Stream Pipeline route (which required some coercion to build) notably bypasses Ukraine, Belarus, the Baltic States and Poland. (ii) In ECT Art 7 (3) creates form obligations on its members to authorize and facilitate energy transit "in no less favourable manner"., including a "soft" obligation to favour the construction of new ETF's, to abstain from unjustifiable closure of transit facilities and to make sure state and private transit operations do not challenge that obligation (Walde and Konoplyanik (2006), note 328, p 543). Russia's withdrawal from the ECT is related to its fear it would be bound to grant access to its gas transportation system for cheap Central Asian gas.

process may have indirect bearing on ECT non-parties. She includes the ongoing dispute between Russia and the Ukraine following 2009's gas wars.[64]

In line with Art 31 VCLT and CERDS Chapter II Art 33 judges, arbitrators and other experts are meant to approach interpretation of treaty provisions through a process of cross-fertilization and interrelation between separate provisions. This rule of application has the effect of enabling WTO Panels and Appellate Body decision-makers to import certain rules from ECT Art 7, for instance, into GATT V (most relevant to the principle of freedom of transit).[65]

As Russia and Ukraine resorted to "diplomacy" to resolve their last "gas war", rather than the ECT's special conciliation procedure, it has been argued the Energy Secretariat is ineffective in progressing the Transit regime[66]. However, with EU Commissioner in December 2012 threatening to invoke retaliation measures under WTO rules (Russia has failed to implement MFN and National Treatment etc), and having influenced State practice for nearly twenty years, the sector specific ECT is likely to find its rules transported to resolve GATT V disputes.

Russia's lack of co-operation towards the Transit Protocol[67] is an unfortunate side-effect of the principle of Permanent Sovereignty and could be viewed as irreconcilable with 'SEFA'. Nevertheless, with over 40 States party to the ECT, State practice contributes to the progressive development of the law. Azaria summarized the ECT's value by emphasizing 5 points; (1) WTO dispute mechanisms only deal with trade disputes while ECT also covers investment disputes (key objectives of SEFA Framework), (2) ECT Art 7's right of transit provisions include both abstention and positive measures (while GATT V only requires abstention from interference with transit), (3) ECT Art 7 creates a right of transit through the area of a contracting party and establishes thresholds and criteria for the use of existing, and construction of new EFTs (4) provides a special DSM. (5) Art ECT 7 imposes an obligation on parties to allow construction of fixed infrastructure.[68]

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[64] *Energy Transit under the ECT and the GATT* by Danae Azaria/Journal of Energy & Natural Resources Law Vol 27 No 4 2009 (Conclusion pg 595)

[65] *Energy Transit under the ECT and the GATT* by Danae Azaria/Journal of Energy & Natural Resources Law Vol 27 No 4 2009 (Conclusion pg 595)

[66] "EU-Russia Energy Relations: The Role of International Law from Energy Investment and Transit Perspective" (Mme Anna Asceva Geneve October 2010/ Concluding remarks pg 96)

[67] *Transit Protocol* - Russia's fear of being bound to allow access to its transit across its territory (third party access from Central Asia) in addition to foreign investment access to its existing and new EFTS' ("*EU-Russia Energy Relations: The Role of International Law from Energy Investment and Transit Perspective*" (Mme Anna Asceva Geneve October 2010).

[68] *Energy Transit under the ECT and the GATT by Azaria* ECT Art 7's right of transit provisions include both abstention and positive measures (while GATT V only requires abstention from interference with transit). Similarly, ECT Art 7 creates a right of transit through the area of a contracting party and establishes thresholds and criteria for the use of existing, and construction of new EFT's as well as a special dispute settlement mechanism. The ECT 7 crucially imposes an obligation on parties to allow construction of fixed infrastructure which is a core objective of SEFA Framework (however the High-Level Group crucially (at 1.13) express a preference "(the best option") is an energy efficiency approach through the use of existing and emerging energy efficiency technologies to avoid unnecessary investments in energy infrastructure.

Despite non-participation, the ECT 1994 Transit regime in conjunction with other regional international activities such as UNECE's 'sustainable energy development strategy' implementing the UN Millennium Declaration[69] have undoubtedly made considerable progress.

A subsidiary source of law[70], Higgins described permanent sovereignty's evolution; '*since 1952 a series of developments within the framework of the UN has focused on control and access to natural resources*". This reveals the link between the latter principle and SEFA Framework's own main objective in 2012.

Highlighting the problem with resolutions, Higgins continued; '*some make reference to binding obligations while others do not'* (different terms; GA Res 1803 (XVII); GA Res 3171 (XXVII); GA Res (S-VI); GA Res 3281 (XXIX). However, like Brownlie[71], Higgins affirmed their value; '*Resolutions are not binding but they can have an important impact on the development of customary international law. In Nuclear Weapons, the ICJ noted they sometimes have normative value…in certain circumstances, provide evidence important for establishing the existence of a rule or emergence of an opinio juris…a series of resolutions may show a gradual evolution of the opinio juris required for the establishment of a new rule (para 70)'. [72]*

The ECT 1994 and certain UN instruments combine to significantly advance the goals of control of and access to resources (through permanent sovereignty) on a parallel course with sustainable development. This paradigm has led to a "necessary" balance being struck between economic development and environment protection. In the ECT Preamble "necessity" is explicit,[73] and links the ECT, the UN Framework Convention on Climate Change and energy-environment treaties.

Reacting to the world's economic crises, Rio Declaration 2012 and UNECOSOC 2012 represent a swing towards development and human priorities (environment dominated the 1970's and 1980's). ICJ decisions[74], the pattern of UN resolutions, activities of international organizations, the ECT and successive BITs all contribute to acknowledgement of "settled state practice". As the need for sustainable development has reached global consensus, the goal of 'SEFA' is likely to follow.

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[69] World Summit on Sustainable Development goals include; (i) sustained access to high quality energy services for all individuals in the UNECE region (ii) security of energy supplies in the short, medium and long-term, (iii) facilitate a transition to a more sustainable energy future and introduce renewable energy sources to reduce health and environmental impacts resulting from the production, transport and use of energy; (iv) well-balanced energy network systems (v) sustained improvements in energy efficiency (vi) in the context of post-EU enlargement, the integration of energy restructuring, legal, regulatory and energy pricing reforms. And in relation to SEFA's Framwork objectives energy efficiency and renewable energy, the activities of IRENA.

[70] Art 38 (1) (4) (d) Statue Permanent International Court of Justice

[71] Brownlie, Legal Status of Natural Resources in International Law; Some Aspects, RCADI (1979) 162. '*Resolutions are vehicles for the evolution of state practice*'

[72] Rosalyn Higgins, Introduction- International Law since 1945: A Personal Journey – Balzan Lecture

[73] *Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy* (pg 40 ECT Preamble)

[74] When considering opinio iuris sive necessitates, Crawford argues the term general international law does not have to be "universally" accepted and highlights how the Court in *Nicaragua* emphasized the need for acts to amount to a settled practice while accompanied by opinio juris. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US), Jurisdiction and Admissibility,* ICJ Reports 1984 (Brownlie's principles of public international law 8th edition (p 27)

Codifying the pattern of UN instruments relevant to access to energy resources[75]; the Brundtland Report 1987 called for multilateral paths towards sustainable development with its intergenerational definition of the concept[76]. The Chapter on Energy included; fossil fuel exhaustion (WCED called for constraints on consumption), lack of basic energy for the world's poorest, need for energy efficiency (new technologies), a shift to renewables. The report was novel in its exclusive focus on global sustainability and linking developmental issues with environmental issues and its call for international cooperation and institutional changes[77]. Its most significant contribution (responsible for the combined environmental and SEFA mindset of the UN today) was the proposed 22 "*Principle, Rights and Obligations*" and focus on Transboundary interferences and environmental problems.[78]

This progressive codification of existing rules and principles has since been applied to a number of large-scale energy production and pipeline projects as detailed by Catherine Redgwell[79] including Rio 1992's Principle 11's '*effective environmental legislative. Environmental standards, management objectives and priorities'*. Of particular significance is how these UN produced 'generally guiding' reports (with legal and sovereignty implications) have led to the progressive state practice of national implementation of EIA and participatory rights (Rio 1992 Principle 10) concerning human rights and environmental protection. In this area there has also been a trend relying on human rights law as applied in *Pulp Mills* (2010)[80]. The rights of indigenous peoples, children (*Minor Oposa[81])* and women (including right to enjoy adequate living including right to electricity)[82] have started to being taken seriously. Importantly, including a '*higher quality of life for all people'* (Principle 8) UN Rio Declaration 1992 affirmed all these principles especially relevant in 2012[83].

The concept of sustainable development has emerged in successive Conventions and Declarations[84] in legal instruments, norms and treaties used as umbrella terms associated with delicately balancing the integration of social, economic and environmental considerations for well-being of peoples[85]. While in Rio 1992's Agenda 21 had called for '*further development of international law on sustainable development, giving special attention to delicate balance between environmental and developmental concerns[86]*.

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[75] The UN Stockholm Declaration 1972 and CERDS Art 6 1974, ECT (1), (2) pg 217
[76] Definition: "*development that meets the present without compromising the ability of future generations to meet their own needs*" (WCED (1987) 43.
[77] Brownlie's Principles of Public International Law (8th edition) James Crawford pg 358 (C)
[78] World Commission on Environment and Development: Our Common Future (Brundtland Report 1987): *Transboundary Natural Resources and Environmental Interferences*" and "*General Obligations to Cooperate on Transboundary Environmental Problems*"
[79] Contractual and Treaty Arrangements Supporting Large European Transboundary Pipeline Projects: Can Adequate Human Rights and Environmnetal Protection Be Secured? Catherine Redgwell pg 103 – 118 (Large European Transboundary Pipeline Projects)
[80] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 13 July (2006) ICJ 2010
[81] *Minor Oposa* (see Lowe, Sustainable Development and Unsustainable Arguments, in A. Boyle and D. Freestone (eds) International Law and Sustainable Development, OUP, 1999, pp. 19-37.
[82] Convention on the Elimination of All forms of Discrimination against Women and children's rights
[83] UN Rio Declaration 1992 on Environment and Development Principle 1 (human beings), Principle 8 (higher quality of life for all people), Principle 10 (participation of all concerned citizens), Principle 13 (compensation for victims of pollution), Principle 17 (EIA), Principle 20 (women rights), Principle 21 (youth rights), Principle 22 (Indigenous Peoples)
[84] Rio Declaration 1992, ECT 1994 and Rio Conference 2012
[85] (UNECOSOC July 2012 (3)
[86] A/CONF.151/26/Rev. 1, Annex II, 12 August 1992

Distinct from permanent sovereignty, sustainable development is not a principle but rather a trigger for mandatory procedures and measures implemented by national authorities. Rather than drawing permanent sovereignty into conflict with sustainable development[87], the former operates a vehicle for change, particularly by getting national law to strike the necessary balance between development needs and concern for the planet and present and future generations.

Birnie, Boyle and Redgwell argued that due to its 'law-making' credentials[88] the Rio Conference 1992 helped progress principles to achieve "*the status of a generally applicable rule of customary international law*". This was subsequently reaffirmed in The Rio Conference 2012 when the 1992 Declaration specifically referred to the latter as a milestone from which progress should be measured[89]. Representing a swing towards development, Rio 1992's main principles[90] aimed at the goal of sustainable development are clearly imported into the ECT 1994 two years later and more significantly into the SEFA Framework 2012[91].

Rio Declaration 1992's Principle 5 (eradicating poverty), Principle 9 (capacity-building for sustainable development exchanges of science and technologies and innovative technologies) are highly relevant to SEFA Framework's emphasis on "energy poverty" and access to pipelines, grids, electricity services. When considering the subsidiary sources of law (Art 38 Statute PICJ (d) judicial and arbitral decisions, the key principles relevant to 'Sustainable Energy For All' to have come out of 1992 and Agenda 21 (and The Aarhaus Convention 1998/Espoo Convention 1991) are narrowed down to four; "The preventive principle" was highlighted in the transboundary hydro-electric power plant (renewable energy) case of *Gabcikovo-Nagymaros, (Hungary/Slovakia) ICJ Reports 1997* (at para 140): The evolving-norms are recited almost verbatim but italicized words were most significantly imported into the ECT, successive BITs, SEFA Framework and Rio 2012 with its emphasis on *necessity, current standards, continuing –evolving obligation to maintain quality of water and protect nature, environmental protection, vigilance and prevention, for present and future generations, new norms and standards given proper weight, new and past activities*; and directly relevant to the paper's headline statement; *"This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."*

Relating this paragraph to SEFA Framework; the necessity of current standards is emphasized in Catherine Redgwell's article particularly regarding EIA's (Rio 1992 Principle 17) and implementing the participatory principle. The Preventive principle is also supported in 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities[92] but limited to those 'not prohibited by international law' intended to separate issues of international liability from topic of responsibility[93]. Hungary's case was on grounds of ecological harm but was insufficient to satisfy the high threshold 'imminent…peril threat" test, however, the ICJ found this did not exclude

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[87] Except arguably in relation to "creeping expropriation" and regulatory measures (Peter Cameron '*The Pursuit of Stability*)

[88] Argued by Birnie and Boyle & Redgwell (3rd edn,2009) 322 based on members acceptance (100 governments present), mandatory language (in contrast to Stockholm 1972)

[89] Report of the UN Conference on Sustainable Development 20-22 June 2012 Rio, Brazil pg 4/B. (Provision 20). A/CONF.216/XX

[90] UN Rio Declaration on Environment and Development Principle 2 (pursuant to their own - adding in development alongside environmental policies), Principle 3 (equitably meet development and environmental), Principle 4 (intregral part of the development process/ cannot be in isolation from)

[91] Principle 5 (eradicating poverty), Principle 9 (capacity-building for sustainable development exchanges of science and technologies and innovative technologies)

[92] ILC Ybk 2001/II(2) 144-70

[93] ILC Ybk 2001/II(2) 150 (Commentary Art 1, 56).

long term threats.[94]. The problem of focusing on responsibility as a means of ensuring environmental protection, is it addresses damage after its occurred. For this reason the principle of preventive action has gained support.[95]

The sic utere tuo principle was cited in *Nuclear Weapons*[96]. This case shows how the principles of permanent sovereignty and State Responsibility[97] are inextricably linked as they involved the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states and areas beyond national control. Despite the Rio 1992 Principle 2, 24 and 25 this is one area where there is a lack of progress as demonstrated by findings in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*), ICJ Judgment, para 226-250 which found permanent sovereignty to be irrelevant. However, international responsibility was recognized[98]. Significantly, in this case the DRC invoked GA resolutions GA Res 1803 (XVII) 1962, NEIO GA Res 3201 (S.VI) 1974), CERDS 3281 (XXIX) 1974 to argue their case. While the permanent sovereign resolutions were found to be irrelevant, breach of international responsibility on the other hand was found.

The precautionary principle was also codified in Rio Declaration 1992 Principle 15 and affirmed as an obligation in the Advisory Opinion of the ITLOS Seabed Disputes Chamber. Significantly, regarding responsibility and liability this instrument also addressed important treaty interpretation issues[99].

The obligation of EIA as set out in Principle 17 of the Rio 1992 is relevant to SEFA objective as it integrates environmental protection with right of transit and fixed infrastructures including the construction and monitoring of existing pipelines and grids. Regards permanent sovereignty and intrusion on States; Principle 17 reassures States an EIA is, '*a national instrument…subject to a decision of a competent national authority*' i.e. the content of EIA is a matter to be defined by national law. This establishes EIA as a technique for integrating environmental considerations into decision-making processes. This is best evidenced by EIA introduced through EC Directive 85/337/EEC regionally and UNEP 1969 (drawing on Principle 7 public scrutiny and participation).[100]

EIA's implicit recognition in Principle 21 Stockholm 1972, Principle 4 of Brundtland Report 1987. Under the regional Espoo Convention[101] 1991 EIAs in a Transboundary Context of 1991 importantly integrated procedural human rights.

Catherine Redgwell's case study[102] highlighted the progress achieved in cooperation, voluntary, monitoring/compliance of obligations and international standards with use

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[94] When grounds involve energy security, due to the impacts involved, the threshold is certainly lower
[95] pg 354 deficiences on the adversarial system of responsibility
[96] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory opinion 8 July 1996, paras 27-31 Along with Principle 2 (also in *Gabcikovo-Nagymaros* 1997)
[97] CERDS Chapter III Common Responsibilities Towards The International Community Art 7, Art 30 1974. Part Two of the ILC's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)
[98] Unsatisfactory legal outcomes arise in relation to rebels or terrorists acting without State authority but still being treated as State actors. Issue of non-state actors and right to self-defence – Judge Kooijmans (DRC v Uganda); *phenomenon of terrorism..complete absence of government authority in whole or part of the State. If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.* (DRC v Uganda); ICJ Reports 2005 p168, 314
[99] Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area, ITLOS Case No17 Advisory Opinion 1 Feb 2011 www.itlos.org
[100] (Sands 2edn, 2003) 799-800 (A/CONF.151/26/Rev.1 Annex II, 1992)
[101] Relevant to Art 38 (a) Statute PICJ

of bespoke international agreements (Simma's approach). However, a 2008 review of Espoo Convention 1991revealed "insufficient progress" with inconsistent levels of application and communication issues between states[103].

Progress was also made when *Pulp Mills* [104] reaffirmed the requirement to conduct EIAs in order to prevent transboundary harm from hazardous activities. Importantly, this case involved quality of water as a natural resource and the extra territorial application of a human rights treaty[105].

In line with Brownlie's admission there is a "*serious difficulty in distinguishing between lex lata and lex ferenda*"[106], the Tribunal in *Iron Rhine Railway* highlighted the debate '*as to what…constitutes 'rules' or 'principles', what is 'soft law'; and which environmental treaty law or principles have contributed to the development of customary international law*' (para 58). While *Gentini*[107] distinguished that, *'a 'rule' is essentially practical and, moreover, binding…while principle 'expresses a general truth, which guides our action''*. Furthermore, R. Dworkin[108] clarified that "*all that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account*." This BIT dispute[109] in the *Iron Rhine Railway*[110] at para 58-59, 222-223 provides insight into the state of the law applicable to 'SEFA' and in context of transboundary fixed infrastructures[111] and the right to transit (pipelines and grids are categorized with railway lines).

This case demonstrates the norm-evolving influence of three provisions from Rio Declaration 1992; affirming no less than three of its 'rights and duties"; first, Art 16's polluter-pays principle (programmatic[112] which is not a rule but a 'general guideline' for "*national authorities…to promote the internationalization of environmental costs and use*

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[102] *Contractual and Treaty Arrangements Supporting Large European Transboundary Pipeline Projects: Can Adequate Human Rights and Environmnetal Protection Be Secured?* Catherine Redgwell pg 103 – 118 (Large European Transboundary Pipeline Projects)

[103] (ECE/M.P. EIA) 11(2008) Section 1:4)

[104] Pulp Mills (Uruguay v Argentina) ICJ 2010 p 14, 82q-3

[105] The Argentine residents applied to the Inter-American Commission on Human Rights concerned about transboundary pollution risks from pulp mills under construction adjacent to River Uruguay)

[106] I. Brownlie, Legal Status of Natural Resources in International Law; Some Aspects, RCADI (1979) 162. (Chapter II pg 255)

[107] Gentini *(Italy v Venezuela) 10 RIAA 551, in B Cheng, General Principles of Law as Applied by international Courts and Tribunals 1953*)

[108] R. Dworkin, Taking Rights Seriously (1977), 24, 26)

[109] Bilateral and local custom. Need for case by case approach. Belgium's right of transit entailed proviing special proof of an obligation on the part of the territorial sovereign (Netherlands). In these circumstances the notion of opinio juris merges into principle of acquiescence. Other attempts to establish a norm of local custom before an International Court have failed. BIT may provide evidence of customary rules.
1895 Treaty only binding on Belgium and Netherlands. Treaties are the most important source of obligation in international law. Crawford (Sources of Law/Brownlie's Principles of Public International Law)

[110] Iron Rhine Railway *(Kingdom of Belgium v. Kingdom of Netherlands), Arbitral Award 2005,* para 58-59, 222-223

[111] See UNECOSOC July 2012 Draft Ministerial Declaration (E/2012/L.10) 2-27 July 2012 Promoting Productive Capacity Sustainable and Equitable economic growth at all levels for achieving the Millennium Development Goals ; *recognizing the need to strengthen the productive capacity of developing countries, in particular the least developed countries, including their infrastructure deficits*.
1.11 UN SEFA Framework 2012; *universal access by 2030 could be achieved with an increase of just 3% of global investment in energy infrastructure.* The High-Level Group call for *'rapid electrification achieved through national program and that developed countries; (i) transforming existing infrastructure in developing countries and an opportunity to adopt more efficient technology by leapfrogging technologies and infrastructure that developed countries had to establish.'*

[112] Art 16 Rio 1992 'it is doubtful whether it has achieved the status of a generally applicable rule of customary international law." (Sands (2nd edn, 2003) 280)

of economic instruments…polluter should bear the costs of pollution."[113] At para 223 when tribunal considered the '*effect of the exercise of a treaty-guaranteed right of one state in the territory of another State and its possible impact'*, it highlighted how the reactivation of the railway line (increased use and impact) through the right of transit, "*may well necessitate measures by the Netherlands to protect the environment*", however, in turn this would involve a contribution on the part of Belgium; "*as an integral element of its request…these measures are to be fully integrated into the project and the costs*".

From a permanent sovereignty perspective, such measures demonstrate how an international customary right to transit (Netherlands bound by its consent with a 19th Century treaty guarantee) can operate to constrain but also answer the '*need to reconcile*'. Secondly, at para 58-59 the Tribunal referred to sustainable development through Principle 4 (Rio 1992) as the source of the obligation (responsibility) "*which reflects the trend (in International and EC law) to protect the environment*". In relation to the conceptual irreconcilability, the Tribunal confirmed; "*these emerging principles now integrate environmental protection into the development process…environmental law and development law stand not as alternatives but mutually reinforcing, integral concepts which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm*." The third Rio 1992 principle implicitly referred to by the Tribunal is Principle 21 (Stockholm 1972)/Principle 2 (Rio 1992) in respect of responsibility not to cause environmental damage. At para 222, citing *Nuclear Weapons[114],* the Tribunal recognized that the principle of prevention of environmental harm is one of general international law and highlighted the ICJ's view that "*the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*". Principle 21/Principle 2 reflect the view of states that are subject to environmental limits in the exercise of their rights under the principle of permanent sovereignty[115].

As for determining the normative status to be attributed to sustainable development in disputes, 'highly qualified'[116] commentator Lowe argued in 1999 is not a rule but rather a functional use as a tool to be used in judicial decision-making. Defining the concept he noted; "*there exists (allegedly) two legal principles, the right or liberty of development and the duty or "no-right" of environmental protectio*n, *that entails no more than an obligation to decide the case with contradictory arguments*". As for the '*need to reconcile economic development with protection of the environment'* (*Gabcikovo-Nagymaros* (1997), Lowe's "correct" reading is; "*there is no logical reason why such a 'reconciliation' between the principles must take place. Decisions in such cases do not necessarily generate principles for the resolution of such conflicts, even less do they depend upon the pre-existence of such principles*.[117]"

Lowe also points out that, "*while many references of the concept in multilateral treaties may appear to provide evidence of the concept of sustainability's translation into customary international law'* such a reading is wrong on two counts; (i) there are no references of the concept binding states unlawfully, (ii) the concept is not 'soft law' as it does not bind nor does it contain a fundamentally norm-creating character. That said, it

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[113] Cassese (2nd edn, 2005) 492-3
[114] *The Legality of The Threat or Use of Nuclear Weapons, ICJ Advisory Opinion 8 July 1996 (paras 27-31)*
[115] *The negotiating history of Stockholm 1972 supports this view see L. Sohn. "The Stockholm Declaration on the Human Environment', 14 Harvard International Law Journal 423 at 485-93 91972)*
[116] (Art 38 (d) Statute PICJ)
[117] *To establish state practice as Crawford points out the qualified decision-maker must go beyond mere existence to adducing and establishing whether there is sufficient 'acceptance of the law'*

does have normative value as, "*a meta-principle, acting upon other rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling boundaries of the true primary norms when they threaten to overlap or conflict*". More recently, Cassese[118] argued that sustainable development is better understood as a collection of different legal categories, and as a '*general guideline'*.

As for the principle of permanent sovereignty and its (alleged) irreconcilable relationship with sustainable development, writing two years earlier but arguably with greater foresight, Schrijver's view is that rather than operating as an obstacle to "progress", the former principle operates as a flexible "*cornerstone*" to reconcile economic development and environmental protection (the former most applicable to SEFA Framework). Highlighting its positive value in the development of international law, Schrijver argues that permanent sovereignty is a key principle which has reactively evolved to (i) international economic and development law (ii) international environmental law and "*can play an important role in the blending of these two fields of law with the aim of promoting sustainable development*'. Moreover, he argues, permanent sovereignty "*not only operates as a cornerstone of sustainable development law*" but "*serves no longer merely as the source of every State's freedom to manage its natural resources, but also the source of corresponding responsibilities requiring careful management and imposing accountability at national and international levels*". Progress has already been made as Schrijver highlights the influential role of conventions (Climate Change, Biodiversity) and the Rio Declaration 1992, "*may in the future have an important bearing on natural-resources management and thus on the principle of permanent sovereignty*". In line with the emergence of SEFA Framework, Schrijver noted that 'Agenda 21' called for further development of sustainable development alongside setting up, "*a normative framework for international economic relations conducive to sustainable development*". In sustainable energy terms, The ECT 1994, SEFA Framework as cited in Rio 2012 answer this call and as such comprise rules of law, "*hitherto understood to constitute international environmental law but also are being described as 'international development law*". The fact that Rio 2012[119] called for '*further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns'*[120] in addition to his recognition of the critical need for greater access and transfer of technology[121] serve as evidence that Schrijver's predictions were right on track[122].

As for the ICJ and Tribunals, Schrijver argues the interpretation of permanent sovereignty will go hand in hand with the continuing "*humankind-orientated*" evolution of international law.[123]

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[118] Cassese International Law (2nd edn, 2005) 492-3)
[119] and the UNECOSOC's Draft Declaration 2012
[120] (A/CONF.151/26/Rev.1, Annex II, 1992)
[121] *Following Principle 9 Rio 1992. UNECOSOC 2012, Rio 2012 Future We Want at 58(i) (gaps between developed and developing countries), (65) and (72 importance of innovation) and (73 Johannesburg Plan of Implementation), Art 8 ECT (pg 51 (19, (2) and 'progressively to remove technical, administrative and other barriers to trade in energy materials and products and related equipment, technologies and services. SEFA Framework (1.9) pg 8.*
[122] And he right identified, "*a trend towards cooperation for the implementation of (i) everybody's right to development, the proper management of natural wealth and resources and equitable sharing of transboundary natural resources and the global commons*"
[123] N. Schrijver Sovereignty over Natural Resources, 1997 pp 368-395
"towards a law which is humankind-orientated, under which both States and (groups of) individuals can be held responsible for environmental degradation and under which sustainable development and environmental preservation are approached from a global perspective

In the field of sustainable development law, progress can be traced through the body of legal instruments, norms and treaties directed at implementing and balancing this trend, while the distinctive procedural elements (often based on human rights law) underpin them[124]. The ICJ has only recently dealt with the substantive aspects of international environmental protection and its associated "general guideline" concept of sustainable development.

To conclude, this paper seeks to illicit an appreciation for the progressive impact the powerful norm-evolving influence of 'law-making' multilateral treaties, successive BIT and pattern of UN Resolutions (including state responsibility) have had on the evolution of all three concepts. Also, an appreciation for the cross-fertilizing interpretative approach to treaty interpretation (Art 31 VCLT) and as expressly called for in Art 33 CERDS 1974[125], which Azaria drew attention to when cross-analyzing GATT V and ECT Art 7 and while arguing the merits of the ECT 1994[126].

Permanent sovereignty is not irreconcilable with sustainable development but it can thwart progress when state practice resists international rights and duties. As far as East-West energy security is concerned, 'little progress' is most acute with Russia and other FSUs who are non-parties to the ECT, the Transit Protocol and failing to implement with other trade, transit and investment obligations (MFN, National Treatment) within their jurisdiction. Also problematic is their reluctance to use the long-established DSMs (WTO and ECT). However, while Russia and Ukraine did not use the special conciliation procedure to resolve their last "gas war", as Russia was bound *at the time* (non ratified) it helped incentivize a quick resolution.

The Sakhalin II (liquefied gas) ''*Yukos-esque''* type of nationalization[127] are both stark reminders that permanent sovereignty is still alive and well but as Redgwell argues risk is better managed[128]. The *Yukos* ECHR case demonstrates the trend of individuals and investors increasingly seeking recourse through human rights law against a State. The conduct of States like Russia using permanent sovereignty as shield against wider access to oil, gas fields and pipelines[129] should not detract from the overall picture of progress demonstrated throughout this paper.

While permanent sovereignty and sovereignty are distinct they are closely linked and as Schrijver's rightly predicted, the principle's new role "*coincides with the current re-interpretation of some of the traditional connotations of State sovereignty which can no*

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[124] N. Schrijver Sovereignty over Natural Resources, 1997 pp 368-395

[125] CERDS Chapter III Common Responsibilities Towards the International Community 1974)

[126] Azaria This is not only relevant to Russia's growing dispute with the EC but also in relation to the key SEFA Framework objective for universal access to energy services for (i) transit states to abstain from interference with transit (GATT V) in addition to ECT Art 7's broader absention and positive measures (both of which impose greater constraint of States 'sovereignty over energy resources' and greater obligation) and (ii) the obligation to allow construction of fixed infrastructures (pipelines and grids)

[127] Yukos Oil Company v Russian Federation 2011 European Court of Human Rights/Niebruegge, Alex M. (2007) 'Provisional Application of the Energy Charter Treaty; The Yukos Arbitration and the Future Place of Provisional Application in International Law, Chicago Journal of International Law, Vol 8 No 1 pp355-357, p 356

[128] Both sides claimed victory in this expropriation/'The Taking Of Property' case. Note this case was one of the biggest claim in history but importantly it was distinctive in the CEO claimant was although no longer resident was Russian himself (albeit with other foreign investors) and the 'taking' in this case took the form a tax liability inducing bankruptcy

[129] The state owned energy monopolies Gazprom and Rosneft seem to be granted with an informal Kremlin shield when snubbing Western partners from access to most prominent oil, gas fields and pipelines – Kramer, Andrew E. (2006) 'Gazprom and Rosneft to cooperate on new gas fields', New York Times, Novembe 28, 2006. Selivanova, Julia (2008) Energy Dual Pricing in WTO Law; Analysis and Prospects in the Context of Russia's Accession to the WTO, London, Cameron May, 2008

longer be equated to unfettered freedom of action…will develop to impinge on the traditional bulwarks of sovereignty[130]."

For the future, as both Crawford[131] and Schrijver argued sovereignty is not about to "wither away" especially given its leading role expressed in Rio Conference 2012[132] However, in an interdependent and competitive world the concerns of scarcity over natural resources, the impacts of Climate Change and 'energy poverty' are ever-pressing. The removal of the term "permanent" from permanent sovereignty is the strongest sign yet of a universal climb-down over energy resources to the extent that Henkin's call for sovereignty to be "*brought down to earth and cut down to size*" is fast becoming less radical than previously thought.

For 'SEFA' to become a reality, greater constraints will be necessary. As the Framework Group[133] warned; "*on a global scale, projections indicate little progress toward the three objectives of Sustainable Energy For All if the world continues on its current path*."

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Nico Schrijver, *Sovereignty Over Natural Resources, Balancing Rights and Duties*, Cambridge Studies In International and Comparative Law CSICL (1997)

[130] "it is not difficult to predict that sovereignty will retain its hold on the international plane for the foreseeable future" N. Schrijver Sovereignty over Natural Resources, 1997 pp 368-395
[131] Crawford Brownlie's Principles of Public International Law ((A) pg 13)
[132] At 58 (b) (Green Economy in the context of sustainable development and poverty eradiction pg 10)/ (58. (b) respect for national sovereignty) and (c) and 67 (importance of leadership role for governments) pg 127 Energy A/Conf.216/XX pg 25)
[133] At (1.9) Sustainable Energy For All - A Framework For Action UN Secretary General High Level Group on Sustainable Energy For All Jan 2012