sense, the two are inherently incompatible. On the one hand, the international trade regime seek a unified global market for goods and services with minimal government interference. On the other hand, environmental law is built on the premise that governmental intervention is necessary because the market has failed. To avoid conflict, nations must try to reconcile their competing objectives.

From the Tuna case we learn that when one nation extends its prescriptive jurisdiction beyond territorial boundaries to determine environmental standards for the rest of the world, the probability of international conflict increases greatly. Because the State's value systems and cost/benefit comparisons differ, setting standards unilaterally is unfair and possibly counterproductive. The alternative is multilateral negotiation.

Consumer choice may be an alternative to trade sanctions. Consumers can make their own decisions as to whether or not to purchase an imported product whose production harms the environment. Because consumers eventually pay for environmental protection measures, their collective decision is more likely to balance the costs and benefits of these measures than governmental regulation, which can be influenced by interest group lobbying. The 'consumer choice' alternative may have limited application and some consumers may be free riders, but it is one way of reconciling the conflict goals of free trade and environmental protection.

PRINCIPLE 21 OF THE STOCKHOLM DECLARATION: A CUSTOMARY NORM OF INTERNATIONAL ENVIRONMENTAL LAW

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INTRODUCTION

Man's life and his interaction with fellow beings is influenced by the legal system. His conduct is regulated by the laws of his country, which he, as a citizen, must adhere to. Man obeys, because any breach results in sanctions, and because the absence of these rules would lead to anarchy in the society where he lives.

Similarly, the conduct of States in their interaction with other States also needs to be regulated. However, as States are by themselves sovereign, they cannot be made subject to the laws of another sovereign State. Consequently, in this time of increased interdependence, the need for principles to govern the interplay of relations among States arises. It is this need which international law addresses by "analysing the legal principles arising from interaction between states, actions by states and certain actions by individuals, corporations, international organisations and other actors on the international plane."[1]

The expansion of international law since the Second World War is apparent. The international system broadened to encompass new substantive concerns such as nuclear war, human rights, economic development, and environmental protection.[2]

International environmental law is a recent addition to legal science. As post-World War II reconstruction led to unprecedented global economic development that was also ecologically detrimental, it became clear that earth's increasingly limited resources would soon become incapable of satisfying the various needs of industrial and developing countries.[3]

The international community's awareness of the environmental problems that have developed led various states to implement guidelines for the use of the

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1 MARTIN DIXON AND ROBERT MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW 1 (1991) [hereinafter DIXON].

2 DANIEL BARSTOW MAGRAW, *International Law and Pollution: An Overview, in* INTERNATIONAL LAW AND POLLUTION, Preface (1991) [hereinafter MAGRAW].

3 ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 33 (1991) [hereinafter KISS AND SHELTON].

environment. Most notable is the Stockholm Declaration on the Human Environment,[4] which recognized that the protection and improvement of the human environment are major issues for the well-being of peoples and their development.

A number of these guidelines have gradually penetrated into contemporary State practice.[5] Principle 21 of the Stockholm Declaration,[6] which limits the territorial sovereignty of States, will be proved as a customary norm under international law. However, before this can be done, an understanding of the various sources of international law and their application is necessary.

I. SOURCES OF INTERNATIONAL LAW

Rules and norms of any legal system derive authority from their source. These "sources" articulate what the law is and where it can be found.[7] Sources are usually easily identifiable in developed municipal legal systems. In the Philippines, for example, the Constitution, the laws enacted by the legislative branch, and judicial decisions form the bulk of rules and principles upon which the entire legal system is based on.

The international legal system, however, is characterized by three systemic disabilities: (i) no international legislature that passes international legislation exists, (ii) there is an absence of an international dispute-settlement mechanism with mandatory jurisdiction and (iii) the system lacks a centralized enforcement authority. Certainly, conventional "law-giving" sources are absent under international law.[8]

The Statute of the International Court of Justice does not explicitly say that its enumeration in Article 38(1) are "sources" of international law; however, it explains how the Court is to decide disputes that may come before it for settlement.[9] The Article is therefore considered as an authoritative statement on the sources of international law.[10]

[4] Stockholm Declaration on the Human Environment, 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

[5] Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution, in* INTERNATIONAL LAW AND POLLUTION 61 (Daniel Barstow Magraw, ed. 1991) [hereinafter DUPUY].

[6] Stockholm Declaration, *supra* note 4.

[7] REBECCA M.M. WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 7 (2d ed. 1992) [hereinafter WALLACE].

[8] MAGRAW, *supra* note 2, at 13; WALLACE , *supra* note 7.

[9] WALLACE, *supra* note 7.

[10] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (1990) [hereinafter BROWNLIE]; DIXON, *supra* note 1, at 16; WALLACE , *supra* note 7, at 8.

Article 38(1) of the Statute of the International Court of Justice states:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

These sources are classified either as formal or material. Formal sources constitute what the law is. Treaties, custom and general principles are considered formal sources. Material sources only identify where the law may be found by providing evidence of the existence of these legal principles. Judicial decisions and teachings of the most highly qualified publicists are material sources.[11]

There is no hierarchy of procedure for the application of international law in the settlement of disputes. However, the sequence in which the sources of law are enumerated provides a guideline for their order of presentation. The first to be applied must be the existing relevant treaty provisions between the parties to the dispute. However, should there be no prevailing provision, a custom which is accepted as legally binding under international law should be applied. "General principles of law recognized by civilized nations" may also be referred to, especially if there exists neither a treaty provision nor a custom which can be identified. Finally, judicial decisions and juristic teachings may be utilized as a means of determining the rules of international law.[12]

The Statute directs the court to apply the relevant treaty provision over a custom or general principle of international law should both exist simultaneously on the issue in dispute.[13] A treaty is defined as an "international agreement governed by international law and concluded in a written form: (i) between one or more States and

[11] D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 19-20 (1983); BROWNLIE, *supra* note 10, at 1-2; DIXON, *supra* note 1, at 17.

[12] HARRIS, *supra* note 11, at 20-21; BROWNLIE, *supra* note 10, at 4; WALLACE, *supra* note 7, at 8.

[13] Wimbledon Case, P.C.I.J. Rep., ser. A., No. 1 (1923).

one or more international organizations; or (ii) between international organizations."[14] It may be between two states (bipartite) or between several states (multipartite)[15] and applies only to those States which have agreed to its terms.[16] This is because any international obligation to be binding on a State must be based on the said State's consent to be bound. Certainly, "[r]ules of law binding upon States... emanate from their own free will expressed in conventions..."[17] Although all treaties create law only for the parties concerned, multipartite treaties can be considered as law-making because they have a greater number of signatories and their provisions may become customary international law.[18]

In international law, a custom is a practice followed by the States concerned because they feel legally obliged to behave in such a way.[19] A State is not bound by a customary rule if it has consistently opposed that rule from inception. A new State, however, is bound by rules which were well established before it became independent.[20]

A rule of customary international law possesses two elements: (i) a material element and (ii) a psychological element. The material element refers to state practice whereas the psychological element is the subjective conviction held by states that the behaviour in question is compulsory and non-discretionary.[21] As stated, the material element refers to state practice. However, before a certain behaviour or state practice can be considered customary, factors such as (i) the duration of the practice, (ii) its uniformity or consistency and (iii) its generality have to be considered.

International law does not set any time limit for a practice before it can be considered a custom. As long as the other requirements of custom are met, the duration of the practice is of relative importance[22] as can be seen from the decision in the *North Sea Continental Shelf Cases* where the International Court of Justice declared that " the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law"[23] The length of time required to establish a certain rule will depend upon the other more important factors such as the uniformity and generality of the practice, and the presence of *opinio juris*.

[14] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 2(1)(I), XXV I.L.M. 543 (1985).

[15] WALLACE, *supra* note 7, at 19.

[16] WALLACE *supra* note 7 at 18; BROWNLIE, *supra* note 10, at 12.

[17] Lotus Case, (Fr. v. Turk.), P.C.I.J. Rep., ser. A, No. 10, (1927).

[18] BROWNLIE, *supra* note 10 at 2, 12; WALLACE, *supra* note 7, at 19.

[19] WALLACE, *supra* note 7, at 9.

[20] DIXON, *supra* note 1, at 20.

[21] BROWNLIE, *supra* note 10, at 5-6.

[22] WALLACE, *supra* note 7, at 10.

[23] North Sea Continental Shelf Cases, (Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. Rep. 3, 43.

Before a state practice can be considered as a custom recognized under international law, the International Court of Justice has declared that "the rule invoked" must be "in accordance with a constant and uniform usage practiced by the States in question."[24] The Court stressed the importance of uniformity and consistency in practice when it added that "so much fluctuation and discrepancy in the exercise ... and in the official views expressed on different occasion ... so much inconsistency in the ... conventions"[25] make it impossible "to discern ... any constant and uniform usage, accepted as law."[26] It should be noted, however, that complete uniformity is not required, although substantial uniformity is,[27] and that inconsistency *per se* is not sufficient to negate the crystallization of a rule into customary international law.[28]

The number of States involved in a particular behaviour is another factor. Universality is not required[29] as Article 38(1)(b) speaks not of universal practice, but of general practice.[30] The Court deems it sufficient that the conduct of states should, in general, be consistent with the behaviour in question, and that instances of state conduct inconsistent with a given behaviour should generally have been treated as breaches of the rule sought to be evidenced by such behaviour.[31] However, practice in itself does not establish custom. An alleged rule of customary international law has to manifest only a material element, but a psychological element, otherwise known as *opinio juris sive necessitatis*.[32]

Opinio juris is a State's psychological conviction that the rule in question is binding in law and obligatory. This "general practice accepted as law"[33] may be distinguished from a rule of international comity, which is based upon a consistent practice in the relations of states not accompanied by a feeling of legal obligation.[34] The importance of this psychological element requirement is highlighted by the assertion of the International Court of Justice that:

> not only must the acts concerned 'amount to a settled practice,' but they must also be accompanied by the *opinio juris necessitatis*. Either the States taking such action or other States in a position to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.* the existence of a subjective

[24] Asylum Case (Col. v. Per.), 1950 I.C.J. Rep. 266.

[25] *Id.*

[26] *Id.*

[27] BROWNLIE, *supra* note 10, at 5.

[28] WALLACE, *supra* note 7, at 11.

[29] BROWNLIE, *supra* note 10 at 5; WALLACE, *supra* note 7, at 11.

[30] WALLACE, *supra* note 7, at 11.

[31] *Id.* at 13.

[32] WALLACE, *supra* note 7, at 15; BROWNLIE, *supra* note 10, at 7; HARRIS, *supra* note 11, at 35.

[33] Statute of the International Court of Justice, art. 38(1)(b).

[34] HARRIS, *supra* note 11, at 35.

element, is implicit in the very notion of the *opinio juris sive necessitatis*.[35]

"General principles of law as recognized by civilized nations" are to be applied in case no relevant existing treaty nor custom can be used. These principles are those which are common to the major legal systems of the world.[36] This is emphasized in the decision of the Court in the *Barcelona Traction, Light and Power Company Case* where it was asserted that "[i]t is to rules generally accepted by municipal legal systems . . . , and not to the municipal law of a particular State, that international law refers."[37]

Judicial decisions may also be applied. However, this is "subject to the provisions of Article 59"[38] which states that "the decision of the court has no binding force except between the parties and in respect of that particular case."[39] Article 59 rules out the application of the doctrine of precedence or *stare decisis* in international law.[40] Despite this fact, the International Court of Justice and international tribunals do examine previous decisions and take them into account when seeking the solution to a subsequent dispute.[41]

The "teachings of most highly qualified publicists of various nations" may be applied "as subsidiary means for the determination of rules of law."[42] The writings are utilized not as a source of law in themselves, but as a means of ascertaining what the law actually is on a given subject.[43]

Works of international organizations are also considered is ascertaining rules and principles of international law.[44] However, the resolutions, directives and undertaking of international organizations, called "soft law", are not formally binding in character.[45] Nonetheless, some of these can and have become "hard law"— resolutions, directives, and undertakings which are binding of their own accord[46] — and thus declarative of international law.

[35] Nicaragua Case (Military and Paramilitary Activities In and Against Nicaragua) (Nicaragua v. U.S.), I.C.J., 108, 109 (1986).

[36] WALLACE, *supra* note 7, at 22.

[37] Barcelona Traction, Light and Power Company Case, 1970 I.C.J. Rep. 3.

[38] Statute of the International Court of Justice, Article 38(1)(d).

[39] *Id.* art. 59.

[40] HARRIS, *supra* note 11, at 47-48; WALLACE, *supra* note 7, at 25.

[41] WALLACE, *supra* note 7, at 25.

[42] Statute of the International Court of Justice, art. 38(1)(d).

[43] WALLACE, *supra* note 7, at 28; BROWNLIE, *supra* note 10, at 24; HARRIS, *supra* note 11, at 49.

[44] Nisuke Ando, *The Law of Pollution Prevention in International Rivers and Lakes, in* THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 345 (Ralph Zacklin & Lucius Caflisch eds., 1981).

[45] DUPUY, *supra* note 5, at 61-62.

[46] *Id.*

The Stockholm Declaration, a resolution of the United Nations General Assembly, is by itself, soft law. However, upon examination of the developments in international environmental law before and after the Declaration, it will be seen that Principle 21 has been accepted as declarative of a customary norm and is therefore binding on its own.

II. INTERNATIONAL ENVIRONMENTAL LAW

A survey of the various treaties, conventions and agreements concluded and decisions rendered since the early 1900s reveals how the present international environmental concepts began.

A. Pre-Stockholm Declaration

Several boundary water treaties containing provisions against water pollution are the first international texts which in part protect the environment.[47] The most notable is the 1909 agreement respecting boundary waters between the United States and Canada.[48]

In 1941, the *Trail Smelter Arbitration*[49] affirmed that no state has the right to use its territory or to permit it to be used so that its emissions cause damage on the territory of another state or to the property of the persons found there. In the *Corfu Channel Case*,[50] the International Court of Justice affirmed that no state may utilize its territory contrary to the rights of other states.

Between the two world wars, some states entered into a number of boundary water agreements which included provisions on water pollution. After World War II, these efforts continued, especially in central and eastern Europe. Some states concluded a network of agreements to regulate the utilization of waters through the creation of bilateral international commissions.[51] By 1950, the first treaty entirely dedicated to countering continental water pollution was concluded between Belgium, France and Luxembourg.[52] Other similar treaties followed for the Mosel,[53] Lake Constance,[54] Lake

[47] KISS AND SHELTON, *supra* note 3, at 34.

[48] Treaty between the United States and Great Britain Respecting Boundary Waters Between the United States and Canada, 11 January 1909, 4 AM. J. INT'L L. 239 (1920 Supp.) [hereinafter 1909 U.S.-Can. Treaty].

[49] Arbitral Award in the Trail Smelter Case (U.S. v. Can.) 3 R.I.A.A. 1905, 1911 (1941) [hereinafter Trail Smelter].

[50] Corfu Channel Case (Merits) (U.K. v. Alb.), 1949 I.C.J. Rep. 4 [hereinafter Corfu Channel].

[51] KISS AND SHELTON, *supra* note 3, at 35.

[52] Protocol to Establish a Tripartite Standing Committee on Polluted Waters, 8 April 1950, Belg.-Fr.-Lux., 66 U.N.T.S. 285.

[53] Convention on the Canalization of the Mosel, 27 October 1956, 534 *Journal Officiel de la Republique francaise* (1 January 1957).

[54] Agreement on the Protection of Lake Constance against Pollution, 27 October 1960, at 458, U.N. Doc. ST/LEG/ser.B/12.

Leman[55] and the Rhine.[56] These agreements, however, merely established international commissions but did not set norms against pollution.[57]

In the *Lac Lanoux Arbitration*[58] decision, the panel alluded to the invasion of rights of foreign states which may result from the pollution of boundary waters.

During the 1950s, stronger efforts to combat marine pollution appeared.[59] New technologies, particularly in the field of the use of nuclear energy, led to further international regulation.[60] At this time, environmental concerns increasingly appeared in general international law texts.[61] The 1959 Antarctic Treaty forbade all nuclear activity on the sixth continent and also envisaged the adoption of measures to protect animals and plants.[62] Furthermore, two of the four 1958 conventions relating to the law of the sea prohibited ocean pollution by oil or pipelines and by radioactive waste, as well as damage to the marine environment caused by drilling operations in the continental shelf.[63] In addition, the third convention was entirely dedicated to fishing and the conservation of marine living resources.[64]

By the end of the 1960s, public consciousness became increasingly aware of the dangers threatening the environment. This development became a springboard for the formation of many international organizations which addressed issues regarding the environment. In 1968, the Council of Europe adopted the Declaration on Air Pollution Control,[65] the first general environmental instrument approved by an international organization, and the European Water Charter.[66] During the same year, the Council of Europe also adopted the first European regional environmental treaty.[67]

[55] Convention between France and Switzerland Concerning the protection of Lake Leman against Pollution, 16 November 1962, 922 U.N.T.S. 49, 35.

[56] Agreement concerning the International Commission for the Protection of the Rhine Against Pollution, 29 April 1963, 994 U.N.T.S. 3.

[57] KISS AND SHELTON, *supra* note 3, at 35.

[58] Lac Lanoux Arbitration (Fr. v. Sp.), 12 R.I.A.A. 281 (1957) [hereinafter Lac Lanoux].

[59] International Convention for the Prevention of Pollution of the Sea by Oil, 12 May 1954, 327 U.N.T.S. 3.

[60] KISS AND SHELTON, *supra* note 3, at 35.

[61] *Id.*

[62] The Antarctic Treaty, 1 December 1959, 40 U.N.T.S. 71.

[63] Convention on the High Seas, 29 April 1958, art. 24-25, 450 U.N.T.S. 82; Convention on the Continental Shelf, 29 April 1958, 499 U.N.T.S. 311.

[64] Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 U.N.T.S. 285.

[65] Committee of Ministers Res. 60(4), Council of Europe, 8 March 1968.

[66] European Water Charter, 8 March 1968, 2 Y.B. I.L.C. 342 (1974).

[67] European Agreement in the Restriction of the Use of Certain Detergents in Washing and Cleaning Products, 16 September 1968, 788 U.N.T.S. 181.

The Organization of African Unity produced the next major initiative in international environmental law when its regional heads of states and governments signed the African Convention on the Conservation of Nature and Natural Resources.[68] Two important innovations appeared in the African convention. First, it recognized the need to protect the habitat of the endangered species as well as the species itself. Second, it proclaimed the special responsibility of a state whose territory is the sole locale of a rare species.[69]

Thus, incrementally, the first international concepts for the protection of the environment emerged.[70] From isolated attempts at environmental protection, bilateral and regional agreements developed. From the protection of single species, the habitat of these species were also sought to be saved. What was therefore developing was a more global approach, one that acknowledged that States were not isolated from each other, and that the acts of one State created effects on its neighboring States. This was affirmed in the Arbitral Awards and decisions mentioned. These cases, however, went further by declaring that States may not allow their territory to be used for acts causing damage to other States.

B. The Stockholm Declaration

The United Nations joined the action directed at environmental protection in 1968 when the General Assembly proposed the convocation of a world conference on the human environment to be held in Stockholm in 1972.[71] The Stockholm meeting took place between June 5 and 16. It brought together 6,000 persons, including delegations from 114 states, representatives of nearly every large intergovernmental organization, 700 observers sent by 400 nongovernmental organizations, invited individuals, and approximately 1,500 journalists. Thus, the Conference achieved a universally recognized significance.[72]

During the closing plenary session, the Conference participants adopted a Declaration on the Human Environment.[73] The Declaration begins with the statement that man is at once the creature and molder of his environment. It also links the protection and improvement of the human environment with development and the full enjoyment of human rights.

[68] African Convention in the Conservation of Nature and Natural Resources, 15 September 1968, 68 INT'L ENVT'L L., 968.

[69] *Id.*

[70] KISS AND SHELTON, *supra* note 3, at 36.

[71] G.A. Res. 2398(XXIII), 3 December 1968.

[72] KISS AND SHELTON, *supra* note 3, at 38.

[73] Stockholm Declaration, *supra* note 4.

The principles contained in the second part of the Declaration translate into more concrete language the concepts affirmed in the preamble.[74] The first principle establishes a fundamental link between environmental protection and human rights. Principles 2 to 7 proclaim that the natural resources of the globe are not only oil and minerals, but also air, water, earth, plants and animals and that man has the particular responsibility to preserve these in the interest of the present and future generations. Principles 8 to 25 address the implementation of environmental protection. Principles 18 to 20 particularly mention instruments of an international environmental policy: planning and management by national institutions, recourse to science and technology, exchange of information, and finally, teaching and information in environmental matters. The last group of principles, most especially Principle 21, is of particular interest in the development of international law.[75]

III. PRINCIPLE 21 OF THE STOCKHOLM DECLARATION

Principle 21 of the Stockholm Declaration provides that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[76]

The principle has two balancing elements: the sovereign right of each State to exploit its own natural resources and, on the other hand, its obligation not to cause transfrontier environmental damage. It declares that the duty of a State not to cause transboundary environmental damage limits its sovereignty over its territory.

A sovereign State's exclusive jurisdiction over its territory has been affirmed in the *Island of Palmas Arbitration*.[77] However, this territorial sovereignty is limited by *sic utere tuo ut alienanum non laedas*, a principle generally recognized by civilized nations.[78] The principle, which asserts that one should not use one's property in a manner that would be injurious to another, is rooted in Roman Law and finds expression today in Principle 21 of the Stockholm Declaration.

[74] KISS AND SHELTON, *supra* note 3, at 39.

[75] *Id.*

[76] Stockholm Declaration, *supra* note 4.

[77] Island of Palmas Arbitration (U.S. v. Neth.), 2 R.I.A.A. 829 (1928).

[78] F.J. BERBER, RIVERS IN INTERNATIONAL LAW, 207 (1959); Ando, *supra* note 44 at 333; R.A. MALVIYA, ENVIRONMENTAL POLLUTION AND ITS CONTROL UNDER INTERNATIONAL LAW 148 (1987).

As early as 1909, this limit on territorial sovereignty has appeared in a treaty.[79] Over the years, it has been applied in the decisions of international tribunals. The decision in the *Trail Smelter Arbitration* case in 1941 reads:

> Under the principles of international law . . . , no State has the right to use or permit the use of its territory in such a manner as to cause injury to the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.[80]

Confirmation of this ruling may also be found in the decision of the International Court of Justice in the *Corfu Channel case* where then Court in 1949 declared "the obligation of every State not to allow its territory to be used for acts contrary to the rights of other States."[81] It has also been reaffirmed in the *Lac Lanoux Arbitration*.[82]

Transboundary environmental damage, which includes pollution, is what is forbidden by Principle 21. A survey of international conventions and agreements from all parts of the world will prove that there is general and consistent state practice regarding the acceptance of this prohibition, especially regarding shared water resources.

In Africa, stipulations to this effect can be found in Article 5 of the Statute relating to the Development of the Chad Basin, Article 4 of the Act regarding Navigation and Economic Cooperation between the States of the Niger Basin of 1963 and Article 12 of the 1964 Niamey Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger, which states that "[the riparian States] undertake . . . to abstain from carrying out on the portion of the River, . . . any work likely to pollute the waters."[83]

In North America, all the frontier rivers and lakes between Canada and the United States are covered by Article 4 of the 1909 Convention concerning Boundary Waters, which reads: "It is further agreed that the waters herein defined as boundary waters flowing across the boundary shall not be polluted in either side to the injury of health or property on the other."[84]

[79] 1909 U.S.-Can. Treaty art. IV, *supra* note 48.

[80] Trail Smelter, *supra* note 49.

[81] Corfu Channel, *supra* note 50.

[82] Lac Lanoux, *supra* note 58.

[83] Niamey Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger, 25 November 1964, 587 U.N.T.S. 19.

[84] 1909 U.S.-Can. Treaty, *supra* note 48.

International rivers between the United States and Mexico are covered by the an agreement[85] entered into by the two States after a prolonged dispute over the water quality of the Colorado River, a shared resource.

In Central America, the Treaty of Peace, Friendship and Arbitration of 1929 entered into by the Dominican Republic and Haiti prohibited the construction of any works likely to change the natural flow of their shared water resource.[86]

In South America, fishing in the common waters of Colombia and Venezuela by means of explosive and noxious substances are prohibited by a Statute Regulating the Frontier Regime. Argentina has concluded a bilateral agreement with three of its five neighbors which contains an express obligation to prevent or avoid pollution of their shared resources. Other South American agreements involving the duty not to cause transboundary environmental damage include the 1969 Treaty on the River Plate Basin and the 1971 Act of Asuncion on the Use of International Rivers.[87]

In Asia and Oceania, the relevant agreements are the 1957 Statute of the Committee for Co-ordination of the Investigation of the Lower-Mekong Basin and the 1960 Indus Water Treaty. The Soviet Union also concluded with three of its Asian neighbors bilateral treaties concerning frontier waters.

In Europe, almost all the boundary waters are covered by agreements. In addition, most of its international watercourses with multiple riparians are protected by various multilateral treaties. More importantly, participating States in the 1974 Convention on the Protection of the Environment[88] agreed to grant nationals of any of the signatories the right of access to their domestic courts or administrative authorities on the same footing as their own nationals, if affected by "environmentally harmful activities" originating from their own territory. Attention should also be given to the European Atomic Energy Community Treaty of 1957[89] which authorizes the organization to issue directives to Member States and to order them to prevent the expansion of radioactive contamination into the atmosphere, soil or waters of other members.

Although most of the treaties cited are limited to shared water resources, it is still apparent that there is a general and consistent practice of States supporting Principle 21's assertion that territorial integrity is limited by the prohibition against causing damage or injury (in most of these cases, pollution). Of course, the mere frequency of

[85] Agreement Concerning a Solution to the International Problem of the Salinity of the Colorado River, 30 August 1973, U.S.-Mexico, 12 I.L.M. 1105 (1973).

[86] Ando, *supra* note 44, at 340.

[87] *Id.*

[88] Convention on the Protection of the Environment, 22 March 1974, 13 I.L.M. 546.

[89] Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167.

treaties on a certain matter is no indication that the international community recognized the principle laid down in these as rules of customary law.[90] Proof of the psychological element or *opinio juris* is necessary. However, the conclusion of these treaties can and do signify that the parties regard themselves as being under legal obligation to behave in the manner indicated by these agreements. The conclusion of these treaties also reflect *opinio juris* and thus proves true that "[i]n many cases, treaties do no more than express and define for more accurate reference the principle of law already existing."[91]

Acceptance of Principle 21 as a binding rule is also apparent upon consideration of the acts of the world community of States. Although resolutions of international organizations are not formally binding in character unless provided for in treaties establishing these organizations, some resolutions can become declarative of international law. Consistent declaratory actions in organizations are quite authoritative since state action within international organizations is state practice. Principle 21 is onecase in which international declarations and institutional resolutions support the expression of universal *opinio juris*.[92]

The substance of Principle 21 has been reaffirmed by several international bodies, in particular, the U.N. General Assembly , in Resolution 3129 of December 1973 on Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States,[93] and Article 30 of Resolution 3281 of December 1974 proclaiming the Charter of Economic Rights and Duties of States.[94] The same rule has been reiterated in Principles 3 and 6 of the 1973 European Economic Community (EC) Programme of Action on the Environment[95] and the 1974 OECD Council Recommendation C(74)224 (regarding Transfrontier Pollution),[96] Recommendation C(74)220 and 221 (on the Control of Eutrophication of Waters and Strategies for Specific Pollutants Control).[97] It has also been reaffirmed in the 1975 Final Act of the Conference on Security and Cooperation in Europe,[98] the 1979 Convention on Long Range Transboundary Air Pollution[99] and Principle 3 of the UNEP Draft Principles of Conduct on Shared Natural Resources.[100] In the 1980s, the essence of Principle 21 was again reiterated in the World Charter for Nature's Principle 21(d) which declares that States should "[e]nsure

[90] BERBER, *supra* note 78, at 129.

[91] *Id.* at 133, *citing* the Nuremberg Judgment, *id.* at 133.

[92] Dupuy, *supra* note 5, at 64.

[93] G.A. Res. 3129 (XXVIII0, U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9030/Add.1 (1973).

[94] Charter of Economic Rights and Duties of States, Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR Supp.(No. 31) at 50, U.N. Doc. A/9631 (1975).

[95] EC Programme of Action on the Environment, 16 O.J. EUR. COMM. (No. C 12/6) (1973); 20 O.J. EUR. COMM. (No. C 139) (1977); 26 O.J. EUR. COMM. (No. C 46) (1983).

[96] *See* OECD Res. C(77)28 (Final), Annex, Introduction (17 May 1977), in OECD, OECD AND THE ENVIRONMENT 151 (1986).

[97] *Id.* at 44, 45.

[98] Conference on Security and Cooperation in Europe: Final Act, 1 Aug1975, 14 I.L.M. 1292 (1975).

[99] Convention on Long Range Transboundary Air Pollution, 13 November 1979, 18 I.L.M. 1442.

[100] UNEP Draft Principles of Conduct on Shared Natural Resources, prin. 3 (1978) (unpublished).

that activities within their jurisdiction or control do not cause damage to the natural systems located within other States or in areas beyond the limits of national jurisdiction."[101] The other 1980s document which restates Principle 21, although specifically refering to pollution damage, is Article 192(2) of the 1982 U.N. Convention on the Law of the Sea.[102]

The fact that Principle 21 is supported by the community of nations and thus forms part of international environmental law is also made obvious by its adoption through a vote of 114-0 at the Conference and 113-0 at the U.N. General Assembly.[103]

Upon consideration of all these, it is submitted that Principle 21 of the Stockholm Declaration is a customary norm of international law.

CONCLUSION

To be able to prove a customary norm, factors such as duration, consistency and generality of state practice should exist alongside *opinio juris sive necessitatis*. Both elements of custom exist with regard to Principle 21 of the Stockholm Declaration.[104]

Regarding the duration of the practice, treaty provisions as early as 1909 have applied the substance of Principle 21.[105] In fact, however, the policy underlying Principle 21 has been applied much earlier than this period. The principle is based on the maxim *sic utere tuo ut alienanum non laedas*, which is rooted in Roman Law. The survey of subsequent judicial decisions and treaty provisions from 1909 until the present has shown that there has been consistent application of this principle. The various treaties which have been cited from all regions also prove the generality of practice of the principle. Thus, the consistent and general practice of States to refrain from any use of their territory which would lead to transboundary environmental damage has been established.

That States believe they have the obligation not to cause transboundary harm in their exercise of their sovereignty over their territories is apparent in the number of treaties concluded all over the world. The numerous works of international organizations such as the United Nations, although not binding in themselves, also

[101] World Charter for Nature, Oct. 28, 1982, G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51), at 17, U.N. Doc. A/37/51 (1982).

[102] Third United Nations Conference on the Law of the Sea, 10 December 1982, art. 192(2), U.N. Doc. A/Conf.62/121, *reprinted in* 21 I.L.M. 1261 (1982).

[103] Report of the U.N. Conference on the Environment 11 I.L.M. 1416 (1972).

[104] Wallace, *supra* note 7, at 15.

[105] 1909 U.S.-Can. Treaty, *supra* note 48.

prove the existence of *opinio juris*, if one is to consider the number of signatories to these declarations.

Lastly, the assertion that the Stockholm Declaration merely "create[s] and delineate[s] goals to be achieved in the future rather than any actual duties, programs ... or strict obligations"[106] is not a bar to the establishment of Principle 21 as a customary norm. Just because the whole document is not in itself binding does not imply that part of it can no longer be treated as obligatory. It should also be noted that some aspirational goals can be and have been transformed into binding customary obligations.[107] As an example, it has been strongly argued that the entire 1948 Universal Declaration of Human Rights, which was unquestionably aspirational when originally adopted, has become part of customary international law.[108]

Having fulfilled the requirements and there being no bar to its acceptance as part of international environmental law, it is thus concluded that Principle 21 is a customary norm. As such, States are compelled to comply with its directive, a customary norm being recognized as possessing a "special value" and enjoying superiority over other forms because it "reflects a deeply felt community of law."[109]

[106] Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. OF INT'L L. 420 (1991).

[107] Magraw, *supra* note 2, at 49.

[108] *Id.*

[109] C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW *161-162 cited in* Anna Leah Castañeda, *From Prerogative to Prohibition: Article 2(4) as Customary International Law in Nicaragua v. U.S.*, 37 ATENEO L.J. 1, 15 (1993).