

# A Global Pact for the Environment - Legal Foundations

Edited by

Yann Aguila and Jorge E. Viñuales



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# A Global Pact for the Environment: Legal Foundations

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## **The Project**

The project leading to this compilation of studies has two purposes. The first is to leave a record of the intellectual discussions underpinning the project of a Global Pact for the Environment, with its many sources, views and debates. The second is to contribute to the discussions of the *ad hoc* open-ended working group established by UN General Assembly A/72/L.51. The report gathers compilations from some of the main authorities in international environmental law from around the World. Each chapter is written in a concise, self-contained and practical manner. The analysis focuses on the different principles and aspects of the Draft Global Pact but it also reviews a range of other materials and topics. Some chapters survey aspects that were not included in the Draft Global Pact. Further information and analysis regarding each of these principles and aspects can be found in the works listed in the Select Bibliography.

This report may be cited as follows: Y. Aguila and J. E. Viñuales (eds.), *A Global Pact for the Environment: Legal Foundations* (Cambridge: C-EENRG, 2019).

# Preface

Laurent Fabius  
Former President of COP21

The first months of 2019 have seen an unprecedented wave of climate strikes led by young students all over the planet, from Australia to France, from Germany to Kenya. Answering the call of Greta Thunberg, a 16-year-old Swedish student, youth is taking up the streets to demand new laws to better safeguard the environment and to recall current generations of their responsibility to guarantee the right of future generations to live their lives in a healthy environment.

It would be a serious mistake not to listen to this call.

In 2016, I was invited to support the project of a Global Pact for the Environment. A first draft was elaborated by an international network of leading legal experts. The project was presented in Paris in June 2017, then endorsed by French President Emmanuel Macron. On May 10<sup>th</sup> 2018, the United Nations General Assembly voted a first resolution opening a two-step process towards the negotiations of this Global Pact. First, the Secretary-General of the UN was to present a report assessing the gaps in international environmental law and the need for a Global Pact to bridge these gaps. Then, an open-ended working group would discuss this report and produce its conclusions by mid-2019.

As I write these lines, the report of the UNSG has been released and underlines that more than 500 international sectoral conventions exist in the environmental field. Despite all these instruments, environmental protection remains insufficient, due to the gaps and lack of coherence, monitoring and application of these texts. To address these shortcomings, the report recommends, among others, harmonizing international environmental law with a treaty that would gather the fundamental principles in this field in order to clarify and reinforce them.

The ad-hoc working group has already met in January and March and meets again in May. The world needs the working group to recognize and conclude that the adoption of an international binding treaty is necessary to strengthen environmental protection. From there, a new resolution of the General Assembly would be voted in 2019 in order to open the formal diplomatic negotiations on the content of this treaty.

I believe that the time has come for the adoption of a Global Pact for the Environment.

The time has come because the red alert is on. Average temperature at the Earth's surface is still rising and 2018 was the fourth hottest year since the beginning of the industrial era. 60% of the world's wildlife has disappeared over the past 44 years. Insects could be completely gone by the end of this century. Extreme weather events, whether droughts, tornadoes, flooding or fires, are causing more and more deaths in both developed and developing countries.

The time has come because the solution lies in an alliance of forces of all kinds, political forces, economic forces, financial forces, social forces, scientific and technological forces and in particular the forces of law. The draft of the Global Pact, which was proposed by over 100 international legal experts whose work I oversaw, recognizes the importance of including every actor and welcoming every initiative that brings us closer to safeguarding our planet. It encourages Parties to take into account the vital role that civil society, economic actors, cities and regions play in the protection of the environment. This does not diminish the obligation of States to face their responsibilities as regards to environmental protection and to implement more efficient environmental norms.

In that regard, the adoption of the Global Pact would be a significant progress.

For citizens, the Global Pact would provide new guarantees and strengthen their capacity to assert their environmental rights before national courts. For companies, the Pact would create a level-playing field and provide them with more predictability and legal security, which are crucial for economic actors to decide on long term investments. For governments and parliaments, the Pact could provide a basis to create new legislation. For judges, the Pact could be used as an inspiration for their decisions, or even – depending on national legal frameworks and interpretations – be directly applied with direct effect to their legal cases.

In the past few months, some opponents to the Global Pact have implied that such treaty presents a risk of regression for the general principles of international environmental law and would reduce the level of protection of the environment. I could not disagree more. On the very contrary, adopting this treaty would contribute to consolidate and disseminate the general principles of environmental law and ensure that all States share a common language in light of this common challenge.

The same have also at times asserted that adding an “umbrella text” to the existing sectorial agreements would create a risk of conflict and pose a problem of articulation. In reality, the question of the articulation between the Pact and sectorial agreements will fit into the well-established distribution scheme of general and specialized laws. Special laws will remain in effect and override the general law. In the event of a conflict between a general principle of the Pact and a special rule in an agreement, the agreement rule will prevail, following the Latin principle *specialia generalibus derogant*.

Further, the Global Pact for the Environment is a relevant complement to the universal Paris Agreement on Climate change.

Concluded in December 2015, the Paris Agreement solely focuses on climate, while the Global Pact addresses the environment as a whole. A holistic approach is necessary since the different phenomena interact with each other: global warming destroys biodiversity, which influences climate in return.

The Paris Agreement does not have legal force in its whole. The Pact – or at least its draft project built with international experts – is an international treaty with subsequent legal value.

With its 29 articles and 140 paragraphs, the Paris Agreement lists the measures that each partner must adopt. In about 30 articles, the Pact gathers the principles, rights and duties that everyone, State, business, citizen, must respect.

These three aspects – global rationale, legal force, rights and duties – explain why, after my Presidency of the Paris Agreement, which I had the honor to assume, the Global Pact for the Environment appeared as the next step I had to support. Why? Because as many others do – and particularly the new generation – I consider as an utmost priority the safeguard of humanity, which is threatened by our destructive actions.

Still, going through the adoption of the Global Pact will not be an easy task. On the one hand, each article raises legitimate questions. They are perfectly analyzed in this volume by authoritative specialists. On the second hand, some, although not many, countries are hostile to the project – as I said – by principle. My feeling is that finding a consensus is necessary but not at the cost of an abandoning the project. Because what is at stake is simply a new and necessary step in the protection of both our planet and humanity.

Is there a more important objective? I do not believe so. The environment has taken a new and central place in our lives. It is now time to give it the international place it needs, with the adoption of a Global Pact for the Environment.

After the adoption of the two 1966 international covenants, one concerning civil and political rights, the other economic, social and cultural rights, I believe it is now time to answer the call of our youth and act for the adoption of a third pact that would assert a new generation of fundamental principles: the rights and duties relating to environmental protection. This would send a strong message and prove we are ready to take on our duty to protect the rights of future generations.

Paris, March 2019

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**Compilation of texts**

*Prepared under the supervision of Yann Aguila*

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# A Global Pact for the Environment: Conceptual Foundations

Yann Aguila and Jorge E. Viñuales

## I. INTRODUCTION

The adoption, on 10 May 2018, of United Nations (UN) General Assembly Resolution A/72/L.51, entitled ‘Towards a Global Pact for the Environment’ (‘Enabling Resolution’),<sup>1</sup> has justifiably attracted great public attention, including expressions of support and, inevitably, also criticism. The resolution called for the establishment of an Ad Hoc Open-ended Working Group, which met in early September 2018 in New York and is scheduled to meet three more times in Nairobi in the first half of 2019<sup>2</sup> to discuss the substantive aspects of the initiative for a Global Pact for the Environment (GPE). Much could be said about this initiative, in which the authors of this article are closely involved, and which has received ample coverage in the media<sup>3</sup> as well as in academic and policy circles.<sup>4</sup> In the specific context of this article,<sup>5</sup> however, we will limit ourselves to two basic observations, which will provide

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- <sup>1</sup> UNGA ‘Towards a Global Pact for the Environment’ UN Doc A/RES/72/277 (10 May 2018) (‘Enabling Resolution’).
- <sup>2</sup> Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277 of 10 May 2018 entitled “Towards a Global Pact for the Environment”, Draft, UN Doc. A/AC.289/L.1.
- <sup>3</sup> See, e.g., ‘Bid for Environmental Rights Pact to Kick Off in Paris Tomorrow’ (The Times of India, 23 June 2017); ‘Un Pacte Mondial pour Protéger l’Environnement’ (Le Monde, 25 June 2017); ‘Un Projet de Pacte Mondial pour l’Environnement’ (Le Figaro, 24 June 2017); ‘Macron Promet de Défendre un “Pacte Mondial pour l’Environnement”’ (Reuters, 24 June 2017); ‘Wang Yi Attends Global Pact for the Environment Summit’ (Ministry of Foreign Affairs of the People’s Republic of China, 20 September 2017); H Xiao, ‘China Lauds UN Environment Pact’ (ChinaDaily, 20 September 2017); ‘Macron rilancia all’Onu un Patto globale per il clima’ (La Stampa, 21 September 2017); ‘Secretário-geral da ONU pede apoio a pacto ambiental proposto pela França’ (Nações Unidas no Brasil, 22 September 2017); L Fabius and Y Aguila, ‘Un Pacto Medioambiental’ (El País, 2 August 2018); ‘Global Pact Will Boost International Environmental Governance’ (The Guardian (Nigeria), 25 September 2018); ‘Appel de 100 Juristes pour l’Adoption d’un Pacte Mondial pour l’Environnement’ (Le Monde, 9 October 2018); Y Aguila et al, ‘The Time is Now for a Global Pact for the Environment’ (The Guardian, 9 October 2018); ‘Uhuru: Kenya Committed to Fight against Climate Change’ (Daily Nation (Kenya), 11 November 2018).
- <sup>4</sup> See, e.g., ‘Global Perspectives on a Global Pact for the Environment’, Sabin Center for Climate Change Law (Columbia University, 20 September 2018) <<http://blogs.law.columbia.edu/climatechange/2018/09/20/global-perspectives-on-a-global-pact-for-the-environment/>>. In addition, many meetings have been held around the world, including in Paris (Conference ‘Towards a Global Pact for the Environment’, La Sorbonne, 24 June 2017), New York (Conference on the Global Pact for the Environment, Columbia University, 20 September 2017), Bogotá (Symposium on the Global Pact for the Environment organized by the Attorney General of the Nation, 1 March 2018), Brasilia (Round Table on the Global Pact for the Environment, World Water Forum, 19 March 2018), Dakar (Conférence ‘L’Afrique s’engage pour la Planète’, 14 May 2018), Geneva (Conference on the Global Pact for the Environment at the UN International Law Commission, 10 July 2018), Santiago de Chile (Coloquio ‘Pacto mundial del medio ambiente, derechos humanos, y constitución’, 28 August 2018), Québec (Conférence ‘Une opportunité pour un Canada plus vert? Le projet de Pacte mondial pour l’environnement’, 21 September 2018), Ottawa (‘Le projet onusien de Pacte mondial pour l’environnement : quelles implications pour le Canada?’, 24 September 2018), Beijing (Conference on the legal aspects of a healthy environment, 12 October 2018), Naples (‘Une patto globale per l’ambiente’, 19 October 2018).
- <sup>5</sup> This article is part of a wider research project that brings together the knowledge and expertise of several generations of international environmental lawyers from around the world to contribute to the development of a Global Pact for the Environment (see Y Aguila and JE Viñuales (eds), *A Global Pact for the Environment: Legal Foundations* (C-EERNG, Advance version, 2019). The authors wish to acknowledge the participation in this research project, the results of which will be published in the form of an edited volume, of the following contributors (in alphabetical order): Virginie Barral,

the necessary background for the analysis of the intellectual origins and conceptual foundations underlying the GPE.

The first observation is that it would be a mistake to see the Enabling Resolution or even the initiative for a GPE as a mere current development. Quite to the contrary, these developments are the reflection of deeper trends that have been operating in the background for decades. For this reason, our second observation is that a broad question such as whether the adoption of a GPE is desirable, with certain contents that will be discussed later, is best answered not by zooming in to argue about the details – which are, indeed, a matter for debate – but by zooming out to understand the fundamentals.

This is why this article first situates the search for a global framework instrument on environmental protection in a long-term perspective and then discusses the main reasons why it is needed. Against this background, we then present the current expression of this much broader trend, in the form of the initiative for a GPE and the momentum it has generated in policy circles, first and foremost at the level of the UN General Assembly. But the need for such an instrument heavily depends on its nature, content and articulation with existing international instruments, which must be designed to specifically allow for significant flexibility in its implementation by States with different legal systems and political realities. For that reason, we propose an analytical framework to guide the delicate exercise of striking a balance between a range of different considerations.

The latter point has been misinterpreted in some circles, sometimes disingenuously so. The heart of the initiative for a GPE is not the specific formulation of certain principles in the draft project or even the architecture retained for it. Much more importantly, it is the widely shared impression that this is an idea whose time has come.

## II. THE GLOBAL PACT IN THE EVOLUTION OF GLOBAL ENVIRONMENTAL GOVERNANCE

The ambition to develop a global pact for the environment is not new. In situating the current initiative, it is important to clarify what forms this ambition has taken in the past and how they fitted within the broader context of global environmental governance.

The first significant attempt to develop a global framework for environmental protection is certainly the Conference on the Human Environment held in Stockholm in June 1972.<sup>6</sup>

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Laurence Boisson de Chazournes, David Boyd, Edith Brown Weiss, Neil Craik, Pierre-Marie Dupuy, Leslie-Anne Duvic-Paoli, Jonas Ebbesson, Francesco Francioni, Guillaume Futhazar, Shotaro Hamamoto, Marie Jacobsson, Walter Kälin, Yann Kerbrat, John Knox, Ginevra Le Moli, Sandrine Maljean-Dubois, Makane Mbengue, Jane McAdam, Pilar Moraga, Nilufer Oral, Michel Prieur, Alexander Proelss, Qin Tianbao, Lavanya Rajamani, Nicholas Robinson, Jason Rudall and Zhang Meng.

<sup>6</sup> 'Report of the United Nations Conference on the Human Environment, Stockholm 5-16 June 1972' UN Doc. A/CONF.48/14/Rev1 (1973). For contemporary assessments of the outcomes see A Kiss and D Sicault, 'La Conférence des Nations Unies sur l'Environnement (Stockholm, 5-16 June 1972)' (1972) 18 *Annuaire Français de Droit International* 603; LB Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Journal* 423. For two contemporary accounts of key figures see W Rowland, *The Plot to Save the World. The Life and Times of the Stockholm Conference on the Human Environment* (Clarke, Irwin & Company 1973); M Strong, 'One Year after Stockholm: An Ecological Approach to Management' (1973) 51 *Foreign Affairs* 690.

This is widely considered as the constitutional moment of international environmental law,<sup>7</sup> as well as a catalyst for domestic environmental law.<sup>8</sup> The ‘framework’ provided fell short of a global treaty, but it defined the province of global environmental governance and set the institutional and strategic foundations for further action on environmental protection.<sup>9</sup> The international context was, however, not entirely auspicious for such an important development. Indeed, the deep ideological and policy divides of the Cold War<sup>10</sup> and, no less important, of the quest for ‘permanent’ economic sovereignty by newly independent States and other developing countries<sup>11</sup> undermined, to some extent, the representative character of the statements made at Stockholm.<sup>12</sup> Yet, the Stockholm Conference provided a solid basis on which to build a more structured framework.

During the 1980s, the efforts leading to the adoption of the World Charter for Nature<sup>13</sup> and, following the realization – in the 1982 meeting of the United Nations Environment Programme (UNEP) Governing Council – of the scope of environmental degradation, the establishment of the World Commission on Environment and Development (WCED), generated momentum for a second and more structured attempt. Two key recommendations of WCED’s outcome report, *Our Common Future*, were the adoption of a Universal Declaration as well as of a Convention on Environmental Protection and Sustainable Development.<sup>14</sup> One

<sup>7</sup> See, e.g., PM Dupuy and JE Viñuales, *International Environmental Law* (2nd edn, Cambridge University Press 2018) 8–12; P Sands et al, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 29–32; J Cretella Neto, *Curso de Direito Internacional do Meio Ambiente* (Saraiva 2012) 127–141; JJ Ruiz, ‘Orígenes y Evolución del Derecho Internacional del Medio Ambiente’ in F Sindico, R Fernández Egea and S Borràs Petinat (eds), *Derecho Internacional del Medio Ambiente* (Cameron May 2011) 3; U Beyerlin and T Marauhn, *International Environmental Law* (Hart Publishing 2011) 7–8; D Hunter, J Salzman and D Zaelke, *International Environmental Law and Policy* (4th edn, Foundation Press 2011) 140–145; P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 48–50; L Guruswamy and KL Doran, *International Environmental Law* (Thomson-West, 2007) 34–39; A Kiss and JP Beurier, *Droit International de l’Environnement* (3rd edn, Pedone 2004) 32–34.

<sup>8</sup> See, e.g., RL Lutz, ‘The Laws of Environmental Management: A Comparative Study’ (1976) 24 *American Journal of Comparative Law* 447. For a statement of environmental law before the Conference, see Woodrow Wilson International Centre for Scholars (ed), *The Human Environment, Vol II: Summary of National Reports submitted in preparation of the United Nations Conference on the Human Environment* (1972).

<sup>9</sup> Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972) in Report of the United Nations Conference on the Human Environment (n 6).

<sup>10</sup> In early May 1972, the Nixon administration announced the mining of the Haiphong harbour, in a major escalation of the Vietnam War. Moreover, countries of the then Soviet bloc abstained from participating in the Stockholm Conference in protest of the exclusion of East Germany. See EP Morgan, ‘Stockholm: The Clean (But Impossible) Dream’ (1972) 8 *Foreign Policy* 149.

<sup>11</sup> A major milestone of this quest was the adoption by the UN General Assembly of Resolution 1803(XVII): UNGA ‘Permanent Sovereignty over Natural Resources’ UN Doc A/RES/1803/XVII (14 December 1962). On the legal process leading to this resolution see NJ Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997). For the wider historical context explaining the need to assert ‘permanent’ sovereignty see B Simpson, ‘Self-Determination and Decolonization’ in M Thomas and A Thomson (eds), *The Oxford Handbook of the Ends of Empire* (Oxford University Press 2017) 417.

<sup>12</sup> The tension between development and environmental protection as potentially conflicting goals found expression, among others, in the meeting held at Founex, on the outskirts of Geneva, one year before the Stockholm Conference (‘Development and Environment: Report and Working Papers of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment, Founex, Switzerland 4–12 June 1972’) and, subsequently, in December 1971, with the adoption of a resolution by the UN General Assembly asserting the over-riding importance of development (UNGA ‘Development and Environment’ UN Doc A/RES/2849/XXVI (20 December 1971)). On this tension, see K Mickelson, ‘The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy’ in S Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press 2016) 109.

<sup>13</sup> UNGA ‘World Charter for Nature’ UN Doc A/RES/37/7 (28 October 1982).

<sup>14</sup> World Commission on Environment and Development, ‘Our Common Future: Report of the World Commission on Environment and Development’ (10 March 1987) Chapter 12, Section 5.2, paras 85–86.

of the leading international organizations active in the area of environmental protection, the International Union for the Conservation of Nature (IUCN), developed on that basis a Draft International Covenant on Environment and Development, which it sought to introduce – through the delegation of Iceland – in the process leading to the United Nations Conference on Environment and Development, held in Rio de Janeiro in June 1992.<sup>15</sup> But the attempts to have such an instrument adopted were unsuccessful. Yet, IUCN, through its Environmental Law Programme, has made efforts to keep this idea alive, revising and updating the ‘Draft Covenant’ since the 1990s.<sup>16</sup>

By contrast, the idea to adopt by consensus, and this time by the full international community, a universal declaration came to fruition in the form of the 1992 Rio Declaration on Environment and Development.<sup>17</sup> At the time, some saw the Rio Declaration as a step backwards because of the prominent place it gives to development concerns.<sup>18</sup> However, with the benefit of hindsight, the Rio Declaration can be considered as the closest step taken so far to formulate a set of consensual and balanced constitutional principles for global environmental governance.<sup>19</sup> Its principles, several of which were newly minted or stated for the first time in an authoritative instrument with global reach,<sup>20</sup> have been subsequently taken up in a range of global treaties. Three major illustrations of this influence are provided by the precautionary principle (stated in Principle 15 as an approach),<sup>21</sup> the principle of common but differentiated responsibilities (stated in Principle 7)<sup>22</sup> and the principle of public participation in environmental matters (stated in Principle 10).<sup>23</sup> Other principles, particularly the three norms that constitute the heart of customary international environmental law,<sup>24</sup> namely

<sup>15</sup> UN Doc A/CONF.151/PC/WG.III/4 CAN YOU ADD TITLE AND DATE?. See JE Viñuales, ‘The Rio Declaration on Environment and Development: Preliminary Study’ in JE Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 1, 10.

<sup>16</sup> The IUCN, in collaboration with the International Council of Environmental Law, have pursued work on a ‘Draft Covenant’, which now has several editions. See IUCN, *Draft International Covenant on Environment and Development* (5th edn, IUCN 2017) <<https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2443>>.

<sup>17</sup> Rio Declaration on Environment and Development in ‘Report of the United Nations Conference on Environment and Development’ UN Doc A/CONF.151/26 (vol I) (12 August 1992) Annex. See Viñuales, ‘Preliminary Study’ (n 15).

<sup>18</sup> See, e.g., H Mann, ‘The Rio Declaration’ (1992) 86 *American Society of International Law Proceedings* 405, 409; M Pallemarts, ‘International Environmental Law from Stockholm to Rio: Back to the Future?’ (1992) 1 *Review of European Community and International Environmental Law* 254, 256; DA Wirth, ‘The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?’ (1995) 29 *Georgia Law Review* 599, 648.

<sup>19</sup> Viñuales, ‘Preliminary Study’ (n 15) 60.

<sup>20</sup> *ibid* 15–16, discussing the model proposed by the late Alexandre Kiss, according to whom no less than seven principles of international environmental law (common but differentiated responsibilities, precaution, polluter-pays, environmental impact assessment, notification of emergencies, notification and consultation in case of risk, peaceful settlement of disputes) were newly stated in the Rio Declaration. See A Kiss, ‘The Rio Declaration on Environment and Development’ in L Campiglio (eds), *The Environment After Rio: International Law and Economics* (Graham & Trotman/Martinus Nijhoff, 1994) 55.

<sup>21</sup> See AA Cançado Trindade, ‘Principle 15: Precaution’ in Viñuales, *The Rio Declaration* (n 15) 403; MM Mbengue, *Essai sur une Théorie du Risqué en Droit International Public: L’Anticipation du Risqué Environnemental et Sanitaire* (Pedone 2009); A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (Kluwer 2002).

<sup>22</sup> See P Cullet, ‘Principle 7: Common but Differentiated Responsibilities’ in Viñuales, *The Rio Declaration* (n 15) 229; L Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006).

<sup>23</sup> See J Ebbesson, ‘Principle 10: Public Participation’ in Viñuales, *The Rio Declaration* (n 15) 287; A Epiney et al, *Aarhus-Konvention. Handkommentar* (Nomos 2018).

<sup>24</sup> See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665 (‘*Costa Rica/Nicaragua*’) para 104. On the current state of customary international law relating to environmental protection, see JE Viñuales, ‘La Protección Ambiental en el Derecho Internacional Consuetudinario’ (2017) 69 *Revista Española de Derecho*

prevention (stated in Principle 2),<sup>25</sup> the requirement to conduct an environmental impact assessment (stated in Principle 17)<sup>26</sup> and the duty of cooperation (stated in Principles 18 and 19),<sup>27</sup> also received their authoritative formulation in the Rio Declaration. But these examples also illustrate the limitations of a statement of principles in a ‘soft law’ instrument such as the Rio Declaration. Such limitations highlight the need for a Global Pact.

### III. THE NEED FOR GLOBAL PACT

The adoption of a GPE would constitute an important milestone in the evolution of international environmental law and, more generally, of global environmental governance. There are several reasons for it, some which are readily apparent and some others which require a more detailed understanding of international, comparative and domestic law. The first reason is relatively straightforward. The Rio Declaration is not binding as such, a feature that has prevented some principles from deploying their full effects.<sup>28</sup>

The second reason is the absence of a broader common core of legally binding principles on which significant gaps in the regulation could rely upon, which leaves certain important questions too open or unsettled. Most observers would accept that plastic pollution is currently a matter that has largely remained unaddressed or has ‘fallen between the cracks’ of international instruments. In fact, the entire land-based marine pollution regime rests, at the global level, on some laconic provisions of the UN Convention on the Law of the Sea (UNCLOS)<sup>29</sup> or on soft law instruments, and the same is true of the critical problem of air pollution, which is only regulated regionally at the present.<sup>30</sup> These are certainly not minor lacunae that can be addressed by mere ‘tweaks’ of existing instruments. In time, they will call for an organized binding response. In the meantime, their broad regulation could rely on a general statement of binding principles.

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Internacional 71; PM Dupuy, ‘Formation of Customary International Law and General Principles’ in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 449.

<sup>25</sup> See LA Duvic Paoli and JE Viñuales, ‘Principle 2: Prevention’ in Viñuales, *The Rio Declaration* (n 15) 107; LA Duvic Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018); X Hanqin, *Transboundary Damage in International Law* (Cambridge University Press 2003).

<sup>26</sup> See N Craik, ‘Principle 17: Environmental Impact Assessment’ in Viñuales, *The Rio Declaration* (n 15) 451; N Craik, *The International Law of Environmental Impact Assessment* (Cambridge University Press 2008); NA Robinson, ‘International Trends in Environmental Impact Assessment’ (1992) 19 Boston College Environmental Affairs Law Review 591.

<sup>27</sup> See L Boisson de Chazournes and K Sangbana, ‘Principle 19: Notification and Consultation on Activities with Transboundary Impact’ in Viñuales, *The Rio Declaration* (n 15) 492; P Okowa, ‘Principle 18: Notification and Assistance in Case of Emergency’ in Viñuales, *The Rio Declaration* (n 15) 471; F Francioni and H Neuhold, ‘International Cooperation for the Protection of the Environment: The Procedural Dimension’ in W Lang, H Neuhold and, K Zemanek (eds), *Environmental Protection and International Law* (Graham & Trotman 1991) 203.

<sup>28</sup> See, e.g., WTO *European Communities – Measures affecting the Approval and Marketing of Biotech Products* (29 September 2006), WT/DS291/R, WT/DS292/R, WT/DS293/R (‘EC – Biotech’) paras 7.88–7.90; *India – Certain Measures Relating to Solar Cells and Solar Modules* (16 September 2016), WT/DS456/AB/R paras 592, 596 and 5.149.

<sup>29</sup> See United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 207 and 213.

<sup>30</sup> See, e.g., Agreement on Transboundary Haze Pollution (adopted 10 June 2002, entered into force 25 November 2003) <[http://haze.asean.org/?wpfb\\_dl=32](http://haze.asean.org/?wpfb_dl=32)>; Convention on Long Range Transboundary Air Pollution (adopted 17 November 1979, entered into force 16 March 1983) 1302 UNTS 217. On these instruments see P Nguitragool, *Environmental Cooperation in South-East Asia: ASEAN’s Regime for Transboundary Haze Pollution* (Routledge 2011); J Slingers and W Kakebeke (eds), *Clearing the Air. 25 Years of the Convention on Long-Range Transboundary Air Pollution* (United Nations 2004); A Byrne, ‘The 1979 Convention on Long-Range Transboundary Air Pollution: Assessing its Effectiveness as a Multilateral Environmental Regime after 35 Years’ (2015) 4 *Transnational Environmental Law* 37.

Third, there are even broader questions that influence the operation of the entire international environmental law system and that have been largely overlooked. A major example is consumption-driven environmental degradation, i.e. environmental degradation in one country led by consumption in others.<sup>31</sup> Unfortunately, neither the Rio Declaration<sup>32</sup> nor the numerous multilateral environmental agreements (MEAs) have much to offer in this regard. The large majority of them (with the notable exception of CITES<sup>33</sup>) focus on production and, thus, they offer almost no means to address the situation of a country in which environmental degradation is driven by foreign consumption.

Fourth, yet another form of gap concerns the possible conflicts between instruments with limited sectoral or spatial scope. The ocean may appear, from the perspective of the climate change regime or that of the ocean dumping regime as a carbon sink or a carbon sequestration dumpsite,<sup>34</sup> but that is in open conflict with the requirements of the provisions on the protection and preservation of the marine environment under the UNCLOS<sup>35</sup> or in the ongoing negotiations relating to the protection of biodiversity beyond national jurisdiction.<sup>36</sup> Legally, there are no overarching principles, aside from the limited set of customary international environmental law norms, that could provide solutions to such far-reaching conflicts. Thus, when one considers the questions of ‘gaps’ seriously, beyond the superficial references to commonly acknowledged lacunae, there is a much deeper need for a binding overarching framework.

A fifth problem, related to the previous one, comes from the fact that some of the Rio principles have been understood and treated differently across treaty contexts and their related dispute settlement mechanisms, with important practical implications. Three examples concern the different positions taken with respect to the nature and scope of

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<sup>31</sup> In two cases, China sought to justify restrictions on the exports of certain raw materials and rare earths on the grounds that foreign demand led to their over-extraction, which in turn was a harmful activity for the environment in China. In both cases, China relied on the general exception in Article XX(g) of the General Agreement on Tariffs and Trade, but the argument was rejected. See *China – Measures related to the Exportation of Various Raw Materials* (5 July 2011), WT/DS394/R; WT/DS395/R; WT/DS398/R para 7.586; *China – Measures Relating to the Exportation of Rare Earths, Tungsten, and Molybdenum* (7 August 2014), WT/DS431/AB/R, WT/DS432/AB/R and WT/DS433/AB/R paras 5.188–5.194. Other examples of consumption-driven environmental degradation abroad include so-called indirect land-use change, plastic pollution of the oceans, and emissions from production of carbon-intensive goods for export markets. See, e.g., DM Lapola et al, ‘Indirect Land-Use Changes Can Overcome Carbon Savings from Biofuels in Brazil’ (2010) 107 Proceedings of the National Academy of Sciences of the United States of America 3388; JR Jambeck et al, ‘Plastic Waste Inputs from Land into the Ocean’ (2015) 347 Science 768; ‘Global Perspectives on a Global Pact for the Environment’ (n 4) (contribution by A Wang); R Muradian et al, ‘Embodied Pollution in Trade: Estimating the “Environmental Load Displacement” of Industrialised Countries’ (2002) 41 Ecological Economics 51; J Kitzes et al, ‘Consumption-Based Conservation Targeting: Linking Biodiversity Loss to Upstream Demand through a Global Wildlife Footprint’ (2017) 10 Conservation Letters 531.

<sup>32</sup> See C Voigt, ‘Principle 8: Sustainable Patterns of Production and Consumption and Demographic Policies’ in Viñuales, *The Rio Declaration* (n 15) 245.

<sup>33</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 992 UNTS 243.

<sup>34</sup> See RE Kim, ‘Is a New Multilateral Environmental Agreement on Ocean Acidification Necessary?’ (2012) 3 Review of European, Comparative and International Environmental Law 243; Y Downing, ‘Ocean Acidification and Protection under International Law from Negative Effects: A Burning Issue amongst a Sea of Regimes?’ (2013) 2 Cambridge Journal of International and Comparative Law 242.

<sup>35</sup> UNCLOS (n 29) art 192.

<sup>36</sup> See E Barritt and JE Viñuales, ‘A Conservation Agenda for Biodiversity beyond National Jurisdiction. Legal Scan’ (UNEP World Conservation and Monitoring Centre 2016) 35–39.

precautionary principle/approach,<sup>37</sup> those regarding the spatial scope of the requirement to conduct an environmental impact assessment,<sup>38</sup> and those relating to public participation.<sup>39</sup> This divergence is possible because of a lack of an overarching statement of binding principles.

A sixth and important reason is that the guidance provided by the Rio Declaration to national legislators and courts is neither clear nor strong enough.<sup>40</sup> The example of the precautionary principle/approach provides, once again, an apposite illustration. One can attempt, in this regard, to identify uses of this principle and to organize them across a spectrum that goes from more conservative to more ambitious ones.<sup>41</sup> Such references have indeed been used: (i) to caution against the principle's 'potentially paralysing effects';<sup>42</sup> (ii) to assess whether certain measures expressly adopted on the basis of the precautionary principle are indeed justified under this principle;<sup>43</sup> (iii) as a stand-alone norm relevant to produce procedural effects (the reversal of the burden of proof)<sup>44</sup>; (iv) as a stand-alone norm relevant to for the interpretation of an environmental provision governing a case;<sup>45</sup> (v) as a stand-alone

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<sup>37</sup> The divergence is serious with respect to precaution, with different international courts and tribunals considering that (i) it is not a recognized norm of customary international law (*EC – Biotech* (n 28) para 7.88) or, conversely, (ii) that it is indeed recognized (*Tatar v Romania*, App No 67021/01 (ECtHR, 27 January 2009) para 120), with two positions in-between, namely (iii) that is an emerging norm (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10 ('*Responsibilities in the Area*') para 135) or (iv) that it 'may be relevant' for interpretation purposes (*Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 ('*Pulp Mills*') para 164). See Dupuy and Viñuales (n 7) 72–73.

<sup>38</sup> Whereas the International Court of Justice (ICJ) has only recognised the requirement to conduct an environmental impact assessment in a transboundary context (*Pulp Mills* (n 37) para 204; *Costa Rica/Nicaragua* (n 24) para 104), the Seabed Chamber of the ITLOS and an arbitral tribunal acting under Annex VII of the UNCLOS have recognised that this requirement also applies to activities with a potential impact on the global commons or disputes areas (*Responsibilities in the Area* (n 37) para 145; *In the Matter of the South China Sea Arbitration before and Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016) paras 947–948). See Dupuy and Viñuales (n 7) 79.

<sup>39</sup> Whereas in the *Pulp Mills* case, the ICJ seemingly rejected – albeit in ambiguous terms – the idea that there may be an applicable public participation requirement that must be taken into account in defining the content of an EIA (*Pulp Mills* (n 37) para 216), the ECtHR recognized the need for public participation, as fleshed out in Principle 10 of the Rio Declaration and the 1998 Aarhus Convention, in a case against Turkey, which is not a party to the latter (*Taskın and Others v. Turkey*, App No 46117/99 (ECtHR, 10 November 2004) paras 99–100). See Dupuy and Viñuales (n 7) 88.

<sup>40</sup> See Y Aguila and S Maljean-Dubois, 'Un Pacte Mondial pour l'Environnement, pour Quoi Faire?' (The Conversation, 19 June 2017).

<sup>41</sup> See E Scottford, 'Environmental Principles across Jurisdictions: Legal Connectors and Catalysts' in E Lees and JE Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2019 forthcoming); JE Viñuales, *The Architecture of Comparative Environmental Law* (2019 forthcoming) Chapter 4.

<sup>42</sup> Canada: *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 (reasoning that, to avoid such paralysing effects, projects that are otherwise socially and economically useful must be allowed to proceed before their environmental consequences are known).

<sup>43</sup> EU: Case T-257/07, *France v Commission*, ECLI:EU:T:2011:444 (relying on this principle on a stand-alone basis, i.e. to conduct an administrative review of a measure which has not been adopted on precautionary grounds). See Case T-229/04, *Sweden v Commission*, ECLI:EU:T:2007:217.

<sup>44</sup> Australia (New South Wales): *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133; (2006) 67 NSWLR 256 (relying on the precautionary principle to require the proponent of a development – the installation of mobile phone antennas – to establish the absence of risk); Brazil: STJ, *Resp n 1330027/SP, 3a turma*, decision of 11 June 2012 (civil liability case where the burden of proving the impact on aquatic fauna caused by the construction of a dam was reversed, requiring the proponent to establish that its project would not have the alleged impact); Canada: *Resurfice Corp v Hanke*, 2007 SCC 7; *Clements v Clements*, 2012 SCC 32 (where causation rules were relaxed somewhat in a case in which the defendant negligently had created a risk and scientific uncertainty prevented the plaintiff from proving causation); India: *Vellore Citizens' Welfare Forum v Union of India AIR 1996 SC 2715* (where the industry was deemed to bear the burden of proving that its activity caused no harm); Indonesia: *Ministry of Environment v PT. Kalista Alam*, Decision of the Supreme Court No. 651 K/PDT/2015 (28 August 2015) (applying precautionary reasoning – presented as *in dubio pro natura* – to effect a relaxation of causation requirements).

<sup>45</sup> Mexico: *Case XXVII.309 CS.*, SJFG, 10<sup>th</sup> Period, Book 37, December 2016, 1840 (relying on Principle 15 of the Rio Declaration to interpret the right to a healthy environment enshrined in Article 4 of the Mexican Constitution).

norm for reviewing of government action<sup>46</sup>; (vi) as a stand-alone norm creating a positive procedural obligation<sup>47</sup>; (vii) as a stand-alone norm redefining the parameters of liability (effectively transforming a fault-based liability system into a strict liability one);<sup>48</sup> and (viii) as a stand-alone norm requiring the creation of a new administrative system.<sup>49</sup> One possible reason for this variation is that the understanding of this principle fluctuates significantly across jurisdictions. Legislators and judges who are aware of the scope of the environmental crisis would be certainly more empowered in their everyday work if they could rely on a binding treaty rather than on a soft law instrument. Environmental protection may face great resistance in some specific periods of the political life of a country, but international norms are patient. Lack of reliance on them or even open confrontation do not necessarily jeopardize their operation.

Finally, a binding instrument with an institutional structure, even a very light one, would be more conducive to the constant interpretation of its principles, either *in concreto*, for instance in the context of specific communications, or *in abstracto*, for example by means of authoritative interpretations such as the practice of general comments in human rights committees.

Overall then, although the Rio Declaration has made a lasting contribution to global environmental governance, its very nature prevents it from addressing the type of problems faced by the current global environmental governance structure.

#### IV. THE INITIATIVE FOR A GLOBAL PACT AND THE UN PROCESS

The previous section briefly presented the broader context of the initiative for a GPE. The initiative emerged in the run-up to the Paris Agreement. The period going from the Rio Summit on Sustainable Development, held in June 2012,<sup>50</sup> to the adoption of the Paris

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<sup>46</sup> Canada: *Centre Québécois du droit de l'environnement v Canada (Environnement)*, 2015 FC 773 (where government inaction – failure to protect endangered species – violated the duty to consider the precautionary principle), *Wier v Canada (Health)*, 2011 FC 1322 (where the government's refusal to review a pesticide despite disagreement among government scientists as to the pesticide's risk violated the duty to consider the precautionary principle); Brazil: TRF 1, *Apelação cível n 2001.34.00.010329-1/DF*, decision of 12 February 2004 (suspending the operating license of insecticide plants pending further impact studies); TRF 2, *Agravo de instrument n 0004075-70.2012.4.02.0000*, decision of 31 July 2012 (suspending oil exploration activity pending further impact studies); India: *Vellore Citizens' Welfare Forum v Union of India AIR 1996 SC 2715* (relying administrative action with respect to certain tanneries operating in the India State of Tamil Nadu); UK: *Dowds v Secretary of State for Environment, Food and Rural Affairs* [2009] Env LR 19 (relying on the precautionary principle to assess a pesticide approval process).

<sup>47</sup> Brazil: STJ, *Resp 1172553/PR, 1a turma*, decision of 27 May 2014 (requiring the conduct of an environmental impact assessment despite the absence of an express requirement to do so in the governing law); Canada: *Castonguay Blasting Ltd. v Ontario (Environnement)*, 2013 SCC 52 (requiring companies to report the release of seemingly benign materials to enable the government to respond in case of possible environmental harm).

<sup>48</sup> Indonesia: *Dedi et.al. v PT. Perhutani*, Decision of the Supreme Court No. 1794 K/PDT/2004 (22 January 2007) (relying on the precautionary principle to determine the strict liability in tort law for the damage suffered by the victims of a landslide in the area where the respondent held a concession).

<sup>49</sup> Brazil: STF, *Recurso Extraordinário n 737.977/SP*, decision of 4 September 2014 (relying on the 'international law principle of precaution' to require pre-emptive mechanisms to address actions that threaten the sustainable use of ecosystems); India: *S Jagannath v Union of India and ors 1997 (2) SCC 87* (requiring, among others, extensive public regulatory action to remedy the environmental damage caused by intensive shrimp farming).

<sup>50</sup> The outcome of the major international conference was UNGA 'The Future We Want' UN Doc A/RES/66/288 (11 September 2012).

Agreement in December 2015<sup>51</sup> saw several major developments, most notably the Addis Ababa Action Agenda on Financing for Development in July<sup>52</sup> and the 2030 Agenda for Sustainable Development, with its Sustainable Development Goals, in September 2015.<sup>53</sup>

In this more specific context, in November 2015, the *Commission Environnement* of the *Club des juristes*, a legal think tank based in Paris, released a report on how to strengthen the effectiveness of international environmental law.<sup>54</sup> The report made 21 recommendations, including the adoption of an International Environmental Pact.<sup>55</sup> Following the adoption of the Paris Agreement, Laurent Fabius (President of the 21st Conference of the Parties to the UN Framework Convention on Climate Change) decided to support the idea and to take it to the international level. Throughout 2016, a documentary basis was assembled by the *Commission Environnement* and, in early 2017, an international network of environmental law experts was set up. Today, this network has over 100 experts from more than 40 different countries representing all legal systems and a wide variety of country situations. Under the aegis of the *Commission Environnement*, and with support from a smaller group of experts who handled the drafting, this network made a range of submissions over five rounds of structured consultations which unfolded in the first half of 2017. Such consultations addressed matters such as the need (or not) for an international treaty, its overall structure, its content and, more specifically, the formulation of the principles that would feature in the draft agreement. The drafting process also benefited from some previous efforts, including IUCN's Draft Covenant<sup>56</sup> and another draft project<sup>57</sup> developed by the *Centre International de Droit Comparé de l'Environnement* (CIDCE), a nongovernmental organization based in France.

To finalize the draft text, an expert meeting was convened in Paris at the facilities of France's *Conseil Constitutionnel* on 23 June 2017. For logistical reasons, only some 30 experts participated in this meeting, which under the chairmanship of Laurent Fabius proceeded to the discussion and adoption of the draft project. The following day, at a high-profile symposium held at the *Grand Amphithéâtre de la Sorbonne*, the draft project was presented by Mr Fabius to French President Emmanuel Macron, in a ceremony featuring former UN Secretary-General Ban Ki-moon, former Governor of California Arnold Schwarzenegger, the French Minister of the Environment Nicolas Hulot, the Mayor of Paris Anne Hidalgo, several

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<sup>51</sup> UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016).

<sup>52</sup> UNGA 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development' UN Doc A/RES/69/313 (27 July 2015) Annex.

<sup>53</sup> UNGA 'Transforming our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015).

<sup>54</sup> Environment Commission of the Club des Juristes, 'Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals' (November 2015).

<sup>55</sup> See Y Aguila, 'La Adopción de un Pacto Internacional para la Protección del Medio Ambiente' (2016) 34 *Revista Aranzadi de Derecho Ambiental*; Y Aguila, 'L'Adozione di un Patto Internazionale per la Protezione dell'Ambiente' (2016) 3 *Rivista Giuridica dell'Ambiente* 563.

<sup>56</sup> See n 16.

<sup>57</sup> See *Projet de Pacte International Relatif au Droit des Êtres Humains l'Environnement du CIDCE* <<https://cidce.org/fr>>.

other political figures, and a wider public of experts, diplomats, students and interested people.<sup>58</sup>

Between June 2017 and early November 2018, when the present article was written, several major steps have been taken to support the idea of a GPE, including many expert gatherings,<sup>59</sup> a high-level event on the sidelines of the UN General Assembly meeting on 19 September 2017 titled 'Summit on a Global Pact for the Environment',<sup>60</sup> a Sino-French Summit between French President Emmanuel Macron and Chinese President Xi Jinping on 8-10 January 2018,<sup>61</sup> and the meeting of the UN General Assembly in which the Enabling Resolution was adopted.

This meeting was held in early May 2018, under point 14 of the Agenda of the UN General Assembly's plenary.<sup>62</sup> The French delegation introduced the Draft Resolution (A/72/L.51) to which the Kenyan delegation proposed minor amendments (A/72/L.53), essentially aimed at ensuring that the process unfolds in Nairobi. Some other delegations (the United States, the Russian Federation, the Philippines and Syria) took the floor to oppose the project or aspects of it. The arguments aired by these delegations included matters of process (e.g. the fact that the project had not been sufficiently discussed or that France had not engaged with the chairperson of the Group of 77 plus China), the need for respect of the sovereignty of States to exploit their natural resources, the need to focus on the implementation of existing instruments rather than on using political capital for an additional normative development, and matters of formulation relating to the need to leave the outcome of the ad hoc group open-ended. Interestingly, a recorded vote was requested (instead of the frequent practice of adoption without a vote), which yielded a 143 majority, with only six votes against (the Philippines, Russian Federation, Syria, Turkey, United States and Iran, although the latter noted at the end that its vote had been inaccurately recorded, because it supported adoption) and six abstentions (Belarus, Malaysia, Nicaragua, Nigeria, Saudi Arabia and Tajikistan). This distribution of votes, and the identity of the current governments – not the countries – voting against the resolution, speaks for itself. It is, however, important to recall it in an article that hopefully will serve as a record for future generations to know where the resistance came from.

The arguments, although not entirely unfounded, ring hollow. The GPE has been in the making for decades, and asking for more time is possibly a euphemism for supporting inaction.

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<sup>58</sup> See Y Aguila, 'Vers un Pacte Mondial pour l'Environnement: Acte Fondateur à Paris le 24 juin 2017' (2017) 25 *La semaine juridique* 718.

<sup>59</sup> See n 4.

<sup>60</sup> See Speech delivered by President Emmanuel Macron during the international launch summit of the 'Global Pact for the Environment', which took place during the 72nd United Nations General Assembly, available at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/events/united-nations-general-assembly-sessions/unga-s-72nd-session/article/speech-by-m-emmanuel-macron-president-of-the-republic-summit-on-the-global-pact>

<sup>61</sup> 'Joint Declaration between the People's Republic of China and the French Republic' (10 January 2018) para 8 ('China and France intend to continue their constructive dialogue on the formulation of the Global Pact for the Environment'), translation available at <[http://www.xinhuanet.com/english/2018-01/11/c\\_136886038.htm](http://www.xinhuanet.com/english/2018-01/11/c_136886038.htm)>.

<sup>62</sup> See 'General Assembly Decides to Establish Working Group Aimed at Identifying Gaps in International Environmental Law' (UN Meeting coverage, GA 12015, 10 May 2018).

The same applies to arguments relating to improving implementation by means of piecemeal – at best – corrections in existing agreements. Adequate consultation of the chairperson of the Group of 77 plus China would have certainly been useful, but developing countries voted massively in favour of the resolution and the Chinese delegation explicitly took the floor to support the French initiative. As for references to sovereignty, there is no element in the proposal or in the idea of a GPE that explicitly or implicitly encroaches upon sovereignty as understood in contemporary international law. Perhaps the reaction was a resurgence from the past, as suggested by the Syrian delegate who noted, quite surprisingly in the light of the existence of hundreds of global environmental treaties, that ‘the concept of world environmental law was still legally controversial’.<sup>63</sup> In any case, these and other concerns will have ample room for discussion in the process envisioned in the Enabling Resolution.

In a nutshell, the resolution calls for the UN Secretary-General to prepare a ‘technical and evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation’.<sup>64</sup> This report, an advance version of which was published in late November 2018,<sup>65</sup> will be discussed by an ‘ad hoc open-ended working group’ with a view to ‘consider possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate, and, if deemed necessary, the scope, parameters and feasibility of an international instrument’.<sup>66</sup> The working group is tasked with ‘making recommendations [to the General Assembly], which may include the convening of an intergovernmental conference to adopt an international instrument’.<sup>67</sup> Ambiguity is pervasive in this and other formulations used in the Enabling Resolution. What seems far more precise is the demanding timeframe for the ad hoc group to do so, namely during the first half of 2019. The President of the UN General Assembly appointed two co-chairs for the working group, one from Portugal (Ambassador Francisco António Duarte Lopes) and the other from Lebanon (Ambassador Amal Mudallali). The group held its first meeting on 5–7 September 2018 to address organizational matters. Three other meetings focusing on substance will be held in the first half of 2019 (the last session is scheduled to start on 20 May 2019), all in Nairobi, as had been the wish of the Kenyan delegation. This is key to ensure the buy-in from developing countries as well as from UNEP.

It is important to note, as will become apparent in the next section, that the initiative for a GPE never expected for the draft project to be adopted as such, or even in a mildly revised form. The text proposed is above all representative of an approach, which may change significantly, even fundamentally during the negotiations. The key expectation is that negotiations will indeed start and that the ‘instrument’ envisioned by the negotiation mandate will constitute a step further than the Rio Declaration.

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<sup>63</sup> Cited in *ibid.*

<sup>64</sup> Enabling Resolution (n 1) para 1.

<sup>65</sup> UN Secretary-General, ‘Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment’ UN Doc A/73/419 (30 November 2018).

<sup>66</sup> Enabling Resolution (n 1) para 2.

<sup>67</sup> *ibid.*

## V. NATURE, CONTENT AND INTERACTION WITH EXISTING INSTRUMENTS

### A. A BINDING INSTRUMENT

The initiative for a GPE specifically aims for the adoption of a binding treaty providing an umbrella to a wider body of MEAs. Although the Enabling Resolution leaves the question open, referring only to ‘*possible options* to address possible gaps ... and, if deemed necessary, the scope, parameters and feasibility of an *international instrument*’,<sup>68</sup> the explicit mention of the ‘convening of an intergovernmental conference to adopt an international instrument’ makes abundantly clear that the recommendations of the ad hoc working group may lead to the adoption of a treaty. At the very least, that ‘possible option’ is certainly within the cards. Some observers have suggested that a soft-law instrument could also be a possible option. That position is consistent with the terms of the Enabling Resolution, but at odds with its spirit, as highlighted in the very title of the resolution ‘Towards a Global *Pact* for the Environment’.

The term ‘Pact’ unequivocally refers to a binding treaty. It was selected, among several other terms falling under the *genus* treaty (e.g. covenant, convention, agreement, treaty, protocol), both for its similarity in at least three UN languages (Pact, *Pacte*, *Pacto*) and in order to convey the generality of the instrument envisioned, which is to be a ‘Pact’ adopted by States but emphasizing the role of much wider body of stakeholders. In addition, the term Pact connotes a general value stance taken by the international community, much as in the context of the recently drafted Global Compacts on Migration and Refugees.<sup>69</sup>

Since the early stages of the initiative, and throughout the discussions within the network of experts, it was clearly understood that the draft project was only intended as a basis for discussion that would be subject to detailed scrutiny by all States and very likely undergo substantial, even fundamental modifications. At the same time, however, the draft project was intended to substantiate the claim that over a hundred environmental law experts, including academics but also practitioners, from all four corners of the world considered the idea to be realistic and ripe for action. Thus, the draft project is, in many ways, a ‘proof of concept’ developed to lend credibility to the larger enterprise of launching negotiations to conclude a GPE. This clarification is important, because much of the criticism that the initiative has faced, including from overtly hostile quarters, either rely on the aforementioned euphemisms for inaction or focus on details of formulation in the draft project which will very likely change in the course of the negotiations, without undermining the overall idea.

### B. FUNDAMENTAL CHOICES RELATING TO CONTENT AND DESIGN

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<sup>68</sup> *ibid* (italics added).

<sup>69</sup> See the 13 July 2018 version of the Global Compact for Safe, Orderly and Regular Migration in UNGA ‘Draft Outcome document of the Conference’ UN Doc A/CONF.231/3 (30 July 2018), adopted at an intergovernmental conference held on 10–11 December 2018; and the 26 June 2017 version of the Global Compact on Refugees <<https://www.unhcr.org/events/conferences/5b3295167/official-version-final-draft-global-compact-refugees.html>>, endorsed by the UN General Assembly at the end of 2018.

The contents of the draft project reflect a number of fundamental choices arising from the consultation process. These choices concern: (i) the conciseness of the instrument, (ii) a formulation emphasizing its enduring character, (iii) its adaptability to different country contexts, (iv) a balance between rights and duties, (v) a balance between well-established principles and novel ones, and (vi) a balance between the normative and the institutional dimension.

The draft project is specifically drafted as a very concise document, a few pages long, avoiding as much as possible unnecessary complications. This is consistent not only with the end result sought by the initiative for a GPE, i.e. a binding statement of fundamental principles, but also with the nature of the draft project as such, which is to provide an accessible basis for discussion that can be scrutinized in great detail by States and other stakeholders, without requiring inordinate amounts of time and effort.

The style used in the formulation of the project seeks to avoid any excessive embeddedness in our present time or, more specifically, it attempts to formulate principles of enduring relevance for the present but also the future. This is a common feature of instruments that are expected to deploy their effects through long periods of time, such as constitutions, human rights treaties, constitutive instruments of international organizations, and so on. However, unlike many of these other treaties, the endurance of the draft project does not rest on a heavy institutional architecture but on the general formulation of its principles. This is because the scientific understanding of environmental problems, as well as of the suitability of different answers, is constantly changing.

The generality of the formulation is also important for the adaptability of the draft project to the very different circumstances prevailing across countries. It would be unfair to say that the draft project assumes that ‘one size fits all’. This important consideration was specifically taken into account by the expert network and the drafting committee, which did their best to ensure that the text is sufficiently general to be capable of providing normative guidance while at the same time allowing States to tailor the implementation of the principles in the GPE to their own circumstances.

Reflecting the wide recognition, at the domestic level,<sup>70</sup> and the increasingly pressing calls, at the international level,<sup>71</sup> for a right to an environment of a certain quality (often characterized with the adjective ‘healthy’, ‘clean’, ‘safe’ or ‘generally satisfactory’), the draft

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<sup>70</sup> See D Boyd, *The Environmental Rights Revolution* (UBC Press 2012); JR May and E Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2015).

<sup>71</sup> See ‘UN Expert Calls for Global Recognition of the Right to Safe and Healthy Environment’ (Office of the High Commissioner for Human Rights, 5 March 2018) (in which former Special Rapporteur John Knox states: ‘I hope the Human Rights Council agrees the the right to a healthy environment is an idea whose time is here. The Council should consider supporting the recognition of this right in a global instrument’); ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/73/188 (19 July 2018) para 37 (‘The time has come for the United Nations to formally recognize the human right to a safe, clean, healthy and sustainable environment, or, more simply, the human right to a healthy environment’); ‘Statement by David R. Boyd, Special Rapporteur on Human Rights and the Environment at the 73rd Session of the General Assembly’ (25 October 2018) (‘after six years as mandate holder, Professor Knox came to the conclusion that there is a glaring gap in the global human rights system. He and I are in 100% agreement that it is time for the UN to recognize the fundamental human right to live in a safe, clean, healthy and sustainable environment’).

project formulates, in its Article 1, a ‘right to an ecologically sound environment’.<sup>72</sup> This statement is mirrored, in Article 2, by the assertion of a correlative ‘duty to take care of the environment’. Importantly, this duty is incumbent on ‘[e]very State or international institution, every person, natural or legal, public or private’.<sup>73</sup> This is a very progressive stance, which has been criticized for excessively expanding the spectrum of duty-bearers and, thereby, possibly undermining the role of the State as the primary duty-bearer in connection with both human rights and environmental norms. This is a relevant point, which States will need to examine in great detail in their discussions concerning a future GPE. The current formulation of Article 2 is designed to put on the table the full spectrum of possible duty-bearers or, in other words, to highlight that the duty to take care of the environment is not to be conceived of only as a duty of States. The architecture of the draft project flows from this combination of a right and a duty. In Articles 3 to 20, the draft project states a series of rights (e.g. Articles 9, 10 and 11, which unravel Principle 10 of the Rio Declaration, but explicitly stating that these are rights of ‘every person’) and duties (on a range of duty-bearers, including ‘States’ or the ‘Parties’, but also ‘their sub-national entities’,<sup>74</sup> ‘present generations’<sup>75</sup> or, by avoiding the identification of a specific duty-bearer, any entity which is in a situation covered by the duty<sup>76</sup>).

The principles featured in the draft project include well-known norms,<sup>77</sup> in some cases using formulations that clarify previous ambiguities or expand the principles’ scope.<sup>78</sup> But the project also innovates by including principles, which so far had not featured in a general statement of principles<sup>79</sup> or even in previous treaties.<sup>80</sup> The expert group sought to strike a balance between the consolidation and the innovation function of the project. Consolidation is important to strengthen existing norms as well as to assuage potential concerns of States reluctant to undertaking new commitments. Yet, some measure of innovation is also

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<sup>72</sup> See ‘Draft Global Pact for the Environment’ (24 June 2017) art 1; ‘White Paper: Toward a Global Pact for the Environment’ (September 2017), both available at <[www.pactenvironment.org](http://www.pactenvironment.org)>.

<sup>73</sup> See ‘Introductory Report on the Draft Global Pact for the Environment’ (September 2018) 7.

<sup>74</sup> Draft Global Pact for the Environment (n 72) art 17.

<sup>75</sup> *ibid* art 4.

<sup>76</sup> *ibid* art 6 (‘Precaution’) or art 20 (‘Diversity of national circumstances’).

<sup>77</sup> See, e.g., the principle of integration, the principle of inter-generational equity, the prevention principle and the requirement to conduct an environmental impact assessment, precaution, the polluter pays principle, the triad of access to environmental information, participation in environmental decision-making and access to justice or cooperation.

<sup>78</sup> See, e.g., Article 4 on the principle of intergenerational equity (compared with Principle 3 of the Rio Declaration, which only referred to intergenerational equity at the end as a consideration in the exercise of the right to development). For the conceptual underpinnings of this principle, see E Brown Weiss, ‘The Planetary Trust: Conservation and Intergenerational Equity’ (1984) 11 *Ecology Law Quarterly* 495. Another example is Article 8 on the polluter-pays principle, which expands the remit of the principle not only as a national instrument but also as a principle governing the relations among States, and it clarifies that the cost shall be borne by the ‘originator’ of the damage (compare with Principle 6 of the Rio Declaration). See generally P Schwartz, ‘The Polluter-Pays Principle’ in JE Viñuales, *The Rio Declaration* (n 15) 429.

<sup>79</sup> See, e.g., Article 17 on the principle of ‘non-regression’. On this principle, see generally M Prieur and G Sozzo, *La Non-Régression en Droit de l’Environnement* (Bruylant 2012).

<sup>80</sup> See, e.g., Article 14 on the ‘role of non-State actors and sub-national entities’ or Article 16 on the principle of ‘resilience’. On the realities underpinning the recognition of these two concepts, see H Bulkeley et al, *Transnational Climate Change Governance* (Cambridge University Press 2014) and N Robinson, ‘Evolved Norms: A Canon for the Anthropocene’ in C Voigt (ed), *A Rule of Law for Nature* (Cambridge University Press 2013) 46.

important because the project must be an additional step in the evolution of global environmental governance and, as much as possible, an inspiring and energizing one.

Finally, the draft project strikes a balance between its normative dimension (the formulation of principles) and its institutional one (the creation of a new body). Sensitive to the concerns expressed by several members of the expert group, which more broadly reflect States' concerns, the draft project provides for a very light institutional component. Indeed, Article 21 contemplates the creation of a Committee of independent experts, whose structure and mandate would be midway between that of the committees set up by human rights instruments and that of the compliance committees established by MEAs. The non-adversarial approach followed by Article 21 of the draft project is derived from the latter source, specifically from Article 15 of the Paris Agreement, which reflects similar provisions in earlier MEAs. However, because the draft project does not provide for the creation of a Conference of the Parties or of any other strong institutional architecture, this committee would operate in a manner akin to that of the Human Rights Committee established by the 1966 International Covenant on Civil and Political Rights. The articulation of these two components, namely a statement of principles and a Committee of independent experts with general and specific compliance as well as interpretive functions, seeks to achieve a focus on implementation without relying on a heavy institutional structure.

**Figure 1: Dimensions of the Global Pact for the Environment**

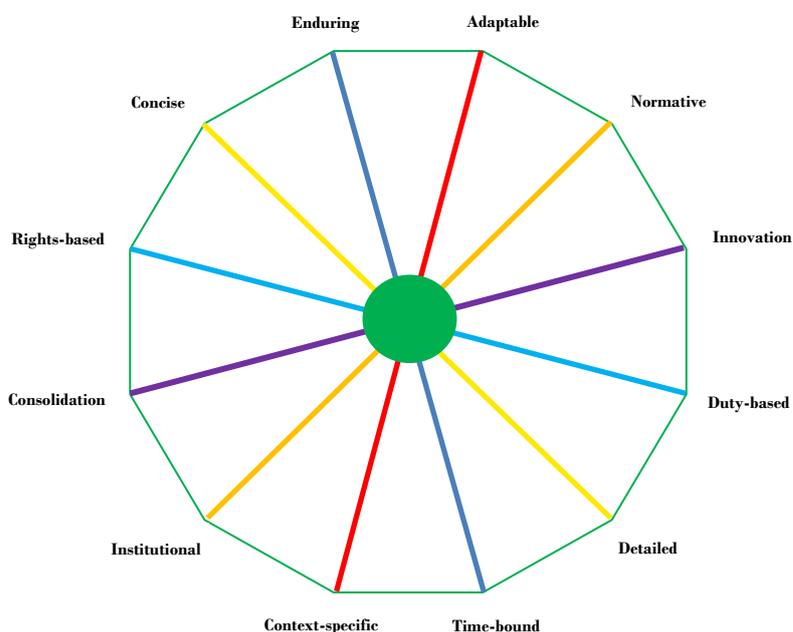


Figure 1 summarizes these six dimensions in graphic form. This figure is offered as a tool for the discussion and design of a potential GPE which may arise from the work of the *ad hoc* working group. A balance in all six dimensions, and perhaps in some others, will need to be struck by the working group and, as the case may be, by the intergovernmental conference. Commentators, whether from academic or policy circles, would also need to shed light on

these dimensions and, more specifically, on the advantages and disadvantages of different combinations. The conceptual chart offered in Figure 1 will hopefully be of use to provide some structure to the debates.

### C. ARTICULATION WITH EXISTING INSTRUMENTS

The Enabling Resolution, in its paragraph 9, '[r]ecognises that the process indicated above [i.e. the ad hoc open-ended working group and its possible continuation by an intergovernmental conference] should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies'.

It is important, in clarifying the scope of this paragraph, to dispel one common misunderstanding. A GPE would neither exclude the application of other instruments to the same situation nor be prevented from applying when such other instruments apply. It is possible for existing instruments to be either more specific or more general than the proposed GPE, or even both more specific and more general at the same time (the analysis may have to be conducted provision by provision or clause by clause). It is also possible that the proposed GPE may cover areas left open by existing instruments (e.g. providing a global fallback regime for matters as diverse as plastic pollution or, more generally, land-based pollution or atmospheric pollution, before a more targeted instrument is adopted) or that it may contribute to their interpretation in such a way that unlocks the potential of certain provisions (e.g. to clarify the implications of some existing treaties for consumption-driven pollution). These and other forms of interaction are possible and acceptable.

Out of all the possible forms of interaction between existing instruments and the proposed one, only those whereby the latter would 'undermine' the former are to be avoided. The term 'undermine' must be understood, in this context, as capable of defeating the environmental protection purpose of existing treaties. As long as the proposed GPE does not defeat the environmental protection purposes pursued by these many instruments, the approach would be deemed consistent with the parameters set in paragraph 9. It is difficult to conceive how the proposed GPE could defeat those purposes. Those who argue against the proposed GPE or a specific provision included in it would have the burden to identify how exactly and to what extent there is a genuine risk that the Pact may undermine an existing instrument. Such arguments should be established in a manner that is no less 'technical and evidence-based' than the report envisaged in the Enabling Resolution, which was published in late November 2018.

It should be noted that, from a technical standpoint, the International Court of Justice has expressly recognized that different norms may all apply together to cover different aspects of a complex situation. Thus, the Court has referred to the need to take into account the prevention of environmental harm in assessing the necessity and proportionality of an armed action taken in self-defence<sup>81</sup> or, more specifically, to the possibility that human rights norms and norms of international humanitarian law (by analogy, also environmental norms) may

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<sup>81</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 30.

apply together.<sup>82</sup> For present purposes, the relevance of this point is to recall that different norms are not necessarily mutually exclusive. The principles formulated in a general statement such as the proposed GPE could (i) apply together with other more specific norms and treaties, (ii) without either excluding their application or being excluded by it, and (iii) making a useful contribution to the regime governing a range of different situations, either by addressing aspects left open by existing treaties or by contributing to the interpretation of the latter.

## VI. PROSPECTS

It is for States to decide whether the adoption of a GPE, of a nature, scope and content to be discussed, is indeed an idea whose time has come. It is of course very likely that, 50 years from now, arguments against the GPE will look like arguments against the 1966 International Human Rights Covenants, or even the 1948 Universal Declaration on Human Rights or the 1948 Genocide Convention, i.e. as either politically motivated or, at best, as retrograde.

The proposed GPE is not an unrealistic idea. It is, in our view, a logical next step in the evolution of global environmental governance. The adoption of an overarching statement of principles is consistent with the practice in many other areas of international law. One could refer in this regard not only to human rights but also to the law of the sea,<sup>83</sup> trade law,<sup>84</sup> international criminal law<sup>85</sup> or international humanitarian law.<sup>86</sup> The situation is similar at the domestic level. Countries from all corners of the world have adopted general environmental statutes<sup>87</sup> which, despite their diverging scope, have a transversal application to environmental protection and seek to provide some unity and coherence of principle to

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<sup>82</sup> *ibid* para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 106.

<sup>83</sup> See UNCLOS (n 29).

<sup>84</sup> See Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

<sup>85</sup> See Rome Statute on the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

<sup>86</sup> See the four Geneva Conventions, with their two substantive additional protocols: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 8; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>87</sup> See, e.g., Brazil: National Environmental Policy Act (1981); Canada: Canadian Environmental Protection Act (1999); China: Environmental Protection Law (2014); France: Environment Code (2000); India: Environment (Protection) Act, No. 29 of 1986; Indonesia: Law No. 32/2009 of on Environmental Protection and Management (2009); Japan: Environmental Basic Law, Law No. 91/1993 (1993); Korea: Basic Environmental Policy Act, Law No. 4257 (1990); Mexico: General Act on Ecological Balance and Environmental Protection (1988); Singapore: Environmental Protection and Management Act (1999); South Africa: National Environmental Management Act (1998); UK: Environment Act (1995); US: National Environmental Policy Act (1969). The scope of these different framework laws is different, with some providing a detailed and encompassing framework and others only a narrow and procedural one. But the main point is the need for transversality. See Viñuales, *Architecture* (n 41) Chapter 2.

sectoral statutes. In many cases, these general statutes came after sectoral ones,<sup>88</sup> precisely to provide some measure of consolidation and coherence. We do not see why similar considerations would not be relevant for international environmental law.

There is, however, much room for arguing about the nature, scope and content of an overarching instrument and, in offering a framework (Figure 1) to structure the diversity of arguments as well as in fleshing out how a balance between different considerations was struck in the draft project, this article hopes to contribute to such discussions and provide a written record for future generations of how this generation sought to address the problems – largely of its own making – that they will face much more acutely.

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<sup>88</sup> Two contrasting efforts at consolidation are those in France and Germany. In both countries, the fragmentation of sectoral laws led to sustained efforts towards the development of a framework instrument. In France, this process resulted in the adoption of the Environment Code in 2000 (on the need for such a Code, see M Prieur, *Rapport sur la Faisabilité d'un Code de l'Environnement* (Ministère de l'Environnement 1993)). In Germany, these attempts have so far been unsuccessful (see S Gabriel, 'The Failure of the Environmental Code. A Restrospective' (2009) 39 *Environmental Policy and Law* 174). The case of Germany is an exception to the broader general trend towards some degree of consolidation.

## CHAPTER 2

# The Right to a Healthy and Sustainable Environment

David R. Boyd

### **Article 1 - Right to an ecologically sound environment**

*Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.*

## **I. OVERVIEW**

Despite decades of environmental laws and policies, nearly one quarter of the global burden of disease and more than eight million premature deaths annually are caused by exposure to environmental hazards in the air we breathe, the water we drink, the food we eat and the buildings and communities in which we live. Despite the 1992 UN Framework Convention on Climate Change and the 2015 Paris Agreement, global emissions of greenhouse gases continue to rise. Despite the 1992 Convention on Biological Diversity, growing numbers of species are becoming endangered and extinct, as wildlife populations across the planet plummet. These environmental problems have grave consequences for human rights, both today and in the future.

At the heart of the proposed Global Pact for the Environment is the fundamental human right to live in a healthy and sustainable environment (Art.1). At a time in history when humanity faces unprecedented environmental challenges caused by our own actions, adopting a rights-based approach is a potentially transformative means of reversing ecological degradation and catalyzing progress towards a sustainable future. History offers numerous examples of the game-changing power of rights, including the abolition of slavery, the emergence of women's rights, the civil rights movement, the end of apartheid, and the recent recognition of Indigenous rights. While environmental rights (and the associated responsibilities) cannot heal all of our self-inflicted ecological wounds, they could provide the spark required to rethinking our priorities, re-orient our society, and repair our relationship with the beautiful blue-green planet that we call home.

## **II. HISTORICAL DEVELOPMENT**

The key United Nations human rights instruments—the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International

Covenant on Economic, Social and Cultural Rights—do not include the right to a healthy environment. They were drafted and adopted before society became aware of the breadth and depth of the global environmental crisis. Today, however, it is beyond debate that humans depend on a healthy environment in order to lead healthy, dignified, and fulfilling lives. Yet the ecological systems, biological diversity and planetary conditions that are the vital foundations of human existence are under unprecedented stress. Were the Universal Declaration of Human Rights to be drafted today, it is hard to imagine that it would fail to include the right to a healthy environment.

While the concepts of environmental rights and responsibilities have deep roots in many Indigenous cultures, the modern emergence of the right to a healthy and sustainable environment can be traced back to the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 1972. The Declaration's first principle states that "man has the 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 he bears a solemn responsibility to protect and improve the environment for present and future generations." Although not legally binding, the Stockholm Declaration has had an extraordinary influence on environmental law, human rights law, and constitutional law.

Over the past fifty years, the right to a healthy environment has been incorporated into regional human rights agreements, regional environmental treaties, constitutions, and environmental legislation. Governments have made efforts, with varying degrees of success, to respect, protect, fulfil and promote this right. National courts, regional tribunals, treaty bodies, UN special procedures, and many others have contributed to defining the content, scope and parameters of the right to a healthy environment, as well as its relationship with other human rights. Despite this laudable progress, there is not yet a global instrument recognizing that all persons in all places have the right to live in a healthy and sustainable environment. This constitutes a glaring and intolerable gap in the international human rights system, as it means the right is protected for some people but not for others.

### III. MAIN FORMULATIONS

The first regional human rights treaty to incorporate the right to a healthy environment was the African Charter on Human and Peoples' Rights of 1981, which provides that "all peoples shall have the right to a general satisfactory environment favourable to their development" (art. 24).<sup>1</sup> The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), states that "everyone shall have the right to live in a healthy environment" (art. 11, para. 1).<sup>2</sup> The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) refers to "the right of every person

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<sup>1</sup> African Charter on Human and Peoples' Rights, June 27, 1981, in force October 21, 1986, 1520 UNTS 217.

<sup>2</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, Nov. 17, 1988, in force November 16, 1999, 28 ILM 161.

of present and future generations to live in an environment adequate to his or her health and well-being” (art. 1).<sup>3</sup> The Arab Charter on Human Rights of 2004 includes the right to a healthy environment as part of the right to an adequate standard of living that ensures well-being and a decent life (art. 38).<sup>4</sup> In total, one hundred and twenty-four States are parties to these four legally binding treaties that explicitly include the right to a healthy environment.<sup>5</sup>

In addition, the Human Rights Declaration unanimously adopted in 2012 by the ten States in the Association of Southeast Asian Nations incorporates the “right to a safe, clean and sustainable environment” as an element of the right to an adequate standard of living (para. 28 (f)). In September 2018, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) opened for signature. The agreement requires that “each Party shall guarantee the right of every person to live in a healthy environment” (art. 4). Although signed by sixteen States, the Escazú Agreement is not yet in force.

At the national level, in 1976 Portugal became the first country to adopt a constitutional “right to a healthy and ecologically balanced human environment,” followed by Spain in 1978. Since then, the right to a healthy environment has gained constitutional recognition and protection in more than 100 States. No other “new” human right has gained such widespread constitutional recognition so rapidly. Constitutions use a variety of phrases to describe this right. For example, Costa Rica’s Constitution states “All persons have the right to a healthy and ecologically balanced environment” (Art. 50). Fiji’s Constitution states “Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures” (Art. 40(1)). There are at least twelve additional countries (e.g. India, Ireland, Nigeria, and Pakistan) where courts have ruled that the right to a healthy environment is an essential element of the right to life and therefore is an enforceable, constitutionally protected right.<sup>6</sup>

About two thirds of the constitutional rights refer to a ‘healthy’ environment. Alternative formulations include rights to a ‘clean,’ ‘safe,’ ‘favourable,’ ‘wholesome’ or ‘ecologically balanced’ environment, or some combination of these terms. Dozens of States have also incorporated procedural environmental rights in their constitutions, including the rights to receive information, to participate in decision-making about environmental matters, and to obtain access to justice if the right to a healthy environment is being violated or threatened.

Also at the national level, more than 100 States have enacted legislation that specifically articulates the right to a healthy environment, including both procedural and substantive

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<sup>3</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, in force October 21, 2001, 2161 UNTS 447.

<sup>4</sup> Arab Charter on Human Rights, May 22, 2004, in force March 15, 2008, 12 IHRR 893 (2005).

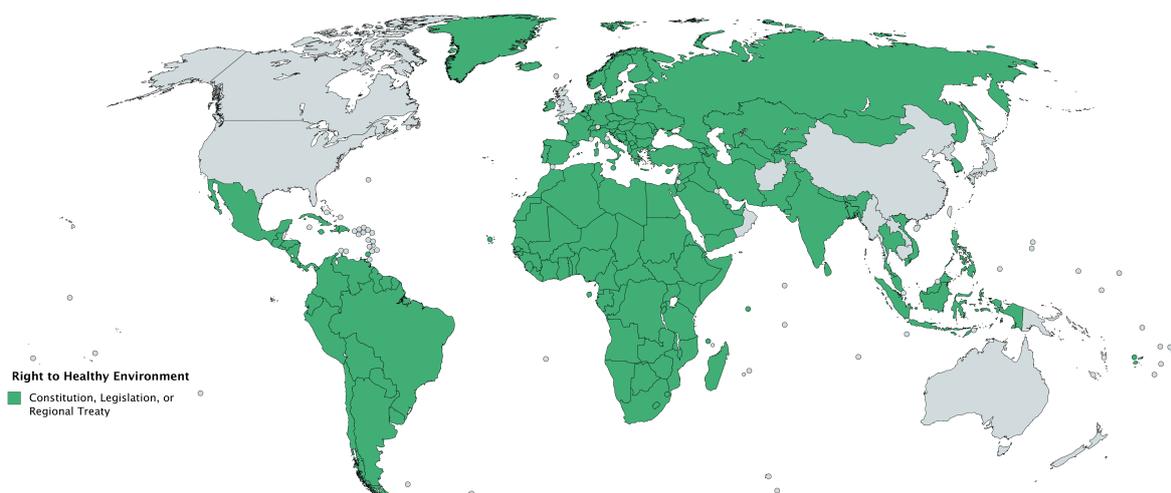
<sup>5</sup> The total number of parties to the African Charter, Aarhus Convention, San Salvador Protocol, and Arab Charter is 128. Subtract four States for total of 124 (UK made a reservation to Aarhus; Palestine has observer status at the UN; and Algeria and Libya are parties to both the Arab Charter and the African Charter).

<sup>6</sup> D.R. Boyd. 2011. “The Implicit Constitutional Right to a Healthy Environment,” *Review of European Community and International Environmental Law* 20(2): 171-79.

elements. For example, the National Environment Protection Act of Bhutan (2007) states that “a person has the fundamental right to a safe and healthy environment with equal and corresponding duty to protect and promote the environmental well-being of the country.” France’s Environmental Code refers to “the individual’s right to a healthy environment” (art. L110-2) and “the recognized right of all to breathe air which is not harmful to health” (art. L220-1), as well as extensive rights related to information, participation and access to justice. The Clean Air Act of the Philippines of 1999 offers detailed provisions setting forth the substantive right to breathe clean air, as well as procedural rights to be informed of environmental hazards, to participate in environmental decision-making, and to bring actions in court to compel the rehabilitation and clean-up of contaminated areas.

In total, at least 155 States already are legally obligated, through treaties, constitutions, and legislation, to respect, protect, and fulfil the right to a healthy environment (see Figure 1). This provides a compelling basis for the United Nations to move expeditiously towards global recognition of the right to a healthy and sustainable environment.

**Figure 1: Legal recognition of the right to a healthy environment**



At both the regional and national levels, human rights commissions and courts have played an active role in defining the scope of the right to a healthy environment and the corresponding obligations upon Governments. The African Commission on Human and Peoples’ Rights produced a ground-breaking decision in 2001 in a case involving pollution caused by the oil industry that violated the Ogoni people’s right to a healthy environment under the African Charter. The Commission determined that Governments have clear obligations “to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”<sup>7</sup> In 2017, the Inter-American Court of Human Rights ruled that

<sup>7</sup> African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, para. 52.

the right to a healthy environment under the Protocol of San Salvador protects individuals and collectives, including future generations, and can be used to hold States responsible for cross-border violations that are within their “effective control.”<sup>8</sup> The Inter-American Court stated that: “Environmental damage can cause irreparable damage to human beings. As such, a healthy environment is a fundamental right for the existence of humanity.” Although the Convention for the Protection of Human Rights and Fundamental Freedoms does not include any explicit references to the environment, the European Court of Human Rights has repeatedly referred to the right to a healthy environment. For example, in a case involving the dangers of using sodium cyanide for gold mining in Romania, the European Court concluded that the State’s failure to take positive steps to prevent an environmental disaster violated the rights to life, private and family life and, more generally, to the enjoyment of a healthy and protected environment.<sup>9</sup> Similarly, the European Committee of Social Rights has interpreted the right to protection of health in the European Social Charter (Art. 11) to include an implicit right to a healthy environment.<sup>10</sup>

#### IV. OPEN QUESTIONS

Scholars across the world have asked: Is the right to live in a healthy environment merely a paper tiger with few practical consequences? Or is this right a powerful catalyst for accelerating progress toward a sustainable future? Proponents argue that recognizing the right to a healthy environment serves as an impetus to:

- Strengthen environmental laws and policies;
- Improve implementation and enforcement;
- Facilitate greater public participation in environmental decision making;
- Increase accountability;
- Alleviate environmental injustices;
- Level the playing field with social and economic rights; and
- Improve environmental performance.

Critics, on the other hand, argue that the right to a healthy environment is:

- Too vague to be useful;
- Redundant because of existing human rights and environmental laws;
- A threat to democracy, because it shifts power from elected legislators to judges;
- Not enforceable;
- Likely to cause a flood of litigation; and

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<sup>8</sup> Inter-American Court of Human Rights, Advisory Opinion, OC-23-17, 15 November 2017.

<sup>9</sup> *Tatar and Tatar v. Romania*, No. 67021/01, 27 January 2009.

<sup>10</sup> European Committee of Social Rights, *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, Decision on the Merits, 6 December 2006, para. 195.

- Likely to be ineffective.

Based on decades of experience in more than 100 States, the evidence is encouraging.<sup>11</sup> Legal recognition of the right to a healthy environment usually spurs governments to review and strengthen environmental laws and policies, improve implementation and enforcement, provide greater opportunities for public participation, and address environmental injustices.

The ultimate test of the right to a healthy environment is whether it contributes to healthier people and healthier ecosystems. The evidence in this regard is strikingly positive. Nations with the right to a healthy environment in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements, and have made faster progress in reducing emissions of sulfur dioxide, nitrogen oxides, and greenhouse gases than nations without such provisions. For example, between 1980 and 2005, wealthy industrialized nations recognizing environmental rights reduced sulfur dioxide emissions by 84.8 percent. In comparison, wealthy industrialized nations that did not recognize the right to a healthy environment reduced emissions by just 52.8 percent during the same time period.<sup>12</sup> An examination of the influence of constitutional environmental rights on the outcomes of the Yale Center for Environmental Law and Policy's Environmental Performance Index (based on a wide range of environmental indicators) concluded: "Ultimately we find evidence that constitutions do indeed matter."<sup>13</sup> A similar study found that constitutional environmental rights are positively related to increases in the proportion of populations with access to safe drinking water.<sup>14</sup>

These benefits are vitally important to vulnerable populations, including women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, minorities and displaced persons. The theoretical problems associated with the right to a healthy environment, for the most part, have not materialized. However, in States where the rule of law is weak, or where civil wars and extreme poverty persist, the right to a healthy environment remains more of an aspiration than a reality. Unfortunately, this is true for human rights in general.

## V. ASSESSMENT

There can be no doubt that the right to a healthy and sustainable environment is a moral right, essential to the health, well-being and dignity of all human beings. However, to ensure that this right is respected, protected and fulfilled, it requires legal protection. Progress has

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<sup>11</sup> D.R. Boyd. 2012. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: University of British Columbia Press.

<sup>12</sup> D.R. Boyd. 2012. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: University of British Columbia Press.

<sup>13</sup> C. Jeffords and L. Minkler. 2016. "Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Performance," *Kyklos* 69(2): 295-334.

<sup>14</sup> C. Jeffords. 2016. "On the Temporal Effects of Static Constitutional Environmental Rights provisions on Access to Improved Sanitation Facilities and Water Sources," *Journal of Human Rights and the Environment* 7(1): 74-110.

been made in this regard over the past four decades. The right to a healthy and sustainable environment is included in regional human rights treaties and environmental treaties binding more than 120 States. It enjoys constitutional protection in more than 100 States and is incorporated into the environmental legislation of more than 100 States. In total, 155 States have already established legal recognition of the right to a healthy and sustainable environment.

Recognition of the right to a healthy environment in a new global treaty would not only be consistent with the state of the law in most of the world, but would also provide a series of vitally important and tangible benefits. It would make this right universal in application, improving on today's patchwork of protection. It would serve as a catalyst for the implementation of stronger measures to effectively respect, protect, fulfil and promote this right. It would reinforce the understanding that protecting human rights requires protection of the environment and at the same time, effective environmental protection depends on the exercise of human rights. It would highlight that environmental protection must be assigned the same level of importance as other interests that are fundamental to human dignity, equality and freedom. It would also help to ensure that human rights norms relating to the environment continue to develop in a coherent, consistent and integrated manner.

On the basis of the extensive experience with the right to a healthy environment and its critical importance in protecting human rights, the current and previous UN Special Rapporteurs on human rights and the environment both recommended that the General Assembly recognize the right in a new global instrument.<sup>15</sup>

Global recognition of the right to a safe, clean, healthy and sustainable environment would be very timely in view of the multiple ecological challenges facing the world. Although this right is not a silver bullet that will solve these problems overnight, it will empower and inspire people throughout the world. The global recognition of this right would fill a glaring gap in the architecture of international human rights. Given the importance of clean air, safe food and water, healthy ecosystems, and a safe climate to the ability of both current and future generations to lead healthy and fulfilling lives, global recognition of the right to a healthy and sustainable environment should be regarded as an essential step forward in humanity's quest for a brighter future.

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<sup>15</sup> UN Doc. A/73/188.

## A General Duty of Care toward the Environment

Francesco Francioni

### **Article 2 – Duty to take care of the environment**

*Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem.*

#### **I. OVERVIEW**

The concept of the duty of care has a complex genealogy in law. In Roman law it identified the private law obligation of the good *pater familias* to provide assistance and support to his dependants, especially minors entrusted to his authority. In civil law, this rather narrow obligation has evolved into the general principle establishing the duty *neminem laedere*, the rational foundation of extra-contractual liability. In common law there is no general obligation of *neminem laedere*, but similar effect may be reached in practice by application of the concept of the “reasonable care”, that is, the reasonable diligence normally exercised by a reasonable man in the specific circumstances of the case.

#### **II. HISTORICAL ORIGIN AND DEVELOPMENT**

In international law, the concept of the “duty of care” is closely related to the concept of ‘due diligence’. Both concepts imply the positive obligation to make every reasonable effort in view of ensuring respect and protection of the rights of others and of general interests of the international community. The early manifestation and applications of the duty of care as a general principle or standard of international law can be found in the field of treatment of aliens and of representatives of foreign states, as well as in the law of neutrality and armed conflict (as shown in the *Alabama* arbitration<sup>1</sup>). Since international law does not recognize a direct responsibility of the State for acts of private persons, the duty of care concept has provided the legal tool for establishing a “breach of duty” in relation to the protection of aliens under international law. This has happened in many cases involving the territorial State’s failure to prevent attacks or injuries to aliens in situations of popular revolt, demonstrations,

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<sup>1</sup> Award of September 14, 1872, RIAA, vol. XXIX, p. 125 ff.

mob violence and public disorder<sup>2</sup>. At the same time, the duty of care has provided the legal basis of the territorial State's responsibility for failure to investigate, prosecute and punish wrongs committed against aliens.<sup>3</sup> With respect to the protection of representatives of foreign States, a general duty of care in the prevention and suppression of injuries to such representatives has been established by the International Court of Justice in the landmark case of the *Hostages in Tehran*<sup>4</sup>. In this case, the Court found Iran in breach of a due care obligation for its failure to prevent and remedy the assault by a mob of militant on the United States embassy and the taking of American citizens as hostages. In the law of armed conflict, besides the already cited seminal case of the *Alabama* arbitration, the positive duty of vigilance has been the object of variable interpretations by the International Court of Justice and the International Criminal Tribunal for Yugoslavia. The former, as is well known, has sternly maintained a narrow interpretation of the duty of vigilance within the strict confines of the "effective control" over the contested activities<sup>5</sup>. The International Criminal Tribunal, instead, has favored the open notion of "overall control" with consequent expansion of the concept and scope of due care.<sup>6</sup>

### III. MAIN FORMULATIONS AND APPLICATIONS IN INTERNATIONAL ENVIRONMENTAL LAW

How has the general duty of care influenced the development of the international law on the protection of the environment? We can safely say that as a general principle of law the duty of care has infiltrated several branches of international environmental law through three distinct stages of development. The first stage coincides with the early history of international environmental law and with the private law framework in which the general duty of care toward the environment was conceptualized and implemented. At this stage, corresponding to the first half of the XXth Century, the duty of care results from the distillation of general principles governing good neighborhood relations between States and entailing a limitation of the general principle of territorial sovereignty in view of ensuring respect and protection of the rights and sovereignty of other States. This transposition of private law concepts and principles onto international law is exemplified by the well-known case of the *Trail Smelter Arbitration* between the United States and Canada.<sup>7</sup> The award found Canada in breach of the duty to prevent damage to the environment of the United States by fumes and noxious emissions originating from a factory located in Canadian territory. There is still disagreement in legal scholarship as to whether this precedent amounts to a

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<sup>2</sup> See, for instance, *Wipperman* case, Moore, Digest, Vol. III, p. 3041 ff.

<sup>3</sup> Among the many relevant cases, we can recall the following cases decided by arbitral tribunals: *Neer*, UNRIAA, vol. IV, p. 60 ff.; *Youmans*, UNRIAA, vol. IV, p. 115 ff.; *Sewells*, UNRIAA, vol. IV, p. 632.

<sup>4</sup> ICJ Reports, 1980, p. 31 ff.

<sup>5</sup> *Military and Para-military Activities in Nicaragua*, Judgment of 27 June 1986, ICJ Reports, 1986, pp. 62-64.

<sup>6</sup> *Tadic* case, judgment of 15 July 1999, IT-94-I-A, para. 145.

<sup>7</sup> Award of 11 March 1941, UNRIAA, vol. III, P. 1906 ff.

recognition of a customary norm prohibiting transboundary pollution<sup>8</sup>. What is clear, however, is that the arbitral tribunal based its decision on “principles of international law”, and more specifically on a principle of due care for the environment of a neighboring country (“Under 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 by fumes in or to the territory of another...”). The limit of this configuration of the general duty of care, which in this case translates into a principle of prevention of harm, is the private law perspective and the narrow context of good neighborhood relations in which the duty is placed. Other forms of “long range” transboundary pollution or contamination are left out of the scope of application of the *Trail Smelter* principle. (This will be later proven with the ‘acid rain’ phenomenon and the Chernobyl catastrophe).

The second stage of the progressive consolidation in international law of the general duty of care toward the environment is marked (not only symbolically) by the adoption of the 1972 Stockholm Declaration on the Human Environment. This soft law instrument transcends the limits of the *Trail Smelter* and marks the evolution of the general duty of care toward the environment in three important directions. First, it introduces the fundamental principle that the environment constitutes an autonomous value of the international community, worth of protection in itself and not because of the economic interests related to the exploitation of its resources. Second, the duty of care is not confined nor incidental to the law governing good neighborhood relations – as in *Trail Smelter* – but becomes an element of the general principle of prevention of environmental harm and extends to areas beyond national jurisdiction like the high seas, the international sea bed and Antarctica. Besides, the legal basis of the attribution to States of wrongful conduct causing damage to the environment is expanded beyond their territorial sovereignty (*Trail Smelter*) to include also States’ “activities within their jurisdiction or control”<sup>9</sup>. This expansion permits an “extra-territorial” reach of the duty of care that the national State of a ship or aircraft, of armed forces stationing abroad, or of a business corporation owes to other States or to the international community as a whole in relation to the foreign activities of such non-state actors that may expose the environment to significant danger. The third stage of the evolution of the duty of care coincides with the passage from a conception of environmental protection framed in a spatial horizon (territory and spaces beyond national jurisdiction) to the contemporary conception of “global environmental goods”. In this conception the environment acquires relevance for the law as a global public good, which cannot be reduced to a specific territory or physical space but needs to be preserved for its intangible character and the vital function it performs in the preservation of the planet’s ecosystem. Needless to recall that such global environmental goods include the ozone layer, the endangered species of flora and fauna, biological diversity,

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<sup>8</sup> For the negative view, see Conforti, *International Law*, XI th ed., Napoli, 2018, p. 239-241; Bodanski, *Customary (and not so customary) Environmental Law*, Indiana Journal of Global Legal Studies, 1995, p. 105 ff. The positive view prevails in the great majority of international law scholarship. See Dupuy and Vinuales, *International Environmental Law*, Cambridge, 2015, p. 51 ff.

<sup>9</sup> Principle 21

and the climate. It is in relation to the operation of the duty of care toward the global environment that international law is facing today its most intractable challenge. Complying with the duty of care toward such global public goods entails the eternal problem of collective action against individual action. In the absence of collective action, individual action involves costs and may hamper economic competitiveness in the face of other recalcitrant actors that free ride on the virtuous efforts of others. At the same time a centralized mechanism of international administration of such global environmental goods is still lacking<sup>10</sup>. This is the reason why in contemporary international law the general duty of care toward the environment needs to be connected to the procedural principle of international cooperation in environmental matters, so as “...to effectively control, prevent, reduce and eliminate adverse environmental effects ...” (Stockholm Declaration, Principle 24).

#### IV. MAIN APPLICATIONS

In its concrete application, in the practice of international and domestic law, the general duty of care toward the environment plays a double role: 1) on the one hand (in the majority of cases), it works as a criterion or standard of interpretation of international obligations arising from applicable treaties and customary law; 2) on the other hand, this duty is as an autonomous principle of law capable of producing new obligations.

##### A. DUTY OF CARE AS AN INTERPRETATIVE CRITERION

An example of the first application is provided by the International Court of Justice judgment in the dispute between Argentina and Uruguay concerning the *Pulp Mills on the River Uruguay*<sup>11</sup>. In this case, the Court used the general principle of due care and due diligence as an interpretative standard of Articles 36 and 41 of the applicable bilateral treaty in order to establish an obligation of the parties to co-ordinate their policies in view of preventing harmful alterations of the ecological equilibrium of the river. This entailed, in the opinion of the Court, a duty of vigilance over the operations of public and private entities in view of preventing harm to the river’s ecosystem<sup>12</sup>.

Another important application of the general duty of care for the environment can be found in the Advisory Opinion of the Sea Bed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS) on the “Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area”<sup>13</sup>. In this opinion, the chamber utilizes the duty of care in order to interpret Article 139 para 1 of the 1982 Law of the Sea Convention so as to derive from this article an obligation of the “sponsoring State” to make any reasonable effort to ensure that persons and entities subject to its jurisdiction or control

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<sup>10</sup> For further elaboration of this point, see Francioni, *Global Collective Goods between Universality and Pluralism*, paper presented at the Annual Meeting of the European Society of International Law, Naples, September 2017. Publication forthcoming. On file with the author.

<sup>11</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14

<sup>12</sup> ICJ Reports, 2010, p. 14 ff., para. 185.

<sup>13</sup> ITLOS, case n. 17, Opinion of February 1, 2011.

carry out activities in the international sea bed area in conformity with the rules set out in the Convention. This duty does not amount to an obligation of result, but only to an obligation of conduct whose nature and scope is variable in relation to the scientific and technological capabilities of the sponsoring State as well as the level of risk posed to the environment by such activities.

ITLOS has adopted the same approach – this time in plenary – in a subsequent Advisory Opinion of April 2015 on the flag State obligations in the event of illegal, unreported and unregulated fishing in the exclusive economic zone of other States. This time, the general duty of care for the marine environment and the sustainable use of its biological resources provided the criterion of interpretation of Article 192 (general obligation to protect the marine environment) and Article 62 (on the obligation to respect conservation measures and fisheries conditions established by the coastal State)<sup>14</sup>.

In arbitral practice the duty of care for the environment has provided the key interpretative tool to establish the responsibility of China in the case of the *South China Sea* decided by an arbitral Tribunal established under Annex VII to the Law of the Sea Convention on 12 July 2016<sup>15</sup>. In particular, this duty was held to amount to a true obligation of vigilance by the State “... in preventing its nationals from fishing in the exclusive economic zone of another” in violation of Article 58, 192 and 194 of the Law of the Sea Convention<sup>16</sup>.

## B. DUTY OF CARE AS A SOURCE OF CUSTOMARY LAW OBLIGATIONS

The most important judicial statement with respect to the impact of the due care principle on customary international law on the protection of the environment is still to be found in para. 29 of the International Court of Justice Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* of July 1996<sup>17</sup>. The Court recognized in this paragraph that:

‘The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national jurisdiction is now part of the corpus of international law relating to the environment’<sup>18</sup>.

This formulation of a ‘general obligation’ to ensure respect for the environment is at the heart of the principle of prevention of environmental harm enunciated in Principle 21 of the Stockholm Declaration. This principle will be confirmed in the subsequent jurisprudence of the International Court of Justice, especially in the *Gabcikovo-Nagymaros* case<sup>19</sup> and in the already discussed *Pulp Mills* case. In the latter case, the general principle of due care for the environment is further expanded to justify the finding:

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<sup>14</sup> ITLOS, case n. 21, Opinion of April 3, 2015, paras. 124–132.

<sup>15</sup> CPA, *In the Matter of the South China Sea Arbitration (Philippines v China)*, case n. 2013-19.

<sup>16</sup> See paras. 744 and 956 of the Award.

<sup>17</sup> ICJ Reports, 1996, p. 226 ff.

<sup>18</sup> Ibid

<sup>19</sup> ICJ Reports, 1997, p. 38 ff.

‘in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement *under general international law* to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse effect in a transboundary context, in particular, on a shared resource.’<sup>20</sup>

This principle has been confirmed in subsequent judgments of the International Court of Justice, in particular, in the two judgments concerning the disputes between Costa Rica and Nicaragua over the San Juan river <sup>21</sup>.

Besides the above case law, it is worth recalling that in arbitral practice the general duty of care toward the environment and its corollary principle of prevention of harm has been interpreted so as to create a new obligation to take care also of the environmental implications also of extraterritorial activities of the State. In the *Iron Rhine* case between Belgium and the Netherlands, concerning the environmental impacts of the exercise of the right of passage of Belgium within the territory of the Netherlands by a modernized railway, the arbitral Tribunal held that:

‘Where a state exercises a right under international law within the territory of another state, considerations about environmental protection also apply. The exercise by Belgium’s right of transit... may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request’<sup>22</sup>

## V. ASSESSMENT

The general duty of care toward the environment is inseparable from the general principle of “*neminem laedere*” and is closely linked to the procedural principle of due diligence governing state responsibility.

The international practice of courts and arbitral tribunals has given increasing prominence to this general duty, both, as a criterion for an expansive interpretation of general provisions of treaties and customary law, and as a conceptual tool to forge new obligations under general international law.

The ample use made in international practice of the duty of care should not hide the difficulties that remain in its application in the international law on the protection of the environment. The main difficulty remains the identification of the variable elements that the judge or the arbiter need to evaluate in order to establish whether or not a violation of the duty has actually occurred in the concrete case. These elements, in the field of environmental law, are becoming more and more complex: It is not only a question of whether the State has made all reasonable efforts to prevent an environmental damage; one will have to take into

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<sup>20</sup> See para 204 of the judgment cited *supra* note 11 (emphasis added)

<sup>21</sup> ICJ Reports, 2015, p. 84 ff, p. 706.

<sup>22</sup> Award of 24 May 2005.

account the foreseeability of the damage, the degree of risk posed by the disputed activity, the level of scientific and technological competence of the State in preventing or effectively responding to a given environmental hazard or harm. In spite of these difficulties, the consolidation of the general duty of care for the environment in the practice of international law has the advantage of replacing the old-fashioned theory of “fault” - based on the unfathomable psychological element of the international wrongful act – with a theory of objective eco-standards that form the substance of primary obligations in modern international environmental law.

## Sustainable Development and Integration

Virginie Barral and Pierre-Marie Dupuy

### **Article 3 – Integration and sustainable development**

*Parties shall integrate the requirements of environmental protection into the planning and implementation of their policies and national and international activities, especially in order to promote the fight against climate change, the protection of oceans and the maintenance of biodiversity. They shall pursue sustainable development. To this end, they shall ensure the promotion of public support policies, patterns of production and consumption both sustainable and respectful of the environment.*

### **I. OVERVIEW**

The principle of sustainable development is undeniably a cornerstone of international environmental law that has shaped the field since at least the 1980's. Its most accepted definition is that of development that “meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>1</sup> Rooted in anthropocentrism, the notion originally stems from the realisation that environmental degradation and economic development are intimately linked and interdependent. It stems from the recognition that a sound environmental base is paramount for sustainable economic development (including the acknowledgment that environmental degradation fuels poverty) and that conversely patterns of development based principally on economic growth are no longer sustainable in view of the impairment of the sound environmental base they lead to. Despite legitimate criticism that the definition offered by the Brundtland Commission is too vague to ascertain sustainable development's conceptual or legal content, it is generally accepted that sustainable development, following Rio+5 and the World Summit for Sustainable development,<sup>2</sup> must be understood in terms of the reconciliation and mutual support between three interdependent pillars: economic development, environmental protection and social development. Crucially, such reconciliation and mutual support is to be achieved through a process of integration of these concerns. The principle of integration, formulated at principle 4 of the *Rio Declaration* which posits that “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in

<sup>1</sup> Report of the WCED (Brundtland Commission), *Our Common Future* (1987), 51.

<sup>2</sup> See GA Res S-19/2, 28 June 1997 and A/CONF.199/200, 2002.

isolation from it”,<sup>3</sup> thus represent the main means by which sustainable development is to be achieved.

## II. HISTORICAL DEVELOPMENT

Whilst the modern understanding of the concept of sustainable development has been fashioned mainly over the course of two decades (the 1980s and the 1990s), the roots of the idea of sustainability can be traced to the 19<sup>th</sup> century both at the domestic and international levels.<sup>4</sup> Crucially however, it is towards the end of the 20<sup>th</sup> century that its global and inescapable dimension starts to take hold. In 1972, at the Stockholm Conference on the Human Environment, the international community acknowledged the intimate connection between environmental degradation and economic development and already advocated for an integrated approach in the management of resources.<sup>5</sup> In the following years, various initiatives within and outside of the United Nations worked on deepening this link to promote a renewed conception of the relationship between environmental protection and economic development, and offer a new conception of development altogether.<sup>6</sup> The phrase “sustainable development” is coined first in the *World Conservation Strategy*,<sup>7</sup> but it is the Brundtland Commission in its report that proposes it is adopted as a new societal model. These contributions were significant as their call for a renewed model of economic and social development was one that would break free from traditional economic growth paradigms and would instead integrate environmental concerns into development choices. And it is to this renewed societal model that the international community pledges to commit to at Rio in 1992 with the adoption of the *Rio Declaration on Environment and Development*, a legally precise, yet non-binding document, laying out the legal contours of a path to sustainable development.<sup>8</sup> If the *Rio Declaration* remains the reference point for a legal evaluation of the meaning of sustainable development, it is five years later, at Rio+5 that the social pillar was added into the equation. This now settled conception that environmental protection, economic development and social development constitute the three interdependent dimensions of sustainable development was later confirmed and generalised at the World Summit for Sustainable Development in 2002.<sup>9</sup> This follow-up summit, together with Rio+20 in 2012<sup>10</sup> and the 2030 Agenda for sustainable development of 2015 which sealed the adoption of the 15 Sustainable Development Goals,<sup>11</sup> all focused mainly on moving from pledges to action

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<sup>3</sup> *Rio Declaration on Environment and Development*, 1992, A/CONF.151/26 (vol. I).

<sup>4</sup> See German forestry principles discussed in Sand, ‘Sustainable Development – Of Forests, Ships and Law’, 37 *Environmental Policy and L* (2007) 2, and *Pacific Fur Seal Arbitration* of 1893 RIAA, VOLUME XXVIII pp. 263-276.

<sup>5</sup> On the integrated approach see for example principle 13, *Stockholm Declaration on the Human Environment*, A/CONF.14/48/Rev. 1.

<sup>6</sup> World Charter for Nature (UN Doc. AG/RES/37/7 1982); World Conservation Strategy (IUCN 1980); World Commission on Environment and Development (Montreal 1987).

<sup>7</sup> See supra.

<sup>8</sup> For a commentary see J. Viñuales (eds), *The Rio Declaration on Environment and Development: A Commentary*, OUP, 2015.

<sup>9</sup> See supra.

<sup>10</sup> United Nations Conference on Sustainable Development (UN Doc. A/CONF.216/L.1 2012).

<sup>11</sup> Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

and on developing the means for making sustainable development a reality. They thus do not upset, beyond the rebalancing of the notion to include its social dimension, the otherwise carefully weighted balance obtained at Rio in 1992. That the Rio Conference was a turning point for sustainable development and its integration principle is also attested to by the fact that it has paved the way to the principle's dissemination in binding international instruments. The principle of sustainable development indeed finds expression in more than 300 treaties and on more than 200 occasions its inclusion features in the operative part of the convention. It is also noteworthy that in the vast majority of cases, sustainable development is viewed as an objective to be achieved.<sup>12</sup>

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Considering that sustainable development features in an extremely wide number of international instruments, the focus will be on its formulations that are either most useful or most significant. In terms of international treaties, sustainable development and integration have been catered for in all three conventional regimes that have derived from the Rio process. They thus appear at article 8(e) of the *Convention on Biological Diversity* which states that “each contracting party shall, as far as possible and as appropriate: (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas” whilst article 6(2) requires parties to “integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies”. Equally, the *Convention on Drought and Desertification* insists on the relevance of integration and its article 1 states that “The objective of the Convention is to combat desertification and mitigate the effects of drought ... in the framework of an integrated approach ... with a view to contributing to the achievement of sustainable development in the affected areas.” But the prominence of sustainable development is particularly salient in the climate change regime. Viewed as an objective that the parties have the right to and should promote in article 3(4) of the *UNFCCC*, that same provision insists that policies and measures to protect the climate system against human induced change should be “integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change”. The *Kyoto Protocol* lists a number of policies that parties shall adopt in order to promote sustainable development.<sup>13</sup> And sustainable development informs most provisions of the *Paris Agreement* where the measures to be adopted by parties must be taken either in the context of sustainable development<sup>14</sup> or in order to promote or foster it.<sup>15</sup> These are certainly the most significant agreements in which sustainable development and integration have been incorporated not only because of their emblematic nature in international environmental law

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<sup>12</sup> This is the case in no less than 265 treaties. See Barral, *Le développement durable en droit international. Essai sur les incidences juridiques d'une norme évolutive*, Bruylant, 2015, 215-233.

<sup>13</sup> Kyoto Protocol article 2(1).

<sup>14</sup> See articles 2(1), 4, 6(8).

<sup>15</sup> See *ibid*, articles 6(1), 6(2), 6(4), 6(9), 7, 8, 10(5).

but also because of their global scope and the non-reciprocal nature of the obligations they lay out.

A couple of formulations included in treaties of more modest scope also deserve to be noted for their precision in either defining sustainable development or providing guidelines regarding its legal operation. The first is article 3(1)(a) of the 2002 *Antigua Convention for Cooperation in the Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* which provides:

“Sustainable development” means the process of progressive change in the quality of life of human beings, which places it as the centre and primordial subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and the full participation of people in peaceful coexistence and in harmony with nature, without prejudice to and ensuring the quality of life of future generations.’

This is undeniably a complete definition, reflecting the anthropocentric nature of the notion, its evolving character and the interests of future generations, the integration of its three pillars and an added recognition of the importance of cultural diversity and participation. The second formulation of note is to be found in article 4 of the *Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* which lays out the general obligations of the parties. Its third paragraph enjoins the parties to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area and lists the measures and principles that parties must adopt and respect to that effect. Alongside the precautionary principle, the polluter pays principle, the duty to undertake environmental impact assessments and the promotion of cooperation the States must also “commit themselves to promote the integrated management of the coastal zones, taking into account the protection of areas of ecological and landscape interest and the rational use of natural resources.” This integrative approach is also particularly frequent in treaties governing areas where both socio-economic as well as environmental considerations naturally arise, such as the management of international watercourses, lakes, regional seas, or mountain areas. These will indeed necessarily involve a balancing between the economic uses of these areas and the preservation of their often fragile ecosystem. An example is the *Protocol on the Integrated Coastal Zone Management in the Mediterranean* which dwells upon the necessary elements to an integrated management approach (Part II) and defines the necessary instruments for its achievement (Part III).<sup>16</sup>

Sustainable development and integration in addition find expression in a range of influential non-binding instruments. Whereas the *Rio Declaration* remains the reference point for the legal characterisation of sustainable development where it appears more than 12

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<sup>16</sup> 21 January 2008, (2009) OJ 434/19, arts 19 and 21.

times,<sup>17</sup> Agenda 21 indicates that States should: “improve the processes of decision-making so as to achieve the progressive integration of economic, social and environmental issues in the pursuit of development that is economically efficient, socially equitable and responsible and environmentally sound.”<sup>18</sup> Prominent texts also include, beyond the *Global Pact White Paper*, the *IUCN Draft International Covenant on Environment and Development* of 2015 whose article 17, according to the draft’s commentary, provides substantive and procedural guidance for giving effect to the concept of sustainable development.<sup>19</sup> It states that:

‘(1) Parties shall pursue integrated policies aimed at eradicating poverty, encouraging sustainable consumption and production patterns and conserving biological diversity and the natural resource base as overarching objectives of, and essential requirements for, sustainable development. (2) Parties shall, at all stages and at all levels, integrate environmental conservation into the planning and implementation of their policies and activities giving full and equal consideration to environmental, economic, social and cultural factors’

It is worth finally noting the contribution of the International Law Commission. Its article 7 (general obligation to cooperate) of the 2008 *Draft Articles on the Law of Transboundary Aquifers* counts sustainable development amongst the general principles on the basis of which parties shall pursue cooperation, alongside sovereign equality, territorial integrity or good faith, thus underlining its fundamental character.

#### IV. OPEN QUESTIONS

If sustainable development is rarely associated with the term rule it is frequently referred to as a concept, a principle, and sometimes as a new branch of international law altogether.<sup>20</sup> Whether sustainable development falls into one category or another is not without significance. The core distinction between rules, principles and concepts lies in their degree of abstraction and generality,<sup>21</sup> rather than in their capacity to express legal values and to inform conduct. Yet sustainable development seems to straddle these various classifications, at least in academic discourse.<sup>22</sup> Its most frequent academic formulation however remains that of a concept or a principle. In judicial practice, whereas the International Court of Justice has initially seen in it a concept in the *Gabčíkovo-Nagymaros Project case*<sup>23</sup> and more recently an objective in the *Pulp Mills on the River Uruguay case*,<sup>24</sup> a new milestone was reached when the

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<sup>17</sup> See principles 2–7, 10, 11, 13, 15, 17–19.

<sup>18</sup> Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol. I), Agenda 21, 9–480 (‘Agenda 21’), 96, para 8.4.

<sup>19</sup> See *Draft International Covenant*, IUCN Environmental Policy and Law Paper No. 31 Rev. 4, p. 72.

<sup>20</sup> Sands and Peel, *Principles of International Environmental Law*, CUP, 2012 at 10; Cordonier Segger and Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, Nijhoff, 2005, ix.

<sup>21</sup> Dupuy and Viñuales, *International Environmental Law*, 2<sup>nd</sup> ed., CUP 2018, 59. These authors further consider concepts as guiding norms that are implemented by principles, which, in turn, are realised by rules.

<sup>22</sup> For example Dupuy and Viñuales label it a concept see supra at 91, Sands and Peel a principle, see supra at 217.

<sup>23</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports (1997) 7, para 140.

<sup>24</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports (2010) 14, para 177.

arbitral Tribunal, in the *Indus Waters Kishenganga case*, referred to it as a principle.<sup>25</sup> Ultimately, even expressed as a concept, sustainable development can be characterised as a legal principle, although it may well represent the most abstract formulation of such legal principles. Integration for its part more naturally falls into the category of principles, especially as it is classed as such in the *Rio Declaration*. It is equally how it is viewed by the arbitral tribunal in the *Iron Rhine Railway case* which also advanced that integration is now required by international law.<sup>26</sup> Interestingly the tribunal in the *Indus Waters Kishenganga case* also concluded that reconciling economic development with the protection of the environment is a requirement under customary international law.<sup>27</sup> Despite academic prudence, there is thus reasonably firm indications from case-law that sustainable development and integration now reflect customary international law principles.

Whilst there is little disagreement that sustainable development operates as an objective to be achieved through the integration of economic, environmental and social concerns, what the process of integration of these concerns entails is still the subject of debate. Some argue that the principle of integration lays down primarily procedural duties, the obligation to take account of these concerns in the process of decision-making, without however necessarily having an impact on the outcome.<sup>28</sup> However, arguably, a purely formal process of integration whereby environmental considerations are simply ‘taken into account’ within the development decision-making process with no actual impact on the decision outcome may well fall short of being considered a sufficient effort in striving to achieve sustainable development. If the principle of integration were to have solely a procedural content, the *status quo* may be forever perpetuated and progress towards sustainable development never be achieved. On the contrary an overview of key instruments reveals that the process of integration of economic, environmental and social concerns is meant to lead to their reconciliation and mutual support, in order to pursue sustainable development. This is acknowledged by the tribunal in the *Iron Rhine Railway case* which posits that: “emerging principle[s] now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as 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.”<sup>29</sup>

## V. RECOMMENDATIONS

In line with the conclusion that there are strong indicators that sustainable development and integration reflect principles of customary international law, as well as with the Global Pact

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<sup>25</sup> *Indus Waters Kishenganga (Pakistan v India)*, Partial award, February 2013, para 450, available at <https://www.pcacases.com/web/view/20>.

<sup>26</sup> *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35, para 59.

<sup>27</sup> *Indus Waters Kishenganga (Pakistan v India)*, Final award, December 2013, para 87, available at: see supra.

<sup>28</sup> See eg Boyle, A. and Freestone, D., ‘Introduction’, in Boyle, A. and Freestone, D. (eds), *International Law and Sustainable Development. Past Achievements and Future challenges* (Oxford University Press 1999), 1–18, 10–11, 17.

<sup>29</sup> See supra para 59.

project's choices relating to the conciseness of the instrument and proposing a formulation emphasising its enduring character, we would recommend a formulation of sustainable development and integration that reflects their general applicability as well as their internal relationship: the principle of integration representing the main process by which the objective of sustainable development is to be pursued. This would require referring first to sustainable development as the core objective and then laying out the duty of integration as the means to achieve the objective. We would also recommend removing the reference to climate change, the protection of the oceans and the maintenance of biodiversity as this would restrict the general applicability of the article and it remains unclear what global environmental challenges are yet to emerge. We would additionally recommend removing the reference to public support policies and patterns of production and consumptions. This is because the first element does not sufficiently reflect current debates on sustainable development and integration and the second element gives undue weight to one of the multiple facets of the requirements of sustainable development. As indicated in the section on main formulations, the *Rio Declaration* connects sustainable development to 12 of its principles beyond integration and patterns of production and consumption. A formulation in line with the above recommendations could thus read as follows:

#### Sustainable development and integration

Parties shall pursue sustainable development. To this end they shall integrate economic, social and environmental concerns with a view to ensure their reconciliation and mutual support into the planning and implementation of their policies as well as domestic and international activities.

## Intergenerational Equity

Edith Brown Weiss

### Article 4 – Intergenerational equity

*Intergenerational equity shall guide decisions that may have an impact on the environment. Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.*

### I. OVERVIEW

The principle of intergenerational equity is based on the concept that each generation holds the Earth in common with other generations, past and future, with obligations to protect it for future generations and rights to benefit from it. It is based on a fundamental norm of fairness between generations in the conservation and use of the environment and its natural resources. It provides a foundation for sustainable development, but it extends beyond it.

Intergenerational equity has deep roots in diverse cultural and religious traditions, including the Judeo-Christian, Islamic, and Asian non-theistic traditions. It has roots in Islamic law, civil law, common law, customary law in African and other communities, and Native American traditional law. In international law, the principle builds upon the use of equity, initially formulated by Aristotle and elaborated by Grotius and others, who viewed equity as applying to cases not covered by universal law. In the latter half of the twentieth century, equity was invoked as a basis for standards for allocating and sharing resources and for distributing the burdens of caring for the environment and its resources.

### II. HISTORICAL DEVELOPMENT

The principle of intergenerational equity has deep historical roots in law. Its recognition as a separate principle has accelerated within the last few decades. The principle is reflected in treaties and other international agreements, in nonbinding legal instruments, in international judicial decisions, in many national constitutions, and increasingly in judicial judgments at the national or sub-national levels and in decisions of environmental courts in countries with such institutions. The Report of the UN Secretary-General in 2013 on *Intergenerational Solidarity and the Needs of Future Generations* confirmed the existence of a principle of intergenerational equity.<sup>1</sup>

<sup>1</sup> UN Secretary General, *Intergenerational Solidarity and the Needs of Future Generations: Report of the Secretary-General*, UN Doc. A/68/322, 15 August 2013.

## A. INTERNATIONAL AGREEMENTS AND OTHER LEGAL INSTRUMENTS

The United Nations Charter invokes the welfare of both present and future generations. The preamble provides: “We the peoples of the United Nations, determined to save succeeding generations from the scourge of war...” The 2015 Paris Agreement addressing climate change, acknowledges in its Preamble that climate change is a common concern of humankind and provides that “[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on ...intergenerational equity.”

International agreements early in the twentieth century for conserving certain species are concerned with sustainable harvesting and thus with ensuring that the species exist for future generations. These include for marine animals the 1911 Treaty for the Preservation and Protection of Fur Seals, the 1931 and the 1949 Conventions for the Regulation of Whaling, and for Birds and other species, the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa, the 1902 Convention for the Protection of Birds Useful to Agriculture, the 1916 Canada- United States Convention for the Protection of Migratory Birds, and the 1936 Mexico-United States Convention for the Protection of Migratory Birds and Game Animals.

Regional Conventions concerned with more general conservation of natural resources also reflect concern with ensuring that nature is robust for future generations. These include the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the 1968 African Convention on the Conservation of Nature and Natural Resources, and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources. At least three treaties in the 1970s explicitly provide for protecting natural and/or cultural resources for future generations: the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, and 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. References to future generations also appear in the 1992 UN Framework Convention on Climate Change, 1992 Convention on Biological Diversity, 1998 UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and 1992 UN ECE Convention on the Protection and Use of Transboundary Waters and Lakes. The last Convention specifically provides in Article 2.5 (c) that “Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.”

Other legal instruments that are not binding have been key in developing a principle of intergenerational equity. The United Nations Stockholm Declaration on the Human Environment references our obligation to future generations in several provisions. Later instruments carry this forward, including the Rio Declaration on Environment and Development, the UN World Charter for Nature, the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and

Sustainable Development of All Types of Forests, and Agenda 21, which acknowledged the proposal to appoint a guardian for future generations.

In 1995 the IUCN proposed a Draft Covenant on Environment and Development that explicitly enunciated a principle of intergenerational equity. Two years later, UNESCO adopted a Declaration on the Responsibilities of Present Generations Toward Future Generations. The Declaration in part grew out of the Cousteau Society initiative for a Bill of Rights for Future Generations. In 2001, the Cousteau Society formally presented to the UN Secretary-General a Bill of Rights for Future Generations in the form of draft UN General Assembly Resolution and a petition with more than 9 million signatures supporting the document.

## B. INTERNATIONAL JUDICIAL DECISIONS

International tribunals have considered intergenerational equity in some cases, but their judgments have not so far been based on the principle of intergenerational equity. Individual judges have noted the importance of the principle. In the International Court of Justice, the late Judge Weeramantry wrote in 1993 that principles of intergenerational equity “can build upon the increasing use by the International Court of Justice of equitable principles to achieve a result that the Court views as fair and just.”<sup>2</sup> In the 1995 Nuclear Tests Case, he referred to the principle of intergenerational equity as “an important and rapidly developing principle of contemporary environmental law.”<sup>3</sup> More than a decade later, in the Pulp Mills on the River Uruguay case, Judge Cançado Trindade discussed intergenerational equity in extensor and noted that “[n]owadays, in 2010, it can hardly be doubted that the acknowledgment of intergenerational equity forms part of conventional wisdom in international environmental law.”<sup>4</sup> In the subsequent Whaling in the Antarctic case, he concluded in his Separate Opinion that “intergenerational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law.”<sup>5</sup>

The Inter-American Court of Human Rights has also considered intergenerational equity in a number of cases that address the rights of indigenous peoples and the transmission of their cultural heritage and ancestral lands to future generations. The principle of intergenerational equity underlies the judgments.

## C. NATIONAL JUDICIAL DECISIONS

National and sub-national courts have increasingly referred to intergenerational equity or explicitly to a principle of intergenerational equity in their decisions. They have invoked the

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<sup>2</sup> Maritime Delimitation in the Areas between Greenland and Jan Mayen (Den. v. Nor.), Judgment, 1993 I.C.J. Rep. 38, 277 (June 14) (concurring opinion by Weeramantry, J.).

<sup>3</sup> Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1995 I.C.J. Rep. 288, 341 (Sept. 22) (dissenting opinion by Weeramantry, J.).

<sup>4</sup> Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment 2010 I.C.J. Rep. 14, ¶ 122 (Apr. 20) (separate opinion by Cançado Trindade, J.).

<sup>5</sup> Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment 2014 I.C.J. Rep. 226, ¶ 47 (Feb. 6) (separate opinion by Cançado Trindade, J.).

principle in two ways: in procedural matters, such as granting standing to representatives of future generations; and in substantive matters, as by finding that certain actions threaten the well-being of future generations and therefore require that certain actions be taken.

National and lower level courts in more than twenty countries have invoked a principle of intergenerational equity or discussed the interests of future generations in reaching their decision. Sometimes the decisions are based upon constitutional provisions or legislative provisions. In other cases, the decision incorporates the principle of intergenerational equity without relying upon either.

The judicial decisions fall within four main categories: threats to natural resources of fauna and flora; pollution; administrative challenges to construction; and challenges to permits for mining projects. The last category has become increasingly significant.

In August 2017, the Supreme Court of India issued an historic judgment regarding permits for a large-scale mining case in the State of Odisha. The Court explicitly discussed the principle of intergenerational equity and required the Government of India to develop a mining policy that addressed intergenerational equity. The draft policy includes a section entitled “Intergenerational Equity,” to address the long-term equity issues in mineral mining projects.<sup>6</sup> In mining cases in the Indian state of Goa, the Supreme Court, referencing intergenerational equity, required as a condition of a permit mine that a trust fund be established for the benefit of future generations. More than \$13 million has been deposited in the Permanent Fund.<sup>7</sup>

Supreme Courts, High Courts, and sub-national courts in other countries, particularly in Brazil, Colombia, and South Africa, have also invoked a principle of intergenerational equity. In the most recent case in Colombia, the Supreme Court ordered the Government to develop a pact for the Amazon region of the country that would consider the region’s importance to future generations.<sup>8</sup>

The number of cases in the Supreme Court and lower courts of countries concerned with intergenerational equity started to rise significantly in 2004 and the years thereafter. The recent emergence of cases concerned with climate change, whether in the United States, the Netherlands, Germany, Norway, Uganda or other countries, implicitly reflects concerns with intergenerational equity and the well-being of future generations. These cases are likely to increase as we confront the potentially harrowing scenarios of climate change.

Many countries have now established Environmental Courts and Tribunals, which are distinct from a country’s judicial courts. As of 2016, 44 countries had 1200 Environmental Courts and Tribunals. Many countries have more than one such court. India, for example, has four zones of Environmental Courts, with a principal bench in New Delhi. Chile has several distinct sections. As of November 2017, the Environmental Courts in India had disposed of 19,214 cases. Research into the judgments of the courts indicates that in many cases the courts have applied intergenerational equity. India’s statute for its Environmental Courts

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<sup>6</sup> *Common Cause v. Union of India & Ors*, SC WP 2014, Judgment (2 August 2017).

<sup>7</sup> *Goa Foundation v. Union of India & Ors*, 435 SCC 2012, Judgment (21 April 2014).

<sup>8</sup> Corte Constitucional [C.C.][Constitutional Court] 8 febrero 2018, Sentencia C-035 de 2016 (Colom.).

explicit includes intergenerational equity as a basis for decision. The developments with Environmental Courts and Tribunals illustrates increasing acceptance of the importance and relevance of intergenerational equity to environmental judgments at local levels.

#### D. CONSTITUTIONAL PROVISIONS

The Constitutions of more than 55 countries now include provisions relating to future generations. Many provide only for obligations to future generations, but some also reference rights. Several refer only to protecting the cultural legacy. The number of countries adopting provisions relating to future generations in their constitutions has risen significantly within the last few decades. As of 1990, only 12 countries had constitutions with provisions for future generations. As of 2016, the Constitutions of 55 countries did so. The inclusion of future generations in Constitutions started to increase in 1992, at the time of the Rio Conference on Environment and Development. The Constitutional provisions implicitly reflect the increasing recognition of the importance of intergenerational equity and provide a basis for cases to be brought based upon constitutional guarantees. National courts have, however, invoked other constitutional provisions also to consider future generations.

### III. FORMULATIONS OF THE PRINCIPLE

The proposed Global Pact for the Environment formulates the Principle of Intergenerational Equity as follows: “Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.” The World Commission on Environment and Development, which preceded the 1992 Rio Conference on Environment and Development, defined sustainable development as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” This general language has been repeated in many legal documents. It reflects the 1972 Stockholm Declaration on the Human Environment, which provided that “[m]an...has a solemn responsibility to protect and improve the environment for present and future generations” and that “[t]he natural resources of the earth...must be safeguarded for the benefit of present and future generations.”

The 1988 Goa Guidelines on Intergenerational Equity, drafted by the advisory body for the project on International Law and Intergenerational Equity, with the United Nations University, provide that “all members of each generation of human beings, as a species, inherit a natural and cultural patrimony from past generations, both as beneficiaries and custodians,” and that “the right of each generation to benefit from and develop this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations.”

The 1997 UNESCO Declaration on the Responsibilities of the Present Generations Toward Future Generations provides in Article 1 that “[t]he present generations have the responsibility of ensuring that the needs and interests of present and future generations are

fully safeguarded.”<sup>9</sup> Subsequent articles in the Declaration articulate the responsibilities to future generations.

As noted in the 2013 UN Secretary-General’s report on Intergenerational Solidarity and the Needs of Future Generations, the “fundamental principle of intergenerational equity” has been formulated as “each generation should bequeath to its successors a planet in at least as good a condition as that generation received it.” As noted in the report, this general principle has been fleshed out in three elements: conservation of options, conservation of quality, and conservation of access. Conservation of options provides that “[e]ach generation should be required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations for solving their problems and satisfying their own values. Conservation of quality is defined as “[e]ach generation should be required to maintain the quality of the planet so that it is passed on in no worse a condition than that in which it was received. Conservation of access is defined as “[e]ach generation should provide its members with equitable rights of access to the legacy of past generations.” As part of the elements, each generation is entitled to comparable options, quality, and access as past generations.

#### **IV. ISSUES RELATED TO THE PRINCIPLE**

##### **A. REPRESENTATION OF FUTURE GENERATIONS**

Future generations are mostly not represented in the decisions we take today, even though the decisions we make may have enormous consequences for the health of the Earth and for their well-being. One of the most important and yet contentious issues is how we can give representation to future decisions. Who speaks for them? Various proposals have been advanced, ranging from Global Guardians for future generations under the United Nations, Ombudsmen for Future Generations, Commission for Future Generations, guardian *ad litem* in judicial proceedings, and children as representatives of future generations to proposals focused on the private sector (such as interests of shareholders in companies) or designated nongovernmental organizations.

##### **B. RELATIONSHIP OF RIGHTS AND OBLIGATIONS**

The principle of intergenerational equity imposes responsibilities on the present generation toward future generations. Whether it conveys rights as well as responsibilities is not well established. A right is an interest that is juridically protected and always associated with a duty. A duty is not always associated with a right. If future generations have rights, the present generation has correlative obligations. In the context of future generations, one can argue that the obligations of the present generation to future generations constitute obligations for which there are no correlative rights in that specific persons to whom the right attaches to do not yet exist. The rights of future generations are more nearly analogous to

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<sup>9</sup> UNESCO Declaration on the Responsibilities of the Present Generations Toward Future Generations, 12 November 1997, UNESCO General Conference, 29<sup>th</sup> Sess., <http://www.unesco.org>

group rights that protect interests held in common, in this case by future generations. The rights represent valued interests that attach to future generations, which representatives of future generations protect.

Intergenerational rights could be viewed as part of international human rights law. While the instruments do not explicitly reference future generations, their rights could be included within rights guaranteed in specific instruments. For example, economic, social, and cultural rights, such as rights to food and to water, could be regarded as articulating the rights of both present and future generations. A right to environment would implicitly include rights of both present and future generations. As future generations becoming living generations, they are entitled to enjoy these rights.

### C. DETERMINING THE INTERESTS OF FUTURE GENERATIONS

How do we determine the interests of future generations? While general formulations set the stage for implementing the principle, the interests of future generations are well determined in specific settings, such as nuclear wastes, mining, deforestation, fossil aquifers, and toxic pollution. We can identify classes of actions that are likely to infringe upon a principle of intergenerational equity: wastes that cannot with reasonable confidence be contained in impact either spatially or over time; damage to soils so extensive as to render them incapable of supporting plant or animal life; destruction of tropical forests that affect overall diversity of species in the region; pollution, land use transformation, use of fossil fuels and other practices sufficient to cause climate change; loss of knowledge essential for understanding natural and social systems; destruction of cultural monuments acknowledged by countries as part of the common heritage of humankind; and destruction of specific endowments established for the benefit of both present and future generations, such as gene banks and libraries of international importance.

Some international agreements and nonbinding legal instruments already impose duties for such actions. A principle of intergenerational equity focuses explicitly on the interests of future generations so as to ensure that they are not overlooked. One danger in designating a specific group to identify the interests of future generations is ensuring that those representing special interests do not capture the dialogue and promote their own interests at the expense of future generations.

### D. RELATIONSHIP WITH INTRAGENERATIONAL EQUITY

Severe problems of equity among people exist today. If people cannot meet their own basic human needs, they cannot be expected to meet intergenerational obligations. The principle of intergenerational equity recognizes that at any given time there may be tradeoffs between present needs and obligations to the future. It provides a way to balance competing demands so that the interests of present generations are considered and those of future generations are not ignored. Further, the principle of intergenerational equity should be seen as essential to implementing the Sustainable Development Goals. It focuses on the long-term implications of our actions and inserts consideration of the interests of future generations into the decisions

we take today. Some of the issues will relate to the environment. Many others will not. The principle of intergenerational equity requires that future generations not be overlooked.

## **V. ASSESSMENT**

The principle of intergenerational equity has gained widespread acceptance within the last two decades, as reflected in international agreements and legal instruments, national constitutional provisions, international, national, and sub-national court decisions, judgments of environmental courts and tribunals, institutions within some countries that focus on impacts of policies and other actions on future generations future.

The principle can help to implement sustainable development and the Sustainable Development Goals, for it ensures that the interests of future generations are not ignored. The principle is integral to addressing climate change and to the challenges in the emerging Anthropocene Epoch.

The principle reflects the fundamental norm of fairness between generations and has deep roots. It is critically important, because it can foster cooperation not only among States but among those in the private sector and civil society. In a kaleidoscopic world, in which there are many critical actors and in which change takes place rapidly, the principle of intergenerational equity helps to give future generations a voice at the table. By providing for a principle of intergenerational equity, we would take a critical step in ensuring that as we address the critical equity issues today, we do so in fairness to future generations.

## CHAPTER 6

# Prevention

Leslie-Anne Duvic-Paoli

### Article 5 – Prevention

*The necessary measures shall be taken to prevent environmental harm.*

*The Parties have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environment of other Parties or in areas beyond the limits of their national jurisdiction.*

[...]

## I. OVERVIEW

International environmental law is based on the will to avoid harm to the environment. It is widely admitted – following the old adage ‘prevention is better than cure’ – that the environment is best protected by preventing harm from occurring rather than by repairing the damage. The specificity of environmental harm dictates this approach: damage to the environment is often irreversible and restoration of the situation prevailing prior to harm is generally impossible or involves very high costs.

The principle of prevention is a well-established norm of international law: it guides the architecture of the majority of international environmental treaties and has achieved customary status.<sup>1</sup> Although the prevention principle can be formulated in various ways, it rests on three definitional pillars: i) its anticipatory rationale that creates an obligation to avoid or minimize risks significant harm; ii) its due diligence character that requires states to act proactively; and iii) its spatial scope that requires States to prevent environmental harm irrespective of the location of harm.

## II. HISTORICAL DEVELOPMENT

The prevention principle finds its intellectual origins in classical legal concepts, including abuse of rights, *sic utere tuo ut alienum non laedas* (‘use your own property so as not to harm that of another’) and good neighbourliness. At the international level, the prevention principle initially took the form of a prohibition to cause transboundary harm (also known as the ‘no-harm rule’) aimed at protecting the territorial integrity of states. Its objectives became more environmental per se as the international community gained awareness about the fragility of

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226, para 29.

the planet. At the international level, it consolidated in the form of Principle 21 of the 1972 Stockholm Declaration on the Human Environment ('Stockholm Declaration'),<sup>2</sup> which was followed by the adoption of fundamental multilateral environmental agreements applying the preventive rationale to sectoral environmental problems.

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

*Prohibition to cause transboundary harm* - An initial manifestation of prevention takes the form of the no-harm rule found in the landmark *Trail Smelter* case that provides that States should not use their territory in such a manner as to cause injury to the territory of another State.<sup>3</sup> This formulation is commonly used in international treaty law, including most prominently in watercourse law.<sup>4</sup> Significantly, the Articles on Prevention of Transboundary Harm from Hazardous Activities adopted by the International Law Commission in 2001 provide detailed guidance regarding how to discharge preventive obligations in a context of transboundary harm avoidance.<sup>5</sup>

*Stockholm Principle 21 / Rio Principle 2* - The principle of prevention moved beyond its traditional 'no-harm' formulation and consolidated in the form of Principle 21 of the 1972 Stockholm Declaration that reads as follows:

'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'<sup>6</sup>

On that basis, it is generally acknowledged that the principle of prevention combines three core norms of international law under a single umbrella: (i) the principle of permanent sovereignty over natural resources; (ii) the prohibition to cause harm to the territory of another State; and (iii) its extension to areas beyond the limits of national jurisdiction.

This manifestation is widely considered to be an authoritative expression of the preventive rationale, as exemplified by the fact that the principle was reiterated almost verbatim in the 1992 Rio Declaration on Environment and Development<sup>7</sup> and is often reaffirmed in

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<sup>2</sup> Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), (1972) 11 ILM 1416.

<sup>3</sup> *Trail Smelter (United States v. Canada)* (16 April 1938 and 11 March 1941), (1941) 3 RIAA 1905, at 1965.

<sup>4</sup> See eg, Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, in force 17 August 2014, (1997) 36 ILM 700, art 7.

<sup>5</sup> International Law Commission, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)' (2001) Yearbook of the International Law Commission (vol II, part 2) 148 ('ILC Prevention Articles').

<sup>6</sup> Stockholm Declaration, above note 2.

<sup>7</sup> Rio de Janeiro Declaration on Environment and Development (Rio de Janeiro, 3 to 14 June 1992), (1992) 31 ILM 876.

international treaties.<sup>8</sup> Most importantly, the International Court of Justice recognised the formulation to be an expression of customary international law.<sup>9</sup>

*Duty to prevent pollution* - A more restricted formulation of prevention can also be found in the form of a duty to prevent a specific type of harm – pollution. International environmental treaties typically include duties to limit pollution to a specific medium (e.g. watercourses<sup>10</sup>) or from a specific source (e.g. vessels<sup>11</sup>), activity (e.g. exploitation of resources in the Area<sup>12</sup>) or substance (e.g. ozone-depleting substances<sup>13</sup>). Yet, the prevention principle is not concerned with pollution avoidance but covers a wider variety of environmental risks.<sup>14</sup>

*General obligation to protect and preserve the environment* - In its most advanced form, the prevention principle is expressed through a general obligation to protect and preserve the environment.<sup>15</sup> Such a formulation views environmental protection in a holistic manner and can more easily integrate an ecosystemic approach.

#### IV. OPEN QUESTIONS

The prevention principle raises significant conceptual and practical questions arising from its three definitional pillars, related to its rationale (A), content (B) and spatial scope (C).

##### A. ANTICIPATORY RATIONALE

*Trigger* - It is widely admitted that de minimis environmental harm is not prohibited and that the obligation to prevent is triggered by a risk of ‘significant’ harm,<sup>16</sup> understood to be more than ‘detectable’ but not necessarily serious or substantial.<sup>17</sup> However, the determination of whether the threshold has been met can only be assessed on a case-by-case basis and is unsurprisingly often disputed.

*Timing and monitoring* - States benefit from a wide margin of appreciation regarding the timing of the preventive act, although the principle of rectification of environmental damage at the source, which is most beneficial for the environment, is generally preferred.<sup>18</sup> In addition, states are under a duty to constantly monitor risks on the basis that prevention is not ‘a one-time effort but requires continuous effort’.<sup>19</sup>

<sup>8</sup> See eg, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (‘UNCLOS’), arts 192–4.

<sup>9</sup> *Legality of the Threat or Use of Nuclear Weapons*, supra note 1, para 29.

<sup>10</sup> See eg Convention on the Law of the Non-Navigational Uses of International Watercourses, supra note 4, art 21(2).

<sup>11</sup> UNCLOS, above note 8, art 211.

<sup>12</sup> Ibid, art 145(a) and 209.

<sup>13</sup> Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, (1985) 26 ILM 1529.

<sup>14</sup> *Chagos Marine Protected Area (The Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)* (PCA), 18 March 2015, paras 320 and 538; *South China Sea Arbitration (Republic of the Philippines v. People’s Republic of China)* (PCA), Award on the Merits, 12 July 2016, para 945.

<sup>15</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, supra note 4, art 20; UNCLOS, supra note 11, art 192.

<sup>16</sup> ILC Prevention Articles, above note 5, art 1 (and confirmed by the jurisprudence).

<sup>17</sup> Ibid, Commentaries to art 2(4).

<sup>18</sup> Treaty on the Functioning of the European Union, Lisbon, 13 December 2007, OJ C 83 (30 March 2010), art 191(2).

<sup>19</sup> ILC Prevention Articles, above note 5, Commentaries to art 12, para 2, at 165.

## B. CONTENT

*Due diligence standard* - Prevention is a positive obligation to act diligently in the face of harm (in opposition to a mere negative duty of restraint). Yet, due diligence is a 'variable concept' which 'may not easily be described in precise terms'.<sup>20</sup> It is generally admitted that the degree of care should be appropriate and proportional to the level of risk that the harm represents.<sup>21</sup> It leaves states considerable autonomy but also creates significant uncertainties regarding the level of care to be exercised: its suitability is assessed on an ad hoc basis and often ex post in an adjudication context.

*Due diligence content* - Codification works and judicial developments have fleshed out two key obligations fundamental to discharging the duty of care expected from a State in the avoidance of environmental harm: (i) an obligation to undertake an environmental impact assessment (EIA);<sup>22</sup> and (ii) an obligation to co-operate<sup>23</sup> – taking the form of a duty to notify,<sup>24</sup> to exchange information,<sup>25</sup> and to consult and negotiate.<sup>26</sup> Other duties (such as the obligation to involve the public in decision-making processes) could emerge to give further specificity to the constantly evolving content of prevention.

*Differentiation* - The assessment of the degree of care raises a question about whether prevention is an objective norm that applies irrespective of historical responsibilities and economic capabilities or whether it is a subjective obligation that acknowledges the need for differentiation. The majority view is that an objective standard is assumed unless explicitly stated otherwise.<sup>27</sup> Although economic and developmental factors have a place in assessing compliance with prevention, they cannot be used as an excuse for non-compliance.<sup>28</sup>

*Duty bearers* - An emerging question relates to whether the obligation to prevent might apply to subjects of international law other than States. The traditional view holds that States are the primary bearers of international obligations but the international community is increasingly willing to hold other actors, including international organizations<sup>29</sup> and

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<sup>20</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS No. 17, Advisory Opinion (1 February 2011) ('ITLOS Advisory Opinion on the Area'), para 117.

<sup>21</sup> *Ibid.*

<sup>22</sup> ILC Prevention Articles, above note 16, art 7; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) (2010) ICJ Rep 14, para 204; *Advisory Opinion on the Area*, above note 20 para 148; *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), (Judgment) (2015) ICJ Rep 665, para 104; *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) (Judgment) (2015) ICJ Rep 665, para 153; 'Environment and Human Rights', Advisory Opinion OC-23/17 of 15 November 2017, IAmCtHR Series A No. 23 ('Environment and Human Rights'), para 160.

<sup>23</sup> ILC Prevention Articles, above note 5, art 4.

<sup>24</sup> ILC Prevention Articles, above note 5, art 8; *Pulp Mills*, above note 22, para 113; *Certain Activities*, above note 22, para 104; *Construction of a Road*, above note 22, para 168.

<sup>25</sup> ILC Prevention Articles, above note 5, art 8 and 12; *Pulp Mills*, above note 22, para 102; *South China Sea Arbitration*, above note 14, para 991.

<sup>26</sup> ILC Prevention Articles, above note 5, art 9 and 10; *Lac Lanoux* (France v. Spain), (1957) 12 RIAA 281, at 310; *Certain Activities*, above note 16, para 104.

<sup>27</sup> International Law Association Study Group on Due Diligence in International Law, 'Second Report', July 2016, at 19.

<sup>28</sup> ILC Prevention Articles, above note 5, Commentaries to Article 3, para 13, at 155.

<sup>29</sup> See, e.g. ILA 'Second Report', above note 27, at 18.

transnational corporations,<sup>30</sup> accountable for their contribution to environmental degradation. Some non-legally binding instruments such as the World Charter for Nature have extended Stockholm Principle 21 to other international actors.<sup>31</sup>

### C. SPATIAL SCOPE

*Prevention in Areas Beyond National Jurisdiction (ABNJ)* - The obligation to prevent extends to ABNJs, as acknowledged in Stockholm Principle 21. Treaty obligations create a duty to protect the environment in the global commons, namely outer space,<sup>32</sup> the Antarctic,<sup>33</sup> the atmosphere,<sup>34</sup> the high seas<sup>35</sup> and the deep seabed.<sup>36</sup> Yet, implementing and enforcing the obligation, which is not directly owed to a specific State, raises practical difficulties.

*Prevention in the domestic territory* - Another open question relates to the application of a customary obligation to prevent environmental damage exists in a purely domestic context. Two major routes converge to confirm the on-going consolidation of such an obligation.<sup>37</sup> The first one follows the human rights path. An obligation to prevent environmental harm in a domestic context can be extracted from the human rights jurisprudence recognising that States have a positive obligation to take preventive measures to ensure that human activities,<sup>38</sup> as well as natural disasters,<sup>39</sup> do not adversely affect the enjoyment of specific human rights. The second route relates to inter-State obligations of prevention that apply irrespective of the location of harm, such as article 192 of the United Nations Convention on the Law of the Sea that creates a general obligation to protect the environment as a whole.<sup>40</sup>

## V. ASSESSMENT

Prevention is widely acknowledged as the *raison d'être* of international environmental law: including the principle in the Global Pact is therefore fundamental. The main challenge lies in formulating the preventive duty in such a way that it provides clear guidance regarding

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<sup>30</sup> See e.g. 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Compilation of Good Practices by John H. Knox' (2015) UN Doc. A/HRC/28/61, paras 79 and 80.

<sup>31</sup> 'World Charter for Nature', UNGA Res. 37/7 (XXXVII) (28 October 1982), Principle 21.

<sup>32</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, in force 11 July 1984) (1979) 18 ILM 1434, art 7(1).

<sup>33</sup> Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, in force 14 January 1998) (1991) 30 ILM 1461, art 2.

<sup>34</sup> ILC, 'Protection of the Atmosphere: Texts and titles of draft guidelines and preamble adopted by the Drafting Committee on first reading' (2018) UN Doc A/CN.4/L.909, guideline 3.

<sup>35</sup> UNCLOS, above n 8, arts 116–118 and art 192.

<sup>36</sup> Ibid, art 145.

<sup>37</sup> For a detailed analysis, see L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018), 242–254. See in particular the explicit confirmation in *Environment and Human Rights*, above note 20, para 140.

<sup>38</sup> See for one example among an abundant jurisprudence, *Environment and Human Rights*, note 22, para 64, and the rights to life and personal integrity.

<sup>39</sup> ILC, 'Draft Articles on the Protection of Persons in the Event of Disasters (with Commentaries)' (2016) Yearbook of the International Law Commission (vol. II, part 2), art 9.

<sup>40</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Preliminary measures (6 March 2015), para 108(1)(d); *South China Sea Arbitration*, Award on Merits, above note 14, paras 927 and 940.

the level of care needed while retaining the flexibility required to adapt to the circumstances of each case.

Significantly, recent developments in the case-law and codification works have brought clarity to the principle. Article 5 of the Draft Global Pact proposes a four-pronged formulation to prevention that significantly builds on these. The proposal relies on the formulation used by the ICJ to recognize the customary status of prevention (para 2) and recognizes its due diligence nature (para 1) in the form of an obligation to undertake an EIA (para 3) and to continuously monitor risks (para 4). Although it consolidates the due diligence nature of prevention, its wording might need further reflection: in particular, the inclusion of the EIA obligation as an element of due diligence while cooperation is considered an independent duty could have significant legal consequences.

In addition, Article 5 of the Draft Global Pact should give full effects to the environmental objectives of the prevention principle. Indeed, recognising prevention as a general obligation to protect the environment as a whole would have three advantages. First, it would facilitate the integration of an ecosystemic approach. Second, it would acknowledge that prevention applies irrespective of the location of harm. And third, it would strengthen the human rights grounding of the Pact by building on the human rights case law that recognizes that prevention is an obligation applicable in a purely domestic context.

## CHAPTER 7

# Environmental Impact Assessment

Neil Craik

### Article 5 – Prevention

*[The necessary measures shall be taken to prevent environmental harm.*

*The Parties have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environments of other Parties or in areas beyond the limits of their national jurisdiction.]*

*They shall take the necessary measures to ensure that an environmental impact assessment is conducted prior to any decision made to authorise or engage in a project, an activity, a plan, or a program that is likely to have a significant adverse impact on the environment.*

*In particular, States shall keep under surveillance the effect of an above-mentioned project, activity, plan, or program which they authorise or engage in, in view of their obligation of due diligence.*

## I. OVERVIEW

Environmental impact assessment (EIA) describes a process whereby governments are required to identify and assess the environmental consequences of planned activities in advance of their authorization, and to notify and consult with those potentially affected by the activity. The duty to conduct an EIA is firmly established in international law, and is one of the means by which a state can implement its duty to prevent environmental harm, and its duty to cooperate with other states.

EIA obligations appear in numerous treaties, including those with near global membership, such as the *Convention on Biological Diversity*,<sup>1</sup> and *United Nations Convention on the Law of the Sea*.<sup>2</sup> EIA obligations have been recognized as “general” and customary principles of international law by the International Court of Justice,<sup>3</sup> the International

<sup>1</sup> *United Nations Convention on Biological Diversity*, 5 June 1992, 31 ILM 818, Art. 14.

<sup>2</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 ILM 1261, entered into force 16 November 1984, (UNCLOS), Art. 206.

<sup>3</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ 20 April 2010 (Pulp Mills), para. 204; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of A Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (merit) ICJ 16 December 2015, para. 101-105, 146-162.

Tribunal for the Law of the Sea,<sup>4</sup> as well as by the International Law Commission.<sup>5</sup> In addition, EIA has been recognized by the international community as a central element of sound environmental management in the *Rio Declaration on Environment and Development*,<sup>6</sup> and through the practice of international organizations.<sup>7</sup> While the general obligation to conduct EIAs is uncontroverted in international law, there remain questions respecting the breadth of application of this obligation, and the scope of discretion that states have in determining the contents of an EIA.

## II. HISTORICAL DEVELOPMENT

EIAs first arose in the U.S. federal *National Environmental Policy Act (NEPA)*,<sup>8</sup> which was enacted to address concerns that federal agencies were ignoring the environmental consequences of their planned activities. *NEPA* identified a number of overarching environmental policy goals that agencies were required to consider prior to authorizing their activities. The policy goals were drafted in broad, aspirational language, and were not intended as substantive strictures to which agencies had to conform, but rather as guidance in the exercise of administrative discretion. In order to ensure that environmental objectives were being given due consideration, *NEPA* included a requirement for agencies to prepare a detailed statement identifying potentially significant environmental impacts of planned activities, but also to examine alternatives to the proposed activity, as a basis by which decision-makers could evaluate different courses of action.<sup>9</sup> *NEPA* also contained requirements for agencies to notify and consult with the public and other stakeholders using the draft environmental impact statement as the basis for consultation.

While *NEPA* only provided the broad outlines for EIA processes, the requirements for the assessment and consultation became highly structured over time as the courts and agencies elaborated on the process requirements. Given its procedural orientation, even where an EIA disclosed significant environmental harm, agencies were not required to mitigate the harm.<sup>10</sup> The logic of *NEPA* was that assessment and public scrutiny would influence discretion in favour of more environmentally benign decisions.

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<sup>4</sup> *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, (Seabed Disputes Chamber of ITLOS), 1 February 2011, para. 141-150;

<sup>5</sup> International Law Commission, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in *Report of the International Law Commission, Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) 377 (ILC 2001), Article 7.

<sup>6</sup> United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc. A/Conf.151/5/Rev.1, Principle 17.

<sup>7</sup> World Bank, *Operational Policies – Environmental Assessment*, January 1999, OP 4.01; Multilateral Investment Guarantee Agency, *Performance Standard 1 – Assessment and Management of Environmental and Social Risks and Impacts*, October, 2013; online: [http://www.miga.org/documents/performance\\_standards\\_env\\_and\\_social\\_sustainability.pdf](http://www.miga.org/documents/performance_standards_env_and_social_sustainability.pdf); International Finance Corporation, *Environmental and Social Review Procedures Manual*. Online: <http://www.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP+Manual.pdf?MOD=AJPERES>.

<sup>8</sup> 42 USC §§ 4321-4375(c).

<sup>9</sup> *Ibid* § 4332(C).

<sup>10</sup> *Robertson v. Methow Valley Citizens Council*, 490 US 332.

EIA requirements spread rapidly within both domestic and international legal systems. At present, EIA is identified as a legal requirement in approximately 190 countries.<sup>11</sup> EIA is practised in every region of the world, across different political and economic systems and across all development levels. While there are important differences between the EIA requirements of different states, the principal form of the requirements tends to be fairly uniform, with legislation setting out the requirements for determining for which activities EIAs are required; the scope and contents of the environmental impact study; the extent of the obligations to notify and consult the public and other stakeholders, and any post-construction obligations of monitoring.<sup>12</sup>

As an international legal requirement, EIA has enjoyed similarly broad acceptance. It was recognized as a key element of inter-state environmental cooperation by the UN General Assembly as early as 1972.<sup>13</sup> UNEP played an important role in developing and diffusing EIA requirements in domestic and international settings, through the adoption of the *UNEP Draft Principle of Conduct*,<sup>14</sup> and then the development of the *UNEP Goals and Principles of Environmental Impact Assessment* in 1987, which elaborated on the content of EIA requirements.<sup>15</sup> These soft law documents were oriented towards encouraging states to adopt domestic EIA laws, but also acknowledged the role of EIA in addressing transboundary issues and activities affecting shared resources. In particular, EIA requirements have been included in regional seas conventions and associated action plans since 1978.<sup>16</sup> The duty on states to conduct an EIA where their planned activities may cause significant harm to the marine environment was included in the *United Nations Convention on the Law of the Sea*, which also includes related obligations for States to communicate the results of their assessments through competent international organizations, and to continue to monitor activities in order to determine whether the activity adversely affects the marine environment.<sup>17</sup> By the early 1990's EIA obligations were integral parts of the *Protocol on Environmental Protection to the Antarctic Treaty*,<sup>18</sup> the *Convention on Biological Diversity*,<sup>19</sup> and the (*Espoo*) *Convention on EIA in a Transboundary Context*.<sup>20</sup> EIA, as a fundamental element of sound environmental

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<sup>11</sup> Richard Morgan, 'Environmental Impact Assessment: the state of the art', 30 *Impact Assessment and Project Appraisal* 5 (2012) at 6.

<sup>12</sup> UN Environment (2018). *Assessing Environmental Impacts- A Global Review of Legislation*, (UNEP: Nairobi, Kenya).

<sup>13</sup> 'Co-operation between States in the Field of the Environment', UNGA Resolution 2995 (XXVII), UN GAOR, 27th Sess., Supp. No. 30 (1972) at 42

<sup>14</sup> *UNEP Draft Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, 17 ILM 1094 (1978), Principle 4.

<sup>15</sup> UNEP Res. GC14/25, 14 Sess. (1987), endorsed by GA res. 42/184, UN GAOR, 42nd Sess., UN Doc. A/Res/42/184 (1987).

<sup>16</sup> Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Kuwait, April 24, 1978, 1140 UNTS 133, 17 ILM 511 (1978), in force July 1, 1979, Art. XI; for complete list see Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press, 2008) at 97.

<sup>17</sup> UNCLOS, Articles 204–206.

<sup>18</sup> *Protocol on Environmental Protection to the Antarctic Treaty*, 4 October 1991, 30 ILM 1455 (1991), Art. 8(1) and Annex 1.

<sup>19</sup> CBD, Article 14.

<sup>20</sup> *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 ILM 802.

management, was sufficiently institutionalized in international and domestic settings to be included in the *Rio Declaration on Environment and Development*.<sup>21</sup>

EIA was recognized as “a requirement under general international law” by the International Court of Justice (ICJ) in the *Pulp Mills Case*,<sup>22</sup> and again in the linked disputes between Nicaragua and Costa Rica.<sup>23</sup> However, the International Tribunal for the Law of Sea was clearer in directly characterizing the requirement as customary in nature, and confirming the application of the obligation to activities that have the potential to cause significant harm to areas beyond national jurisdiction.<sup>24</sup> The existence of a customary obligation to conduct an EIA has also been identified by the International Law Commission.<sup>25</sup>

The ambiguity surrounding the precise normative status of the duty to conduct EIAs may have arisen due to the particular methodology employed by the ICJ in determining the presence of an obligation to conduct EIA, which relied on the role of EIA as a mechanism by which states can implement their due diligence obligations to prevent transboundary environmental harm, suggesting that the obligation is derived deductively from the presence of a prior obligation to prevent harm.<sup>26</sup> The ICJ is clear, however, that EIA is a separate and independent obligation. Moreover, while the ICJ employs a deductive method, there is considerable evidence of state practice and *opinion juris* in support of a customary obligation.<sup>27</sup> In addition to the soft law and treaty practice noted above, states include obligations to assess transboundary harm in their domestic legislation, and engage one another in assessment processes. While states often disagree on the scope and content of EIA obligations in particular circumstances, they do not deny the presence of such an obligation in inter-state disputes.

The customary rule implements, and ought to be interpreted in light of, the duty to prevent harm and the duty to cooperate. The latter gives rise to associated duties of notice and consultation, which are also implemented through EIA obligations. The presence of a substantive duty to prevent transboundary harm points to an important difference between domestic and international EIA processes. Where agencies retain discretion to approve projects that are likely to cause significant harm in domestic contexts, in the international sphere, states are more constrained since the duty of prevention requires them to take steps to mitigate transboundary harm.

### III. FORMULATIONS IN INTERNATIONAL LAW

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<sup>21</sup> *Rio Declaration*, Principle 17.

<sup>22</sup> *Pulp Mills Case*, para. 204.

<sup>23</sup> *Certain Activities Case*, para. 101-105, 146-162.

<sup>24</sup> *Activities in the Area*, para. 145.

<sup>25</sup> EIA is identified as a requirement in connection with activities that have potential to cause significant transboundary harm in ILC 2001, Principle 7. More recently, transboundary EIA was identified as having customary status in the ILC's *Third Report on the Protection of the Atmosphere* (S. Murase, Special Rapporteur), 68<sup>th</sup> Sess., UN Doc. A/CN.4/692, February, 2016, para. 59.

<sup>26</sup> This approach is most clearly adopted by Judge Donohue in *Certain Activities Case, Separate Opinion of Judge Donohue*.

<sup>27</sup> See *Certain Activities Case, Separate Opinion of Judge Dugard*; see also Murase, *Third Report on the Protection of the Atmosphere*, paras. 41-60.

International law contains both unelaborated and elaborated formulations. The latter are set out in treaties, such as the *Espoo Convention*, the *Antarctic Protocol*, as well as subsidiary instruments, such as the *Voluntary guidelines on biodiversity-inclusive impact assessment* adopted by the parties to the *Convention on Biological Diversity*,<sup>28</sup> and the EIA rules of international organizations.<sup>29</sup> Unelaborated formulations, including customary international law, require states to carry out EIAs, but do not specify the contents of the EIA. As a consequence, states retain some discretion to determine the contents of an EIA in accordance with domestic legal requirements.<sup>30</sup> The extent to which this discretion to determine the contents of an EIA is qualified by international law has uncertain boundaries, and ought to be interpreted in light of the particular circumstances of the activity and its potential impacts.<sup>31</sup> Nevertheless, the core of the obligation to conduct EIAs is well-established in international law and can be summarized as follows:

1. An EIA shall be required prior to the commencement of a planned activity that is likely to have a significance environmental impact on the territory of another state or in areas beyond national jurisdictions.
2. The planned activities to which the obligation applies include physical undertakings. The application of EIA to policies, plans, and programs is not well supported in international law.
3. The contents of an EIA shall be determined by domestic law, but ought to be sufficient to allow states to evaluate the environmental impacts, both direct and indirect, of the activity, as well as potential mitigation measures, in accordance with due diligence.
4. Where an assessment discloses a significant environment impact is likely to result from the activity, the state undertaking the activity is under a further obligation to notify potentially affected states (or competent international organizations, in the case of the global commons), disclose the results of its EIA, and to enter into consultations with affected states with a view to resolving any outstanding concerns.
5. EIA processes shall provide opportunities for public participation.

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<sup>28</sup> Conference of the Parties to the CBD, Decision VIII/28, "Impact Assessment: Voluntary guidelines on biodiversity-inclusive impact assessment", UN Doc. UNEP/CBD/COP/8/31

<sup>29</sup> For example see World Bank Guidance Notes on Tools for Pollution Management: Environmental Impact Assessment, Getting to Green-A Sourcebook of Pollution Management Policy Tools for Growth and Competitiveness World Bank Group, Washington DC (2012); see also International Seabed Authority, Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, ISBA/19/LTC/8, Kingston, Jamaica, 2013.

<sup>30</sup> *Pulp Mills*, para 205; Costa Rica/Nicaragua, 157

<sup>31</sup> *Pulp Mills Case*, para 205.

6. States who undertake activities are under a continuous obligation to monitor environment impacts, where monitoring is found to be reasonably necessary.

#### IV. UNRESOLVED QUESTIONS

There are a number of issues associated with EIA obligations that remain unresolved and subject to continuing developments in international law. As noted, the application of EIA to policies, plans and programs, – what is often referred to as strategic environmental assessment (SEA) – is becoming more common in domestic assessment legislation,<sup>32</sup> and appears in some international instruments.<sup>33</sup> But international practise in relation to SEA is often framed as a discretionary obligation, with only one regional treaty requiring SEA. SEA has strong support in the expert literature as a proactive measure to better ensure that upstream policy decisions do not ignore environmental objectives.<sup>34</sup> In addition, examining the environmental impacts of decisions earlier in the planning cycle facilitates the assessment of cumulative effects (from multiple activities), which is especially important in relation to climate change and biodiversity impacts.

The application of international EIA rules to issues of common concern, namely, climate change and biodiversity, is an important emerging trend in international law. While both issues are of unquestioned relevance to impact assessment since planned activities affect (and are affected by) climate change and biodiversity, the challenge has been to adequately account for these more complex and diffuse impacts in the assessments. One response to this challenge has been the adoption of implementation guidance for incorporating biodiversity and climate considerations into EIA processes.<sup>35</sup> The development of further EIA/SEA rules is one of the key issues in the negotiations for a new treaty on marine biodiversity beyond national jurisdictions.<sup>36</sup>

The status of biodiversity and climate change as issues of common concern gives rise to questions respecting the extent to which international EIA obligations are owed in relation to these impacts, as distinct from traditional transboundary impacts. Article 14 of the Convention on Biological Diversity imposes obligations to assess irrespective of whether the

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<sup>32</sup> EU Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, OJ 2001 L197/30; NEPA, 42 USC § 4331(c).

<sup>33</sup> Protocol on Strategic Environmental Assessment (Kiev), 21 May 2003, UN Doc. ECE/MP.EIA/2003/2; see also *CBD*, Article 14(1)(b).

<sup>34</sup> Monica Fundingsland Tetlow & Marie Hanusch (2012) Strategic environmental assessment: the state of the art, *Impact Assessment and Project Appraisal*, 30:1, 15-24.

<sup>35</sup> CBD Decision VIII/28 Annex, Impact Assessment: Voluntary guidelines on biodiversity-inclusive impact assessment; European Commission, *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment*. (European Union 2013); Council on Environmental Quality, *Incorporating Biodiversity Considerations into Environmental Impact Analysis under the National Environmental Policy Act*. (CEQ 1993); Council on Environmental Quality, *Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews*, (CEQ, 2014); Canadian Environmental Assessment Agency, *Guide on Biodiversity and Environmental Assessment*. (CEAA 1996); Netherlands Commission for Environmental Assessment, *Recommendations on Climate Change in Environmental Assessment*, (NCEA, 2009).

<sup>36</sup> See, Earth Negotiations Bulletin, v.25, No.179, Sept. 20, 2018, “Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction, 4-17 September 2018”.

impacts are transboundary in nature, although the ICJ held article 14, which requires parties, “as far as possible and as appropriate”, to “introduce appropriate procedures requiring EIA of proposed projects that are likely to have significant adverse effects on biological diversity” does not create a direct obligation to carry out prior EIAs.<sup>37</sup> At present, the status of biodiversity and climate change as issues of common concern give rise to an obligation to cooperate, but there is limited state practise in support of recognizing an *erga omnes* obligation to assess impacts that do not have transboundary impacts.<sup>38</sup> However, extending the international obligation to issues of common concern is consistent with domestic EIA practice, and the underlying principles of due diligence.<sup>39</sup>

On the issue of public participation, the ICJ in the *Pulp Mills* case held that there was no legal obligation to consult affected populations on the basis of the legal instruments invoked in that case.<sup>40</sup> However, participation is an integral element of EIA, which functions as both a technical tool of assessment and a democratic tool for identifying and accounting for the views of affected groups and individuals. Rights of participation are uniformly present in domestic legislation and are identified as a constituent element of EIA treaty obligations.<sup>41</sup> Such a reading is consistent with Principle 10 of the Rio Declaration, as well as human rights approaches to environmental law,<sup>42</sup> especially in relation to indigenous and local communities.<sup>43</sup>

## V. ASSESSING THE WORDING OF ARTICLE 5

As currently drafted, the EIA obligation is embedded within the broader obligation to prevent environmental harm, instead of being identified as an independent obligation. Typically, in other international instruments and codification exercises, EIA duties have been separately identified signifying that the obligation arises independently. Their placement in a single article may cause some confusion about the meaning of individual paragraphs since there are some inconsistencies across the paragraphs. For example, the EIA obligation uses the threshold requirement of significant environmental harm, while the prevention obligation is

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<sup>37</sup> *Certain Activities Case*, para 164

<sup>38</sup> Murase (2016), para. 60

<sup>39</sup> *Ibid.*

<sup>40</sup> *Pulp Mills Case*, para 216

<sup>41</sup> *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)*, 25 June 1998, 38 ILM 517, in force 30 October 2001, Art 6; *CBD*, art. 14(1)(a); *Espoo Convention*, art. 2(6); *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, 36 I.L.M. 700 (not yet in force), Art. 16.

<sup>42</sup> *Hatton and Others v. the United Kingdom* [GC], judgment of 8 July 2003, paragraph 128; *Advisory Opinion OC-23/17*, IACHR, November 15, 2017; *Saramaka People v. Suriname*, Series. C No. 172 Inter-Am. Ct. H.R. (2007), para 194; see also United Nations Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox – Mapping Report*, Twenty-fifth Session, 30 December 2013, UN Doc. A/HRC/25/53/2014 Mapping report.

<sup>43</sup> Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, CBD Decision VII/16C (2004) Annex. See also Anaya, James. "Report of the Special Rapporteur on the rights of indigenous peoples." *Human Rights Council (A/HRC/21/47)*. Available at: <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf> (accessed 3 October 2012) (2012) (p.17, para. 65).

not so qualified, notwithstanding that the customary duty to prevent transboundary harm relates to significant adverse impacts. The obligation's intent could be strengthened by explicitly linking the EIA to the harm prevention goal (by adding the phrase "with the intent of avoiding or minimizing such adverse impacts" at the end of the EIA paragraph).<sup>44</sup> Doing so underlines the important distinction between domestic and international EIA, whereby the former can be purely procedural, but the latter requires substantive action in the face of predicted significant transboundary harm.

Secondly, paragraph 2 refers to the duty to prevent *transboundary* harm, but the EIA paragraph is framed to include all environmental impacts, not just those that transcend national boundaries. As discussed, the customary rule does not as yet obligate states to conduct EIAs in relation to environmental harm that is wholly internal to the state. If the intent were to widen the EIA obligation to include issues of common concern, such as climate change and biodiversity, more precise language would clarify that intent.

The draft provision links the duty to conduct an EIA with prior authorization suggesting a focus on applying EIA to government decision-making, potentially excluding activities not subject to prior government authorization. The ILC addressed this in its work on harm prevention by including a provision requiring states to require prior authorization for activities being carried out under its jurisdiction or control. Alternatively, the provision could relate to activities proposed to be carried out without reference to the authorization.

The EIA duty in article 5 includes both EIA and SEA given its application to plans and programs. The application beyond physical undertakings goes further than existing customary rules, and extends the obligation into practises that are unevenly implemented in domestic legal systems. As noted, SEA is an emerging trend, and may represent best practises in assessment.

The inclusion of a monitoring provision is consistent with international law, although the use of the term "monitoring", not "surveillance", is typically used in this context. The opening clause "in particular" adds a further ambiguity since it is not clear whether monitoring is a particular instance of the EIA obligation or the duty to prevent environmental harm.

Finally, the EIA provision could usefully include a direct reference to the obligation to provide for public participation as an integral part of EIA procedures. While this might be implied by the presence of article 10 to the Global Pact, an explicit reference to the obligation to provide for public participation in EIA processes would clarify the legal obligations in this regard and strengthen EIA procedures. Relatedly, the extent of the obligation would be clearer, if it included the consequential obligation of states to notify and consult potentially affected states at the earliest stage possible in the EIA process.

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<sup>44</sup> See *CBD*, Article 14.

## CHAPTER 8

# Precaution

Makane Mbengue

### Article 6 – Precaution

*Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.*

## I. OVERVIEW

The 1992 Rio Conference on Environment and Development (hereinafter, ‘the Rio Conference’) allowed for precaution to become one of the core principles of the international legal system, in general, and of the international law relating to sustainable development, in particular.<sup>1</sup> Precaution is incorporated in Principle 15 of the Rio Declaration on Environment and Development (hereinafter, the ‘Rio Declaration’) which states that “(i)n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Principle 15 stipulates that States are required to adopt a precautionary approach in making decisions or potential omissions which may harm the environment. Such a duty remains intact irrespective of the absence of scientific uncertainty as to the existence or extent of such risk.<sup>2</sup> Precaution is the most fundamental and decisive tool to anticipate environmental and sanitary risks.<sup>3</sup>

Two peculiar elements trigger the application of precaution within the international legal order: risk and scientific uncertainty. Risk is a more or less foreseeable and contingent danger which can cause damage. As long as there is any trace of doubt as to the occurrence of an event, there is risk. The element of uncertainty is a *sine qua non* condition of the invocation of

<sup>1</sup> See L. Boisson de Chazournes and M. M. Mbengue, ‘The Principles of Precaution and Sustainability’, in *Elgar Encyclopedia of International Economic Law*, Cheltenham, UK. Northampton, MA, USA (E. Elgar) 2017, pp. 621-623.

<sup>2</sup> See A.A. Cançado Trindade, ‘Principle 15’, in J.E. Viñuales (ed), *The Rio Declaration on Environment and Development. A Commentary*, p. 403.

<sup>3</sup> See M. M. Mbengue, *Essai sur une théorie du risque en droit international public. L’anticipation du risque environnemental et sanitaire*, Pedone, Paris, 2009.

precaution and permits to differentiate precaution from like-minded concepts such as prevention and vigilance.<sup>4</sup> Prevention relies primarily on sound science.

Once a decision-maker has an idea of the likelihood of occurrence of the suspected risk, she will naturally reflect on the possibilities of shielding herself from it. The terminology used to denote damage in international instruments varies. Reference can be made directly to the concept of damage. Some instruments refer to the concept of “impact”. In spite of these terminological variations, the formulation of precaution in international instruments embodies an original, if not special, concept of damage. The latter is usually bound to a threshold of severity, which limits the application of the precautionary principle. This threshold usually invokes concepts such as “severity” and “irreversibility”.<sup>5</sup>

The adoption of precautionary measures is subject to the capabilities of states. It follows that compliance with precaution may be stricter for developed countries than for developing countries. However, the reference to “capabilities” in Principle 15 of the Rio Declaration “is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields”.<sup>6</sup>

While the principle is formulated in Principle 15 of the Rio Declaration in a manner which reflects other critical principles such as the effective implementation of international environmental law,<sup>7</sup> the legal basis of precaution as a principle is a matter of much controversy and debate.<sup>8</sup>

The origins of can be traced back in German law, where the principle constituted one of the basic principles of environmental policy ever since 70s. The German equivalent of precaution is the *Vorsorgeprinzip*. But it is only in the 80s that precaution started to emerge as a legal tool of environmental protection in interstate relations.

Prior to the Rio Conference, at the universal level, precaution was first incorporated in legal instruments such as the World Charter for Nature,<sup>9</sup> the 1985 Vienna Convention for the Protection of the Ozone Layer (“Vienna Ozone Convention”),<sup>10</sup> and the 1990 London Convention on Oil Pollution Preparedness, Response and Cooperation (“London

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<sup>4</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, para. 140.

<sup>5</sup> See L. Boisson de Chazournes, ‘Precaution in International Law : Reflection on its Composite Nature’, in *Law of the sea, environmental law and settlement of disputes : Liber amicorum judge Thomas A. Mensah et al.* (ed.s), Leiden (M. Nijhoff) 2007, pp. 21-34.

<sup>6</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 47, para. 162.

<sup>7</sup> See M. Kunz, ‘Principle 11’, in J.E. Viñuales (ed), *The Rio Declaration on Environment and Development. A Commentary*, pp. 311, 321 (linking the environmental legislation priorities of Principle 11 of the Rio Declaration—which are framed relative to “the environmental and development context” of respective States—to Principle 15’s caveat that the precautionary approach shall be applied by States “according to their capabilities”). Calling for more substantive precautionary measures to protect against environmental harm and more effective enforcement of environmental standards in this context, see further Report of the Human Rights Council Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’, A/HRC/37/59, 24 January 2018, Framework Principle 11, para 33(c); Framework Principle 12, paras 34-35.

<sup>8</sup> See Kunz, op. cit., p. 412.

<sup>9</sup> See art. 11(b).

<sup>10</sup> See Preamble.

Convention”).<sup>11</sup> In particular, the Vienna Ozone Convention took note of the important developments surrounding precaution at the domestic level, by stressing in its Preamble, “the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels”.

Noteworthy are also the developments that took place in the early 90s at the dawn of the Rio Conference to foster the progressive development of precaution at the international level. For instance, the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, in a rather pioneer way, enunciates among the “General Obligations”<sup>12</sup>, the “Adoption of Precautionary Measures”. It read as follows: “Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter-alia, preventing the release into the environment of sub-stances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention (...)”.

## II. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Subsequently to the Rio Conference, precaution has been quite often considered as a relevant principle or approach in the fabric of international environmental law. Several instruments incorporate precaution.

Such instruments include a broad array of treaties such as, *inter alia*, fisheries agreements<sup>13</sup>, trade agreements<sup>14</sup> and river basin agreements.<sup>15</sup> In the *Hormones* case, for instance, the WTO Appellate Body indicated that precaution “finds reflection”<sup>16</sup> in the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), albeit this Agreement making no explicit reference to precaution. As a consequence, the Appellate Body recognized that a WTO member has the right to establish appropriate level of sanitary protection that “may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations”.<sup>17</sup> Noteworthy is the fact that the Appellate Body acknowledged that “responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned”.<sup>18</sup>

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<sup>11</sup> See Preamble.

<sup>12</sup> See art. 4.

<sup>13</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Requests for Provisional Measures, Order of 27 August 1999.*

<sup>14</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998.

<sup>15</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 71, para. 164.

<sup>16</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 124.

<sup>17</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 124.

<sup>18</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 124.

Precaution is at the heart or even the *raison d'être* of many environmental treaties. These treaties comprise some of the most important conventional instruments regarding the preservation of the global environment such as the Convention on Biological Diversity,<sup>19</sup> the UNFCCC,<sup>20</sup> the 1994 Oslo Protocol on Further Reduction of Sulphur Emissions to the 1979 Convention on Long-Range Transboundary Air Pollution,<sup>21</sup> the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>22</sup> the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity,<sup>23</sup> and the 2001 Stockholm Convention on Persistent Organic Pollutants.<sup>24</sup> Among these instruments, noteworthy is the language of the UNFCCC which provides as follows: “The Parties should *take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost”.

At the regional level, in the period post-Rio, several regional instruments such as the TFEU<sup>25</sup> and the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR Convention”) have made explicit mention to precaution.<sup>26</sup> It is also important to take note of the important developments in the field of water-basin agreements that have allowed for cross-fertilization of precaution in the field of international water law. Many water-law instruments in Africa, for example, enunciate precaution as a core principle to ensure the equitable and reasonable use of international watercourses as well as to prevent damage to other riparian states in the use of shared watercourses. The Niger Basin Water Charter, to mention only one example, reads as follows: “The use of Niger Basin water shall take into account the principle of precaution under which a State Party shall not defer the implementation of measures intended to avoid any situation that may have a transboundary impact on the grounds that scientific research has not shown causality between these substances and a possible transboundary impact”.<sup>27</sup> In this instrument, precaution is even mentioned before prevention<sup>28</sup> in the section dealing with the applicable ‘General Principles’ to the use and protection of the Niger basin.

Last but not least, Non-governmental organizations have been also very proactive in stressing the importance of precaution in the system of international environmental law. Legal texts reflecting the principle include the IUCN Draft Covenant,<sup>29</sup> the 2015 Oslo

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<sup>19</sup> See Preamble.

<sup>20</sup> See art. 3(3).

<sup>21</sup> See Preamble.

<sup>22</sup> See Preamble, art. 3.

<sup>23</sup> See arts 10(6), 11(8).

<sup>24</sup> See Preamble, arts. 1, 8(7)(a).

<sup>25</sup> See art. 191(2).

<sup>26</sup> See art. 2(2)(a).

<sup>27</sup> See art. 7.

<sup>28</sup> Prevention is mentioned in art. 8.

<sup>29</sup> See art. 7.

Principles on Global Climate Change Obligations (“Oslo Principles”),<sup>30</sup> and the CIDCE Draft Covenant.<sup>31</sup>

### III. OPEN QUESTIONS

The question of whether precaution is a *principle* or an *approach* is subject of controversies. For instance in the *Hormones* case that arose in the context of the WTO dispute settlement system, the European Community argued that that the precautionary principle is, or has become, “a general customary rule of international law”<sup>32</sup> or at least “a general principle of law” while the United States and Canada respectively claim that precaution was more an “approach” or a “concept”<sup>33</sup> than a principle.

Several controversies have also surrounded the legal status of precaution under international law. For instance, the Appellate Body of the World Trade Organization (WTO) noted in 1998 that the status of precaution was the subject of controversy among academics, law practitioners, regulators and judges and felt that “whether it has been widely accepted by (WTO) Members as a principle of general or customary international law appears less than clear”. According to the Appellate Body, “it (was) unnecessary, and probably imprudent, for the Appellate Body (...) to take a position on this important, but abstract, question”.<sup>34</sup> Despite these initial hesitations, overtime precaution has been incorporated into an ever-growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. Certain international courts and tribunals have thus considered that precaution is crystallizing progressively into a norm of customary international law.<sup>35</sup>

Before the WTO Appellate Body, precaution was first invoked before the International Court of Justice. Firstly in the second *Nuclear Tests* case, in which New Zealand affirmed that France was compelled, in applying this principle, to abstain from any underground tests until their innocuity was proven.<sup>36</sup> In the *Gabcikovo-Nagymaros* case, Hungary invoked the precautionary principle to justify, *inter alia*, the impossibility of respecting a treaty by which it was bound to Slovakia. The Court evoked the apparition of new environmental norms which must be taken into account in the field of environmental protection, without however resorting to the qualification of the precautionary principle as a legal principle.<sup>37</sup>

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<sup>30</sup> See arts. 1(a)(1)-(2), (b).

<sup>31</sup> See arts. 3(1)-(2).

<sup>32</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 121.

<sup>33</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 122.

<sup>34</sup> *European Communities – Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS/26/AB/R and WT/DS/48/AB/R, 16 January 1998, para. 123.

<sup>35</sup> *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 47, para. 135.

<sup>36</sup> *Nuclear tests case*, Judgement of 20 December 1974, *ICJ Reports*, 1974. The Court did not examine this question. See the separate opinion of judge Weeramantry, who stated that in that case the precautionary principle should have been applied, *ICJ Reports*, 1995, p. 338.

<sup>37</sup> *Case concerning the Gabcikovo-Nagymaros Project*, Judgement of 25 September 1997, *ICJ Reports*, 1997, para. 140.

Both in the *Pulp Mills on the River Uruguay* and the *Whaling in the Antarctic* cases, the parties agreed on the relevance of precaution for the settlement of the said disputes. In the first one, the Court mentioned precaution to only say that “may be relevant in the interpretation and application”<sup>38</sup> of the treaty that was at the heart of the dispute between Argentina and Uruguay. In the second one, it simply did not mention it!

To date, the most progressive international court and tribunal regarding precaution, is the International Tribunal for the Law of the Sea. The latter found in its Order in *Southern Bluefin Tuna* that States should “act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm” to fish stocks.<sup>39</sup> Furthermore, its Seabed Disputes Chamber more recently indicated in its Advisory Opinion in *Activities in the Area* that the incorporation of the precautionary approach into a growing number of international treaties and other instruments “has initiated a trend towards making this approach part of customary international law”.<sup>40</sup>

#### IV. ASSESSMENT

States are required to exercise their sovereignty over natural resources within a responsibility toward ensuring that these activities do not damage the environment beyond their territorial boundaries. This principle is intrinsic to a core preference in international environmental law for preventing ecological harm, rather than simply compensating for harms already committed.

Precaution has fertilized in such a way to impregnate traditional principles and techniques of international environmental law. Due diligence, for example, applies now in situations where scientific evidence concerning the scope and potential negative impact of an economic activity is insufficient.<sup>41</sup> As such, precaution is a major instrument for sustainability.

Precaution would definitely benefit for more legal clarity and predictability at the international level: clarity regarding its formulation and clarity regarding its status. The right to an healthy environment as well as the achievement of Sustainable Development Goals (SDGs) are dependent on effective implementation of precaution and compliance with it by states. Unfortunately, despite its pioneer character, the Rio Declaration has not planted the seeds for precaution to play a more effective role in the governance of the global environment.

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<sup>38</sup> *Pulp Mills*, para. 164.

<sup>39</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, para 77.

<sup>40</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para 135.

<sup>41</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 47, para. 131.

## Mitigation and Remediation of Environmental Damage

Shotaro Hamamoto\*

### Article 7 – Environmental Damage

*The necessary measures shall be taken to ensure an adequate remediation of environmental damages.*

*Parties shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Parties shall promptly cooperate to help concerned States.*

### I. OVERVIEW

Mitigation and remediation of environmental damage aim at ‘avoid[ing], reduc[ing] and, if possible, remedy[ing] significant adverse effects’ (Article 5(3)(b), *Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*). More precisely, ‘[m]itigation is the use of practice, procedure or technology to minimise or to prevent impacts associated with proposed activities’ and ‘[r]emediation consists of the steps taken after impacts have occurred to promote, as much as possible, the return of the environment to its original condition’ (Antarctic Treaty Consultative Meeting, *Revised Guidelines for Environmental Impact Assessment in Antarctica*, 3.5, 2016).

### II. HISTORICAL DEVELOPMENT

In *Trail Smelter* arbitration, the tribunal found that the Smelter in Canada having caused damage in the United States, Canada was under an obligation to see to it that the Smelter should refrain from causing any damage through fumes in the United States (Second Decision, 11 March 1941, *RIAA*, vol. 3, p. 1966). However, the tribunal rejected the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity on the ground that such a régime would unduly and unnecessarily hamper the operations of the Smelter and would not constitute a solution fair to all parties concerned (*Id.*, p. 1974). The tribunal instead decided that a complex régime should be installed to determine the maximum emission of Sulphur

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\* With indefatigable research assistance by Naiwen Teng.

dioxide (*Id.*, pp. 1974–1980). This is an early example of mitigation measures ordered by a tribunal under international law.

International law may prohibit certain activities causing damage to environment. If a State carries out such activities resulting in environmental damage, it may be held responsible for its wrongful act. However, it is frequently difficult to establish causal links between the conduct in question and the environmental damage. Even if the responsibility of the State causing environmental damage is established, the usual consequence of an unlawful act under general international law is reparation. Payment of a certain amount of money does not guarantee that the environmental damage in question be remedied. It follows that some international rules on *remediation* are needed. In addition, since the responsibility of States is entailed only after unlawful acts have been conducted – in other words, environmental damage has been caused –, some international rules are needed to oblige States to take *mitigation* measures before carrying out certain activities that may cause environmental damage.

The International Court of Justice held in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment*, (I.C.J. Reports 2015, p. 665, p. 707, para. 104), concerning proposed activities which may have a significant adverse impact in a transboundary context:

‘[i]f the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate<sup>1</sup> that risk.’

In a similar vein, the General Assembly adopted the Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (Resolution 61/36 (2006), Annex), Principle 5 (Response measures) of which provides:

Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

(...)

(c) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(d) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage

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<sup>1</sup> ‘réduire’ in the authentic French text.

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

#### A. GENERAL STATEMENT

A number of international instruments envisage mitigation and remediation of environmental damage. An example of general statement of the obligation is found in Article 3 of the Convention on the Transboundary Effects of Industrial Accidents (1992) provides in its Article 3:

1. The Parties shall, taking into account efforts already made at national and international levels, take appropriate measures and cooperate within the framework of this Convention, to protect human beings and the environment against industrial accidents by preventing such accidents as far as possible, by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied.

See also Article 1 of the *Convention on Nuclear Safety (1994)*, Article 1 of the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (1997)*, Article 194 of the *United Nations Convention on the Law of the Sea (1982)*, Article 9 of the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972)*, Article 7 of the *Convention on the Law of the Non-navigational Uses of International Watercourses (1997)*,

#### B. MITIGATION AND REMEDIATION MEASURES TO BE TAKEN BEFORE ENVIRONMENTAL DAMAGE IS CAUSED

It is often provided that States are expected to take measures to mitigate or remediate environmental damage that might happen in the future. For example, Article 18 of the *Convention on Nuclear Safety (1994)* provides:

Each Contracting Party shall take the appropriate steps to ensure that:

- (i) the design and construction of a nuclear installation provides for several reliable levels and methods of protection (defense in depth) against the release of radioactive materials, with a view to preventing the occurrence of accidents and to mitigating their radiological consequences should they occur; (...)

See also Article 8 (Emergency Preparedness) of the *Convention on the Transboundary Effects of Industrial Accidents (1992)*, Paragraph 224 of General Assembly Resolution 72/73, 'Oceans and the law of the sea' (2017), Article 8 of the *International Convention on Oil Pollution Preparedness, Response and Cooperation (1990)*, Paragraph 3.5 of the *Revised Guidelines for Environmental Impact Assessment in Antarctica* adopted by the Antarctic Treaty Consultative Meeting (2016), Article 5 and Appendices II and V of the *Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, 1991, amended in 2017)*, Article 2(2)

of the *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety* (2010).

In the case of imminent or grave danger or damage, Article 14(1) of the *Convention on Biodiversity* (1992) provides for an obligation of notification:

1. Each Contracting Party, as far as possible and as appropriate, shall:

(...)

(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; (...)

Similar obligations are laid down in Article 27 of the *Convention on the Law of the Non-navigational Uses of International Watercourses* (1997) and Article 8(1)(a) of the *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (1999).

### C. MITIGATION AND REMEDIATION MEASURES TO BE TAKEN AFTER ENVIRONMENTAL DAMAGE IS CAUSED

Mitigation and Remediation become particularly important when environmental damage is actually caused. Many international instruments envisage mitigation and remediation measures to be taken in such situations. Art 4(2)(iii) of the *Protocol to the 1979 Convention on Long-Range Transboundary Pollution on Persistent Organic Pollutants* (1998) thus provides:

In the event of a significant release of a substance into the environment, the exemption will terminate immediately, measures will be taken to mitigate the release as appropriate (...).

See also Article 6 of the *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal* (1999), Article 24(5) of the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (1997), Article 5 of the *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety* (2010), Paragraph 241 of General Assembly Resolution 72/73, 'Oceans and the law of the sea' (2017),

Some instruments set forth concrete measures to be taken by relevant States. A cooperation and coordination obligation is laid down, for example, in Art 3(2) of the *ASEAN Agreement on Transboundary Haze Pollution* (2002):

The Parties shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to prevent and monitor

transboundary haze pollution as a result of land and/or forest fires which should be mitigated.

A similar obligation is found in Article 12(4) of the *Minamata Convention on Mercury (2013)*.

More concrete measures include information exchange between relevant States (Annex IX of the *Convention on the Transboundary Effects of Industrial Accidents (1992)*) and information to the public (Article 5(1) of the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998)*; Annex VIII of the *Convention on the Transboundary Effects of Industrial Accidents (1992)*).

#### D. COMPREHENSIVE DOCUMENT

The *Space Debris Mitigation Guidelines* of the Committee on the Peaceful Uses of Outer Space (A/AC.106/890, Annex IV, February 2007) is a rare international instrument that contains comprehensive rules on mitigation. The *Guidelines* include: 1. Limit debris released during normal operations; 2. Minimize the potential for break-ups during operational phases; 3. Limit the probability of accidental collision in orbit; 4. Avoid intentional destruction and other harmful activities; 5. Minimize potential for post-mission break-ups resulting from stored energy; 6. Limit the long-term presence of spacecraft and launch vehicle orbital stages in the low-Earth orbit (LEO) region after the end of their mission; and 7. Limit the long-term interference of spacecraft and launch vehicle orbital stages with the geosynchronous Earth orbit (GEO) region after the end of their mission. The Guidelines was endorsed by General Assembly Resolution 62/217 (22 December 2007).

#### IV. ASSESSMENT

As recognized by the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, it is considered that there exists a general obligation of mitigation of environmental damage. It can also safely be said that States consider that they are obliged under general international law to take mitigation and remediation measures in case of (imminent) environmental damage, as far as they are to take 'necessary' (Article 194, *Convention on the Law of the Sea*) and 'reasonable' (Article 2(2)(d), *Nagoya-Kuala Lumpur Supplementary Protocol*) measures subject to any requirement of domestic law (Article 6(1), *Basel Protocol*). More concrete obligations could be envisaged in international instruments dealing with specific questions, with respect to which States are ready to accept more intrusive obligations.

A general statement on mitigation and remediation of environmental damage will be quite useful to remind us the objectives of any international instruments on environmental protection. It is often pointless to apply general international law rules of State responsibility, according to which States conducting wrongful acts are obliged to pay reparation, to environmental protection. Alleviation of environmental damage or restoration of damaged environment is far more important.

It is also to be noted that any rules on mitigation and remediation of environmental damage will be more effective in combination with other rules, particularly those on environmental impact assessment (Chapter 7), access to information (Chapter 11) and public participation (Chapter 12).

## CHAPTER 10

# Polluter-Pays

Alexander Proelss

### Article 8 – Polluter pays

Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.

## I. OVERVIEW

As indicated by its name, the polluter-pays principle requires that the cost of measures which have to be taken in order to control, reduce or remove environmental pollution generally has to be borne by the polluter. While implementation of this principle appears easy in light of the fact that it seems to state the obvious, a closer examination reveals that it is characterized by significant indeterminacy in relation to its content, scope and consequences.<sup>1</sup> The polluter-pays principle was originally conceived as a cost-allocation rule to create market efficiency.<sup>2</sup> It has generally come to be accepted that using environmental goods such as air and water involves a cost which must be internalized, i.e., incorporated into the budget of the producing enterprise,<sup>3</sup> in order to ensure that the price of a product reflects the entirety of production costs. By requiring the producer to internalize all costs of production, including those caused by the need to control, abate and clean-up pollution of the environmental goods used in the production processes instead of passing them on to third parties, the polluter-pays principle has developed into a pollution-control mechanism.<sup>4</sup> At the same time, taking into account its original objective to foster market efficiency, the polluter-pays principle cannot be regarded as legitimizing measures that distort international trade and investment. Thus, inasmuch as it combines the purposes of preventing market failures due to over-production as a result of improper cost allocation on the one hand and pollution control on the other, it may well be

<sup>1</sup> See e.g. U. Beyerlin and T. Marauhn, *International Environmental Law* (Oxford/Portland: Hart/Beck/Nomos), at pp. 58-59.

<sup>2</sup> U Kettlewell, 'The Answer to Global Pollution? A Critical Examination of the Problems and Potential of the Polluter-Pays Principle' (1992) 3 *Colorado Journal of International Environmental Law and Policy* 429, at pp. 431, 437. See also PM Dupuy and JE Viñuales, *International Environmental Law* (Cambridge: Cambridge University Press, 2018), at pp. 81-82; J-M Arbour, S Lavallée, J Sohnle and H Trudeau, *Droit international de l'environnement*, 3<sup>rd</sup> ed. (Montréal: Editions Yvon Blais, 2016), at pp. 157, 159-160.

<sup>3</sup> See the definition of the term 'cost internalisation' provided by the OECD's Glossary of Statistical Terms, available at <<https://stats.oecd.org/glossary/index.htm>> (last visited on 4 December 2018).

<sup>4</sup> Kettlewell, above n. 2, at p. 437.

said that the polluter-pays principle is a predecessor of, or specific mechanism that contributes to fostering, the broader concept of sustainable development.<sup>5</sup>

## II. HISTORICAL DEVELOPMENT AND MAIN FORMULATIONS

The polluter-pays principle was first mentioned in the Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies adopted by the Organization for Economic Co-operation and Development (OECD) in 1972<sup>6</sup> and has since then been further developed in subsequent OECD recommendations<sup>7</sup> – a fact that, similar to its inclusion in the First Environmental Action Programme (1973-76) of the then European Economic Community,<sup>8</sup> evidences its origins within the realm of environmental economics also from an institutional perspective. As far as the perspective of international environmental law is concerned, the 1972 Declaration of the United Nations Conference on the Human Environment (‘Stockholm Declaration’)<sup>9</sup> did not yet contain any direct reference to the polluter-pays principle. The first time that this principle was comprehensively secured in a global environmental instrument was at the occasion of the 1992 Rio Conference, when the international community adopted the Rio Declaration on Environment and Development.<sup>10</sup> Principle 16 of this Declaration reads: ‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’ Only since then<sup>11</sup> has the polluter pays principle been incorporated and defined – even though not in a completely uniform manner – in binding multilateral environmental agreements, ranging, *inter alia*, from the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic<sup>12</sup> and the 1992 UN/ECE Convention

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<sup>5</sup> See Kettlewell, above n. 2, at pp. 460, 478.

<sup>6</sup> Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies [C(72)128], 26 May 1972. All relevant OECD recommendations are included in OECD, *The Polluter-Pays Principle – OECD Analyses and Recommendations* (Paris: OECD, 1992), at pp. 11-22 and can be retrieved at: <<https://legalinstruments.oecd.org/en/instruments?mode=advanced&reference=C&committeeIds=1546>>.

<sup>7</sup> Recommendation of the Council on the Implementation of the Polluter-Pays Principle [C(74)223], 14 November 1974; Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution [C(89)99(final)], 7 July 1989.

<sup>8</sup> The general action programmes provide a general policy framework for the EU’s environment policy, define the most important medium and long-term goals and set out the basic political and regulatory strategies. Their major aim is to link the more specific legislative measures that have been adopted on the basis of Article 192 (1) and (2) TFEU with the broader and long-term perspective of the environmental policy.

<sup>9</sup> Declaration of the UN Conference on the Human Environment, 16 June 1972, (1972) 11 ILM 1416.

<sup>10</sup> Declaration on Environment and Development, 13 June 1992, (1992) 31 ILM 876. For an analysis of the preparatory work, with specific regard to the polluter-pays principle, see P Schwartz, ‘Principle 16: The Polluter-Pays Principle’, in JE Viñuales (ed.), *The Rio Declaration on Environment and Development – A Commentary* (Oxford: Oxford University Press, 2015), 429-450, at pp. 430-431.

<sup>11</sup> But note that the International Convention on Oil Pollution Preparedness, Response and Cooperation, 30 November 1990, 1891 UNTS 77, already states in its preamble that the polluter pays principle is ‘a general principle of international environmental law’.

<sup>12</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 November 1992, 2354 UNTS 67, Art. 2 para. 2 lit. b.

on the Protection and Use of Transboundary Watercourses and International Lakes<sup>13</sup> to the 1996 Protocol to the London Dumping Convention<sup>14</sup> and the 2001 Stockholm Convention on Persistent Organic Pollutants.<sup>15</sup>

Compared to the cautious wording of the Rio Declaration, it is interesting to note that the Draft Global Pact for the Environment uses stricter language, as it establishes a legal duty of the future parties to ‘ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.’ The reference being made in Principle 8 to a ‘duty to ensure’ links the Draft Global Pact to recent developments in international jurisprudence. According to the International Tribunal for the Law of the Sea (ITLOS), such a duty constitutes an obligation of conduct, i.e., a due diligence obligation, ‘an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result’,<sup>16</sup> but not an obligation of result.<sup>17</sup> Against this background, although there can be no doubt that also due diligence is a concept that is characterized by its variable nature,<sup>18</sup> the version of the polluter-pays principle included in the Draft Global Pact certainly implies stricter requirements than the mere political appeal (‘should’) to ‘endeavour to promote’ enshrined in Principle 16 of the Rio Declaration. It is perhaps also not without relevance that the polluter-pays principle, as defined in the Draft Global Pact, does not even mention the aim of internalization of environmental costs, the use of economic instruments, and the need to take due regard to the public interest and to safeguard that international trade and investment are not distorted anymore. Based on these omissions as well as the on the development of the polluter-pays principle into a hard law rule envisaged by the Draft Global Pact, one may assume that Principle 8 aims at detaching this principle from its economic origins and turning into a truly environmental concept. In doing so, the Draft Pact seems to rely on Art. 6 of the Draft International Covenant on Environment and Development proposed by the IUCN in 1995,<sup>19</sup> which directly connects the polluter-pays principle to the environmental principle of prevention.

Within Europe, the polluter-pays principle had already been accepted as a binding principle of primary European environmental law with the Single European Act of 1 July

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<sup>13</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, 1936 UNTS 269, Art. 2 para. 5 lit. b.

<sup>14</sup> Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972, 7 November 1996, (1997) 36 ILM 1, Art. 3 para. 2.

<sup>15</sup> Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119, preamble.

<sup>16</sup> ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, at § 110.

<sup>17</sup> ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, 4, at § 129. In a broader environmental context, recourse to a duty to ensure had, *inter alia*, already been made by Article 2 of the Rio Declaration (above n. 10) and by the International Court of Justice (ICJ) in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226, at § 29.

<sup>18</sup> ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, at § 117.

<sup>19</sup> For the most recent version of this draft see IUCN Environmental Law Programme, *Draft International Covenant on Environment and Development*, 5<sup>th</sup> ed. (Gland: IUCN, 2017), pp. 1-28.

1987.<sup>20</sup> It is today codified in Art. 191 para. 2 of the Treaty for the Functioning of the European Union (TFEU)<sup>21</sup> and thus regarded as one of the cornerstones of European environment policy. As far as secondary EU law is concerned, reference to the polluter pays principle is made, *inter alia*, in Art. 14 of the Waste Framework Directive.<sup>22</sup> Furthermore, Art. 1 of the Environmental Liability Directive<sup>23</sup> expressly clarifies that the ‘purpose of this Directive is to establish a framework of environmental liability based on the “polluter-pays” principle, to prevent and remedy environmental damage.’

### III. NORMATIVE QUALITY AND LEGAL STATUS

As regards its normative quality, one may ask whether the polluter-pays principle, notwithstanding its denomination as a principle, is really a principle or rather a rule. According to legal theory, rules may be described as ‘optimizing commands’ which demand that an ideal objective is pursued.<sup>24</sup> In contrast to principles (in terms of legal theory), the extent to which a rule can be implemented does not depend on the existence and scope of competing norms. Rather, if a rule, or optimizing command respectively, is valid, it prescribes a definitive legal consequence by permitting, forbidding or commanding something. In other words, rules are structured in the pattern of fact and legal consequence and are, therefore, applicable in an ‘all-or-nothing-fashion’.<sup>25</sup> The polluter-pays principle requires, even though in an abstract and vague manner, that the polluter bears the costs of measures which have to be taken in order to reduce or remove environmental pollution. As is the case with the precautionary principle,<sup>26</sup> the better reasons thus seem to militate in favor of accepting that it must be qualified as a rule.<sup>27</sup>

The normative quality of the polluter-pays principle as a rule says nothing about whether it is legally binding.<sup>28</sup> This question ought to be answered on the basis of the accepted sources of public international law. If and to the extent to which the polluter-pays principle is codified in an international treaty, it generally participates in the latter’s legally binding force,

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<sup>20</sup> Single European Act of 17 and 28 February 1986, O.J. L 169/1 (1987).

<sup>21</sup> Consolidated version: Treaty for the Functioning of the European Union of 13 December 2007, in force 1 December 2009, O.J. C 202/47 (2016), Art. 191 para. 2.

<sup>22</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing certain Directives, O.J. L 312/3 (2008).

<sup>23</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, O.J. L 143/56 (2004).

<sup>24</sup> R Alexy, *Recht, Vernunft, Diskurs* (Frankfurt/M.: Suhrkamp, 1995), pp. 177 ff. In contrast, Dupuy and Viñuales (above n. 3, at p. 59) suggest that rules and principles could be distinguished from each other according to their degree of generality and particularity.

<sup>25</sup> R Dworkin, *Taking Rights Seriously* (London et al., Bloomsbury, 2013), pp. 40-41.

<sup>26</sup> A Proelss, ‘Prinzipien des internationalen Umweltrechts’, in id. (ed.), *Internationales Umweltrecht* (Berlin: De Gruyter, 2017), pp. 69-103, at para. 36; J Schröter, *Strukturprinzipien des Umweltvölkerrechts und ihr Beitrag zur Eindämmung des Klimawandels* (Berlin: ESV, 2015), pp. 274-291; *contra* S Marr, *The Precautionary Principle in the Law of the Sea* (The Hague: Martinus Nijhoff, 2003), p. 13; C. Voigt, *Sustainable Development as a Principle of International Law* (Leiden and Boston: Martinus Nijhoff, 2009), p. 63.

<sup>27</sup> E.g. Beyerlin and Marauhn, above n. 1, p. 59; see also U. Beyerlin, ‘Different Types of Norms in International Environmental Law’, in D. Bodansky, J. Brunnée and E. Hey (eds.), *Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 425 at p. 441; P. Sands and J. Peel, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2012), p. 189; Schröter, above n. 26, at p. 247.

<sup>28</sup> See also Dupuy and Viñuales, above n. 2, at pp. 58-59.

provided that it is not framed by the specific treaty provision in a non-binding (i.e., soft law) manner.

As far as general international law is concerned, the argument has been presented by one authority that the principles of international environmental law should, due to their fundamental, or objective, character inherent in ‘the consciousness [that] has emerged of the pressing need to secure the protection of the environment, given its vulnerability, the risks surrounding everyone, and the harmful consequences of irreparable damages caused to it’, be accepted as being automatically binding upon States.<sup>29</sup> However, apart from the fact that it is unclear whether also the polluter-pays principle would, according to Judge *Cançado Trindade*, qualify for being valid *erga omnes*,<sup>30</sup> this position is far from having found general acceptance. Description of a norm of international law as a ‘principle’ does not automatically imply that it is legally binding, but rather reflects a statement on the quality, or systematic categorization respectively, of the norm concerned. Furthermore, it is arguably problematic, to say the least, to infer from an alleged fundamental nature of principles (which ones exactly?), or the moral values that are allegedly embodied in them,<sup>31</sup> that these principles are automatically binding upon all States, irrespective of their will.<sup>32</sup>

Based on the assumption that a principle of international law is only legally binding provided that it can be assigned to one of the accepted sources of international law, virtually all observers agree that State practice is not sufficiently uniform to assume that the polluter-pays principle has gained the status of a global rule of customary international law.<sup>33</sup> This is due to fact that no general consensus exists on the meaning and scope of the individual elements of the polluter-pays principle. In this respect, reference has, *inter alia*, been made to the soft wording of Principle 16 of the Rio Declaration,<sup>34</sup> differences in how the polluter-pays principle has been codified in international treaty law,<sup>35</sup> difficulties in circumscribing the specific modalities of the internalisation of environmental cost,<sup>36</sup> and uncertainties relating to whether the polluter-pays principle is applicable only at the domestic level or also in the context of inter-State relations.<sup>37</sup> However, if existence and meaning of the individual

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<sup>29</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, Sep. Op. *Cançado Trindade*, ICJ Reports 2010, 135, at §§ 52 ff.

<sup>30</sup> Judge *Cançado Trindade* only refers to the principles of prevention, precaution, sustainable development and intergenerational justice; see ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, Sep. Op. *Cançado Trindade*, ICJ Reports 2010, 135, at §§ 53, 210, 220.

<sup>31</sup> See ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, Sep. Op. *Cançado Trindade*, ICJ Reports 2010, 135, at § 217: ‘Those principles emanate from human conscience, the universal juridical conscience, the ultimate material “source” of all law.’

<sup>32</sup> For further reasoning see Proelss, above n. 26, at para. 6.

<sup>33</sup> P Birnie, AE Boyle and C Redgwell, *International Law and the Environment*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2009), at pp. 322-323; P Sands and J Peel, *Principles of International Environmental Law*, 4<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2018), at p. 240; Beyerlin and Marauhn, above n. 1, at p. 59; Beyerlin, above n. 27, at p. 441; Proelss, above n. 26, at para. 49; but see Schwartz, above n. 10, at p. 435: ‘The PPP has a firm legal basis as a principle of law deriving from a variety of legal sources including international and regional treaties, domestic legislation, and as a regional custom particularly in Europe.’

<sup>34</sup> Beyerlin and Marauhn, above n. 1, at p. 59.

<sup>35</sup> Birnie, Boyle and Redgwell, above n. 33, at p. 323.

<sup>36</sup> Dupuy and Viñuales, above n. 2, at pp. 82-83.

<sup>37</sup> Sands and Peel, above n. 33, at p. 241. Note that Principle 16 of the Rio Declaration only asks the ‘national authorities’ to endeavour to promote the internalization of environmental costs and the use of economic instruments.

elements of a norm are surrounded by uncertainty, State practice and *opinio juris* lack the point of reference necessary for making it possible to assess whether the norm concerned has developed into customary international law. Against this background, the Arbitral Tribunal in the *Rhine Chlorides Case* was arguably correct in holding that ‘ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d’effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général.’<sup>38</sup>

#### IV. CHALLENGES AND OPEN QUESTIONS

It has been observed that the codification of the polluter-pays principle in the Rio Declaration ‘is one of the most controversial formulations, attracting as much support as criticism for its substantive and procedural propositions that now embody legal or policy instruments worldwide.’<sup>39</sup> Aside from the sometimes questionable effectiveness of applying the polluter-pays principle in relation to its objectives,<sup>40</sup> legal scholars have argued that the indeterminacy of contents and scope would prevent this principle from providing meaningful guidance to policymakers.<sup>41</sup> This critique is particularly related to the questions who is the polluter, and what mechanisms, or economic instruments respectively, are eligible to promote the internalization of environmental costs. In both respects, it is generally understood that the competent actors on the State-level enjoy a broad scope of discretion as to how to implement the polluter-pays principle.<sup>42</sup> This may be demonstrated by the extremely careful vocabulary used in Principle 16 of the Rio Declaration (‘should endeavour to promote the internalization of environmental costs and the use of economic instruments’, ‘taking into account’, ‘in principle’, ‘due regard to the public interest’), as well as by referring to the need to assess in a specific situation which mechanisms are best suited to provide for the internalization of environmental cost.<sup>43</sup> Thus, measures taken in order to implement the polluter-pays principle range from regulatory approaches such as environmental taxes, emissions charges, emissions trading systems and product and production standards to investment and environmental cost-spreading mechanisms.<sup>44</sup> Similarly, the concept of polluter is a flexible one that may include industry operators, merchandise producers and consumers, to mention only a few.<sup>45</sup> In many instances, it will not be possible to allocate all costs associated with preventing, controlling and reducing harm to the environment to the originator, taking into account that

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<sup>38</sup> *Case concerning the Auditing of Accounts (Netherlands v. France)*, Award, 12 March 2004, RIAA XXV, 267, at § 103.

<sup>39</sup> P. Schwartz, ‘The Polluter-Pays Principle’, in L. Krämer and E. Orlando (eds.), *Principles of Environmental Law* (Cheltenham and Northampton: Edward Elgar Publishing, 2018), 260-271, at p. 268.

<sup>40</sup> E.g. Schwartz, above n. 39, at pp. 268-270.

<sup>41</sup> Beyerlin and Maruhn, above n. 1, at p. 59; Birnie, Boyle and Redgwell, above n. 33, at pp. 325-326; Arbour, Lavallée, Sohnle and Trudeau, above n. 2, at pp. 162-163.

<sup>42</sup> Dupuy and Viñuales, above n. 2, at pp. 82-83; see also ECJ, Case C-254/08, *Futura Immobiliare*, Judgment, 16 July 2009, ECLI:EU:C:2009:479, at §§ 43-48.

<sup>43</sup> See Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution [C(89)99(final)], 7 July 1989, at para. 12.

<sup>44</sup> For a more detailed overview see Schwartz, above n. 10, at pp. 437-445.

<sup>45</sup> See IUCN, supra n. 19, at p. 53 (Commentary to Art. 6).

a strict application of the polluter-pays principle in relation to, say, the issue of nuclear accidents would not lead to meaningful results, taking into account the potential scope of environmental harm.<sup>46</sup>

Depending on whether the polluter-pays principle is framed in stricter or softer terms by the relevant legal instrument, however, the scope of discretion of the competent actor in relation to its implementation can usually not be held to be unlimited. This can be demonstrated, *inter alia*, by reference to the case law of the Court of Justice of the European Union (CJEU). In the *Raffinerie Méditerranée Case*, the Court held that ‘it is not a consequence of the “polluter pays” principle that operators must take on the burden of remedying pollution to which they have not contributed’.<sup>47</sup> On the other hand, taking into account its origins in environmental economics, the argument can be made that measures that do not provide any economic incentives are difficult to justify under the polluter-pays principle, and so are, based on the formulation of Principle 16 of the Rio Declaration, non-tariff barriers to trade as well as direct subsidies.<sup>48</sup> The question remains, though, whether the latter limitations (if accepted) also apply in situations where the polluter-pays principle has, as far as its formulation is concerned, been detached from its economic origins and thereby developed into a more preventive conception.<sup>49</sup> Arguably, a contextual application of the polluter-pays principle that takes sufficient account of the principle of prevention would demand that cost internalization must not apply to negative externalities that do not remain within the limits of what can be considered as tolerable, i.e., less than significant, environmental damage.<sup>50</sup>

Further uncertainties concern the relationship between the polluter-pays principle and the concept of liability. While the International Law Commission (ILC), when commenting on the preamble of their 2006 Draft Principles on Allocation of Loss, stated that it ‘considers the “polluter pays” principle as an essential component in underpinning the present draft principles to ensure that victims that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation’,<sup>51</sup> other sources have advanced the view that the polluter-pays principle in its Rio formulation would be ‘a tool for making the polluter pay [...] *regardless of* the loss and damage emanating from his activities.’<sup>52</sup> From a conceptual perspective, cost internalization and reference to economic instruments ought to be distinguished from traditional liability schemes, even though both mechanisms pursue similar objectives. It should be noted in this respect that the scope of the polluter-pays principle is not limited to the financial settlement of damage that has already

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<sup>46</sup> Birnie, Boyle and Redgwell, above n. 33, at p. 325; see generally IUCN, supra n. 19, at p. 54 (Commentary to Art. 6).

<sup>47</sup> ECJ, Case C-378/08, *Raffinerie Méditerranée*, Judgment, 9 March 2010, ECLI:EU:C:2010:126, at § 67.

<sup>48</sup> IUCN, supra n. 19, at p. 54 (Commentary to Art. 6); Sands and Peel, above n. 33, at p. 244; see also OECD Recommendation on the Implementation of the Polluter-Pays Principle [C(74)223], 14 November 1974, Sections II. (para. 3) and III.

<sup>49</sup> See, e.g., Art. 2 para. 2 lit. b of the Convention for the Protection of the Marine Environment of the North-East Atlantic. Note again that Art. 6 of the Draft International Covenant on Environment and Development (above n. 19) codifies the principle of prevention and the polluter-pays principle in one provision.

<sup>50</sup> Dupuy and Viñuales, above n. 2, at p. 82.

<sup>51</sup> ILC, Draft Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, (2006) Yearbook of the ILC, Vol. II-2, 59-90, at p. 61 (para. 2).

<sup>52</sup> Schwartz, above n. 10, at p. 441 (italics added).

been occurred, but also covers prevention and mitigation costs for pollution.<sup>53</sup> Taking into account that both the Rio Declaration (Principle 13) and the Draft Global Pact (Principle 7) contain special principles concerning remediation of environmental damage, or the development of national law regarding liability and compensation for the victims of pollution respectively, also these instruments seem to be based on the assumption that liability schemes cannot be regarded as directly implementing the polluter-pays principle. In contrast, international liability schemes that combine a duty of operators to provide financial security and guarantees for potential compensation claims with subsidiary industry- and/or State-sponsored funds, such as those accepted in relation to oil transport by ships, carriage of dangerous goods and wastes, and nuclear installations, are more closely related to the polluter-pays principle than sometimes thought.<sup>54</sup>

Whether or not the polluter-pays principle is applicable only at the domestic level or also in the context of inter-State relations is not uniformly answered.<sup>55</sup> While Principle 16 of the Rio Declaration only refers to the ‘national authorities’, other formulations, including the one that has been codified in the Draft Global Pact, are not similarly clear vis-à-vis the existence of a corresponding limitation. It should be noted, though, that cost internalization is difficult to achieve in an international system where environmental policies and standards have not been fully harmonized.<sup>56</sup> In principle, a transboundary application of the polluter-pays principle can only be envisaged in relation to fields where polluters have been subjected to international standards, as in the case of the EU ETS. This situation ought to be distinguished, though, from an inter-State application of the polluter-pays principle which would imply that the international community enacts measures safeguarding that individual States internalize environmental cost – a development that is far away from legal realities. Against this background, it has convincingly been stated that ‘[i]t seems more appropriate to refer in this respect either to the no-harm principle, the prevention principle or the principle of “common but differentiated responsibilities”.’<sup>57</sup> Based on this understanding, by regulating the conduct of different actors (private corporations *versus* States) by reference to different mechanisms (economic instruments *versus* due diligence and differentiation based on equity)

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<sup>53</sup> IUCN, *supra* n. 19, at p. 53 (Commentary to Art. 6); but see Schröter, *above* n. 26, at pp. 292-293; Proelss, *above* n. 26, at para. 48.

<sup>54</sup> Schwartz, *above* n. 10, at p. 442; Sands and Peel, *above* n. 33, at pp. 240-241; *contra*, based on a narrower understanding of the polluter-pays principle, Birnie, Boyle and Redgwell, *above* n. 33, at pp. 324-325. According to the OECD, a domestic legal requirement by which the costs of reasonable measures to control accidental pollution after an accident should be collected as expeditiously as possible from the legal or natural person who is at the origin of the accident ‘is consistent with’, but not required by the polluter-pays principle. See Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution [C(89)99(final)], 7 July 1989, Appendix, at para. 5. See also *ibid.*, at para. 10: ‘One specific application of the Polluter-Pays Principle consists in adjusting these fees or taxes, in conformity with domestic law, to cover more fully the cost of certain exceptional measures to prevent and control accidental pollution in specific hazardous installations which are taken by public authorities to protect human health and the environment [...]’.

<sup>55</sup> Sands and Peel, *above* n. 33, at p. 241.

<sup>56</sup> Kettlewell, *above* n. 2, at pp. 445-447, 477.

<sup>57</sup> Dupuy and Viñuales, *above* n. 2, at p. 83; see also Arbour, Lavallée, Sohnle and Trudeau, *above* n. 2, at p. 157; Beyerlin and Marauhn, *above* n. 1, at p. 58.

on different levels (domestic *versus* international),<sup>58</sup> the polluter-pays principle on the one hand and the principles of common but differentiated responsibilities and of prevention on the other complement rather than collide with each other in their objective to protect the environment.<sup>59</sup>

## V. ASSESSMENT

As demonstrated, many open questions exist in relation to the scope and implementation of the polluter-pays principle. This does not mean, however, that it would be void of legal meaning. Notwithstanding the fact that it has so far not developed into a rule of global customary international law, the polluter-pays principle has the potential to serve as an important cornerstone of international environmental law by requiring States and international organizations to safeguard that polluter acting under their jurisdiction and control are forced to effectively internalize the cost of pollution. While the competent actors necessarily enjoy a comparatively broad scope of discretion in relation to the choice of mechanisms and the identification of the polluter, the limits of this discretion depend on the exact formulation of the polluter-pays principle in a given context. Thus, inclusion of the polluter-pays principle in a future Global Pact for the Environment not only provides the opportunity for developing it into a binding principle of global environmental law, but also for shedding further light on its focus, scope, implementation and relationship with the other principles of international environmental law.

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<sup>58</sup> Note that under the principle of prevention a State cannot be held directly responsible for pollution caused by the conduct of a private actor on its territory or under its control, but only if it has breached its own duty to ensure that environmental harm is prevented. Thus, the State only has to exert its best possible efforts to minimize the risk of such harm. See ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, 14, at §§ 101, 197; ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, (2010) Yearbook of the ILC, Vol. II-2, 148-170, at p. 154 (para. 7). For further reasoning see Proelss, above n. 27, at paras. 10-14.

<sup>59</sup> Schwartz, above n. 10, at p. 447; Beyerlin and Maruhn, above n. 1, at p. 58.

## CHAPTER 11

# Access to Information

Pilar Moraga Sariego

### **Article 9 – Access to information**

*Every person, without being required to state an interest, has a right of access to environmental information held by public authorities.*

*Public authorities shall, within the framework of their national legislations, collect and make available to the public relevant environmental information.*

## **I. OVERVIEW**

Access to information on environmental issues is one of the principles of environmental law<sup>1</sup> and part of principle 10 of the Rio Declaration, which also considers the principle of participation and access to justice in this area. The combined treatment of the three principles is warranted in light of the interdependence that characterizes them – the application of one principle will depend on the others: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided” (principle 10 of the Rio Declaration on Environment and Development).

According to the foregoing, this principle refers to the possibility each individual has of accessing information related to environmental issues and is enshrined in various international and regional instruments, as well as in human rights legislation, the latter of which will progressively define its content as we shall analyze further below.

## **II. HISTORICAL DEVELOPMENT AND MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS**

At the international level, the content of the principle of access to environmental information timidly emerged during the 1972 United Nations Conference on the Human Environment

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<sup>1</sup> Scotford, Eloise, *Environmental Principles and the Evolution of Environmental Law*, Hart Publishing, 2017.

(Stockholm Conference), and was later crystallized in the Rio Declaration (principle 10), the content of which would later permeate throughout numerous International Environmental Treaties<sup>2</sup> and Regional Treaties<sup>3</sup> that would go on to hone their content progressively. However, it is worth acknowledging that it is the regional treaties and human rights-related case law that has allowed for developing in much greater depth the meaning and scope of access to environment-related information on the international level<sup>4</sup>.

Thus, for example, in the Aarhus Convention, on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the parties recognize access to environmental information as a right that serves to fulfill other rights: “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (Article 1).

In the case of the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, which has yet to enter into force,<sup>5</sup> access to environmental information is also enshrined as a right with a view to bolstering democracy, sustainable development and human rights, and in this context reinforces the provisions of Rio Declaration principle 10 in the following terms: “The Parties to the present Agreement, Recalling the adoption, at the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in 2012, of the Declaration on the application of Principle 10 of the Rio Declaration, reaffirming the commitment to the rights of access to information, participation and justice regarding environmental issues, recognizing the need to make commitments to ensure proper fulfilment of those rights and declaring a willingness to launch a process for exploring the feasibility of adopting a regional instrument”. To that end, this Agreement established its objective, which is to guarantee the full and effective implementation of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development” (Article 1).

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<sup>2</sup> United Nations Framework Convention on Climate Change, Art. 6.a.ii; Convention on Biological Diversity, Art. 14.1.a; Kyoto Protocol, Art. 10.e; United Nations Convention to Combat Desertification, Arts. 16.f and 19.3.b; Minamata Convention on Mercury, Art. 18.1, and Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Art. 15.2.

<sup>3</sup> North American Agreement on Environmental Cooperation (NAAEC), Art. 4; Convention on Environmental Impact Assessment in a Transboundary Context, Arts. 2.6 and 4.2; PROTOCOL on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Art. 8; Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Art. 21.2; Convention on access to information, public participation in decision-making and access to justice in environmental matters, Art. 1; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, article 5. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Art. 16, and African Convention on the Conservation of Nature and Natural Resources, Art. XVI.

<sup>4</sup> Inter-American Commission on Human Rights, *El Derecho de Acceso a la Información*, en el Marco Jurídico Interamericano OEA/Ser.L/V/II.CIDH/RELE/INF. 9/12, march 7th 2011. 2011.

<sup>5</sup> Enters into force once all 11 countries sign it. Biddulph, M., Newman, D. A contextualized account of general principles of international law, *Pace International Law Review*, vol26, issue 2, 2014. Kyu Sung, W., How did they become law?: A jurisprudential inquiry about the outcome principles of historic united nations environmental conferences, *Georgia Journal of International and Comparative Law*, 2017.

On the other hand the contribution by the case law of the Inter-American Court of Human Rights, particularly the advisory opinion requested by the Republic of Colombia, is noteworthy. In its opinion, the Inter-American Court of Human Rights (IACHR) affirmed that access to information is a right linked to Article 13 of the American Convention on Human Rights and ties it to the disclosure and transparency of the public administration, as well as to the democratic control exercised by the citizens, the fulfillment of which depends on other rights, such as, for example, the right to life and to health. For the IACHR, access to environmental information is instrumental, to the extent that it allows satisfying the other rights set forth in the Convention, including the rights to health, life or integrity of the person (OC-23/2017, paragraph 213).

### **III. CONTENT OF THE PRINCIPLE/RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION**

The principle/right of access to environmental information raises questions regarding our understanding of what access is and the conditions that must be guaranteed to ensure said information is accessed correctly. At the same time it is necessary to clarify what we mean by environmental information, and by those who are liable and those who are beneficiaries. Finally, it is worth noting that this does not entail an unrestricted access to information; international law provides for certain exceptions. In light of the foregoing, we propose to refer to each of these aspects below.

#### **A. “ACCESS” TO ENVIRONMENTAL INFORMATION**

Upon reading the regional treaties referring to access to environment-related information, we can see that certain conditions must be guaranteed to ensure said information is accessed correctly, both with respect to the request for information (interest, costs, non-discrimination) and the response (deadline, response adapted to cultural diversity).

With regard to the request for information on environmental issues, based on current legislation (Escazú, Article 2; Aarhus, Article 4) and international case law (OC-23/2017, paragraph 219) no direct interest by or personal impact on the individual is necessary, nor is any justification required for the reasons why the information is being requested.

On the other hand, the request for information on environmental issues could translate into costs for the applicant, which must be moderate, known in advance, and must consider an exemption in cases of vulnerable populations (Escazú, Article 5.17). With respect to the latter, mechanisms in order to assist these populations in exercising the right to access information are also required (Aarhus, Article 3.2).

Lastly, the Aarhus Convention stresses that guarantees should be in place in order to exercise this right without any discrimination based on nationality, citizenship or place of residence, which is relevant for purposes of equity and justice from a territorial point of view (Article 3.9).

In relation to the response, it is worth noting that some international instruments recognize the need to establish a time limit, which in the case of the Aarhus Convention is one month from the date on which the request was submitted, unless the volume and complexity of the information requested justify an extension of that period to a maximum of two months as of the request date (Aarhus, Article 4). In the case of the Escazú Agreement that term is 30 days, which may be extended in accordance with the national legislation, but may never be extended beyond 10 additional days (Art.12.5).

At the same time, certain treaties have indicated that the response to a request for environmental information must take into account the diverse cultural realities of the country. In this regard, the Escazú Agreement establishes the need to furnish the information in several languages and formats: “to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats that are comprehensible to those groups, using suitable channels of communication”.

## B. ENVIRONMENTAL INFORMATION

After addressing the content and meaning of access or the right to access, we must now turn to the definition of the type of information that must be made available to the public. In this regard the contribution by the Escazú Agreement is noteworthy when specifying the content thereof: (a) the texts of treaties and international agreements, environmental laws, regulations and administrative acts; (b) reports on the state of the environment; (c) a list of public entities competent in environmental matters and; (d) a list of polluted areas, by type of pollutant and location; (e) information on the use and conservation of natural resources and ecosystem services; (f) scientific, technical or technological reports; (g) climate change sources aimed at building national capacities; (h) information on environmental impact assessment processes and on other environmental management instruments; (i) an estimated list of waste by type and, when possible, by volume, location and year; and (j) information on the imposition of administrative sanctions in environmental matters (Escazú, Article 6.3). The following are also considered: concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources, in accordance with domestic legislation (Article 6.9). The foregoing is interesting, as it reinforces the idea and the need to access private environmental information, but that is of public interest, held by state bodies.

The IACHR’s case law shares this idea by pointing out that the environmental information to which access is requested is information of public interest that is held by the state bodies or agencies, making no distinction as to whether the information is of public or private origin. In this respect, this case law further adds that access to information contributes to the democratic exercise: “Access to information, under the State’s control, that is of public interest allows participation in public administration through social control that can be exercised with such access and, in turn, fosters transparency in state activities and promotes responsibility by the officials in their public administration”, (OC-23/2017, paragraph 213).

The Court later indicated which matters should be considered as being of public interest, among which activities and projects that could potentially cause an environmental impact were included, such as, for example, information relating to natural resources exploration or exploitation activities in the territory of indigenous communities and the development of a forestry project (OC-23/2017, paragraph 214).

The European Court of Human Rights and the African Commission on Human and Peoples' Rights also recognized the obligation of making information available in connection with dangerous activities that place human health at risk (OC-23/2017, paragraph 215).

Lastly, the Escazú Agreement posits the need to maintain the information updated: "Each Party shall use its best endeavors to publish and disseminate at regular intervals, not exceeding five years, a national report on the state of the environment, which may contain: (a) information on the state of the environment and natural resources, including quantitative data, where possible; (b) national actions to fulfil environmental legal obligations; (c) advances in the implementation of the access rights; and (d) collaboration agreements among public, social and private sectors". This idea is also embedded by the IACHR in a recent advisory opinion, along with indicating that the information must be complete, comprehensible, and furnished in an accessible language (OC-23/2017, paragraph 221).

### C. PARTIES TO THE REQUEST FOR INFORMATION

In the international and regional arena, the obligation or duty to provide information falls upon the State parties, and the beneficiary is the population in general. In this context, the States assume obligations of enabling access to information, disseminating it, making it available in cases of active transparency, and unrestricted in terms of its use and/or disclosure. In this sense, IACHR recognizes that the right of individuals to obtain information is supplemented by a correlative positive obligation of the State to provide it, therefore the individual may access it to know it and assess it (OC-23/2017, paragraph 221). In this consequences, the State's obligation of providing information *ex officio*, known as the "obligation of active transparency", imposes the duty upon the States to provide information that is necessary for persons to exercise other rights, which is particularly relevant in terms of the rights to life, integrity of the person, and health. Moreover, this Court has indicated that the obligation of active transparency imposes upon the States the obligation to provide the public with the maximum amount of information informally (OC-23/2017, paragraph 220).

In this respect, the Escazú Agreement indicates that: "Each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure" (Article 5.1). "Each Party shall facilitate access to environmental information for persons or groups in vulnerable situations, establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions" (Article 5.3). "Each Party shall guarantee that the above-mentioned persons or groups in

vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response” (Article 5.4).

On the other hand, with respect to the applicant, the Agreement provides that the exercise of the right of access to environmental information includes: (a) requesting and receiving information from competent authorities; (b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and (c) being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right” (article 5.2).

However, the duty of public bodies contains exceptions that allow them to justify the limitations on providing information.

#### D. RESTRICTIONS ON ACCESS TO ENVIRONMENTAL INFORMATION

The Aarhus Convention establishes the cases where the authority may deny access to environmental information, namely if: a) the public authority does not hold all of the requested information; b) the request is manifestly abusive and made in very general terms; or c) the request concerns documents that are in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice (Article 4). It also provides for the possibility of refusing a request to access information if the disclosure adversely affects internal law, national security, the proper course of justice, trade secrets or industrial property.

In the context of the Escazú Agreement, limits are provided for in connection with the provision of information in the event that the requested information or part thereof is not delivered to the applicant because it falls under the domestic legal regime of exceptions. Nevertheless, in cases where a Party does not have a domestic legal regime of exceptions, that Party may apply the following exceptions: (a) when disclosure would put at risk the life, safety or health of individuals; (b) when disclosure would adversely affect national security, public safety or national defence; (c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or (d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.

For its part, the IACHR reiterates that the right to access information under the State’s control (OC-23/2017, paragraph 224) allows restrictions, provided that these have been previously established by law and refer to a purpose permitted by the American Convention (“respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals”), and are necessary and proportional in a democratic society, which depends on whether these are directed at satisfying an imperative public interest. Consequently, a principle of maximum disclosure applies, with a presumption that all information is accessible subject to a restricted regime of exceptions, whereby the burden of proof to justify any refusal to allow access to information must necessarily fall on the body or agency to which the information request was submitted. Should the refusal persist, the State must provide a substantiated response that explains the reasons and rules on which it relies

for refusing to provide the information. The State's failure to respond constitutes an arbitrary decision (OC-23/2017, paragraph 224).

#### **IV. CONCLUSIONS**

According to the foregoing, it is possible to conclude that an analysis of access to environmental information in the area of environmental law reveals a development that has made it possible to raise the standards of compliance with the principle, especially within the framework of human rights.

Indeed, in Rio 1992 access to environmental information constituted a principle that invited states to make the environmental information they held accessible to the population, especially information concerning hazardous activities or materials.

Over time this principle has acquired a nature more akin to human rights, the implementation of which also depends on other fundamental rights (right to life and to health) and the State's obligation of making environmental information available. This obligation involves, on the one hand, creating mechanisms to facilitate requesting information for the individuals seeking it, but also involves an obligation of active transparency by the state bodies and agencies of keeping information updated and providing assistance to the more vulnerable populations in order to facilitate the exercise of their right.

As for the request to access information, this does not require a direct individual interest or a personal impact on a private interest, what is more the fact that the request for information does not have to be justified is particularly stressed.

In regards to the type of information that may be requested, this refers to information that is held by State bodies and involves a public interest, in which case access to environmental information also refers to private activities (such as mining claims, concessions, contracts, etc.).

In terms of the type of information, it must be accessible, true, timely, of good quality and furnished taking into consideration the cultural and socioeconomic characteristics of the recipient of the information. Namely, the characteristics of multiculturalism and/or vulnerability must be taken into account in terms of the language and format used, and the costs involved in delivering the information.

Finally, certain restrictions in providing the information must be considered, especially in cases where the state bodies or agencies do not hold the requested information.

## Public Participation

Jonas Ebbesson

### Article 10 – Public participation

*Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment.*

#### I. OVERVIEW

Public participation refers to crucial elements of good governance, the rule of law, trust and legitimacy in environmental decision-making.

The right to participate in decision-making is closely related to the right to access to information and the right to access to justice. Jointly, these rights serve the objective of contributing to the protection of the environment, health and well-being of every person of the present and future generations.

While access to information, public participation in decision-making and access to justice are considered rights in themselves, they are also intertwined. Hence, effective enjoyment of the right to participate in decision-making depends on the right to have access to information and the right to have decision-making, decisions, acts and omissions legally reviewed and corrected.

A key explanation for the broad international support for public participation in decision-making is that it can contribute to the protection of health and the environment. It can make the application, implementation and enforcement of environmental laws more effective; it may engage environmental concerns, which are otherwise at risk of being ignored; and it provides for “second thoughts”, reflections and thinking in terms of alternatives – all essential elements in any sustainable development policy.

The right to participate in environmental decision-making does not amount to a veto, but it can promote the legitimacy of the process as well as the decision taken. If members of the public have a fair opportunity – not only pro forma – to voice their views in the development, application, implementation, and enforcement of legal norms and policies, it can enhance the trust in public authorities and the acceptance of the decisions taken.

The right to participate in environmental decision-making also builds on well-established notions in international human rights law, while developing and adapting them to

environmental contexts. This nexus between international environmental law and human rights law is also revealed in the need of ensuring that members of the public are not penalised, persecuted or harassed when exercising their participatory rights.

## **II. HISTORICAL DEVELOPMENT**

Public participation in environmental matters is a relatively recent concept in international law. In particular, it has developed since the 1992 UN Conference on Environment and Development (UNCED), and with broad recognition in global as well as regional contexts. As mentioned, this development stems both from international environmental law and international human rights law. This makes good sense, since public participation is at the crossroads of environmental and human rights law.

Few international environmental agreement of global scope, adopted before the 1992 UNCED include references to public participation. From that year, the situation is the contrary: just about all environmental agreement adopted at or after the UNCED contain provisions in support of public participation, although with different degree of detail and ambition. This is true for environmental treaties of both global and regional scales. In addition, some regional treaties have been adopted with the specific objective of ensuring participatory rights for the public in environmental matters. In these case, the provisions for public participation are stricter and more detailed.

The normative input from international human rights regimes, of global and regional scope, in support of participatory rights is significant. Established concepts, such as the right of freedom of expression, the right to participate in governance, and the right to a fair trial, but also the right to life, the right to health, the right to property, the right to development, and the right to respect for privacy and family life have been applied and interpreted in support of participatory rights in environmental matters. The human rights regimes were set up before the 1990s, but from that moment in time one can observe a significant development of the jurisprudence within these regimes, confirming the link between human rights law and public participation in environmental matters.

While the regional international law on public participation and also on human rights is less developed in Asia-Pacific than in most other areas, some international policy measures have been taken there as well. More importantly, several national measures, including through constitutional provisions, legislation and jurisprudence by the courts, have been taken in this region in support of participatory rights. Accordingly, the support for public participation in environmental matters is greater than reflected through the lack of regional environmental treaties and human rights jurisprudence.

## **III. MAIN FORMULATIONS OF THE RIGHT**

### **A. ENVIRONMENTAL TREATIES AND INSTRUMENTS**

The key formulation of public participation in international law and policy is Principle 10 of the 1992 Rio Declaration:

‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.’

Principle 10 has had huge influence for the development of international environmental treaties of global scope and regional. Among the treaties somehow supporting the notion of access to information and/or public participation within their respective issue area are:

- 1992 UNFCCC (art 6), with 1997 Kyoto Protocol (art 10(e) and 2015 Paris Agreement (art 12);
- 1992 Convention on Biological Diversity (art 5), with 2000 Cartagena Protocol (art 23) and 2010 Nagoya protocol (art 6);
- 1994 UNCCD (art 5);
- 1998 Rotterdam Convention (PIC Convention) (art 15);
- 2002 Stockholm Convention on Persistent Organic Compounds (art 10);
- 2013 Minamata Convention on Mercury (art 18).

Two provisions from the listed treaties illustrate how public participation have been provided for in multilateral environmental agreements. Under the 2002 Stockholm Convention, each party shall:

‘within its capabilities, promote and facilitate ... public participation in addressing persistent organic pollutants and their health and environmental effects and in developing adequate responses, including opportunities for providing input at the national level regarding implementation of this Convention’ (art 10 (1d)).

The parties to the 2015 Paris Agreement shall:

‘cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement’ (art 12).

Other instruments of global relevance in support of Principle 10 and public participation are the International Law Commission’s Draft Articles on Prevention (arts 13 and 15) and the 2010 UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (“Bali Guidelines”).

More detailed and ambitious treaty regimes have been developed at the regional level, where four treaty regimes provide for participatory rights in environmental matters. These are:

- 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) – applicable to almost 50 parties, including the EU, in Europe, the Caucasus and Central Asia;
- 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazù Agreement) – not yet in force but signed by 14 states in Latin America and the Caribbean;
- 1993 North-American Agreement on Environmental Cooperation (NAAEC) – applicable to the three states of North America;
- 2003 Revised African Convention on the Conservation of Nature and Natural Resources /African Convention) – applicable to 16 states in Africa.

The Aarhus Convention is to date the most advanced treaty regime providing for public participation. Once in force, while different in the details, the Escazù Agreement will provide for a rather similar legal scheme. Both treaties set minimum requirements for public participation. They also prohibit discrimination and oblige the parties to ensure that members of the public are not penalised, persecuted or harassed for exercising these rights. While less comprehensive than the Aarhus Convention and the Escazù Agreement, the NAAEC and the African Convention both have bold provisions for participatory rights to be implemented by the parties.

In different ways and with different ambitions, the mentioned treaties set minimum standards or principles providing or promoting public participation. An additional approach for defining participatory rights, of particular relevance in transboundary contexts, is to *prohibit discrimination* on the basis of nationality, domicile or place of harm and provide for *equal access*. This means that when states make decisions that may cause transboundary effects, they must apply the criteria in their national laws for access to information, participation in decision-making or access to justice *no less favourably* for those affected on the other side of the state borders. This approach is set out in several treaties and in OECD recommendations, and expressed as follows by the ILC Draft Articles on Prevention.

‘Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.’ (art 15)

## B. HUMAN RIGHTS TREATIES AND INSTRUMENTS

In addition to the environmental treaties, support for public participation is provided by the following human rights instruments:

- 1948 Universal Declaration;
- 1966 International Covenant on Civil and Political Rights;
- 1966 International Covenant on Economic, Social and Cultural Rights;
- 1950 European Convention on Human Rights;
- 1969 American Convention on Human Rights;
- 1981 African Charter on Human and Peoples' Rights.

The human rights regimes applicable for Europe, the Americas and Africa have developed highly important jurisprudence in support of public participation in environmental context, in some cases with explicit reference to Principle 10 of the Rio Declaration or to the Aarhus Convention.

## IV. OPEN QUESTIONS

The treaties, jurisprudence and other instruments referred to in the previous section indicate the development towards a duty under *general international law* to provide for public participation in environmental decision-making.

Various human rights courts and international review bodies have recognised participatory rights in environmental matters under international, but the issue has not yet been considered by the International Court of Justice. In the *Pulp Mill* case, the Court concluded that the obligation to carry out environmental impact assessments in transboundary contexts is part of general international law. However, it did not assert that public participation should be a necessary element in the EIA process (probably due to the way the parties argued the case). Even in the absence of such a ruling by the International Court of Justice, the mentioned treaties and jurisprudence as well as various intergovernmental policy document provide fragments of a *normative pattern* in support of the above conclusion. There is also support for the conclusion that under international law states must not discriminate in such contexts on the basis of citizenship, nationality, domicile or the place of the harm.

This duty of states under general international law mirrors the right of members of the public to participate in environmental decision-making.

## V. ASSESSMENT

The Principle on public participation as set out in the Draft Pact for the Environment covers most key elements for public participation. However, it fails to address some important issues that should be added to the principle. I therefore recommend that the draft Principle in the Pact be changed, so that the texts in the square brackets are added to the draft.

Every person has the right to participate, at an appropriate stage and while [all] options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment.

[The right to participate applies without discrimination as to citizenship, nationality, domicile or the place of the harm.]

[Parties shall ensure that persons are not penalised, persecuted or harassed when exercising their participatory rights.]

My final comments refer to three features that should generally be avoided in any legal scheme for public participation in environmental matters:

#### A. NO PRO FORMA PUBLIC PARTICIPATION

Public participation is an important legitimacy factor. It can be wisely used in environmental decision-making, so as to promote the engagement of citizens, ensure the rule of law and improve the quality of environmental decision-making. However, it can also be abused. This is the case when it is only implemented and provided for *pro forma*. It then gives the impression that members of the public could voice their views, while in reality their views have no impact. Some steps and measures can be taken to minimise the risk of such abuse. One is to make sure that the public is entitled to participate at an early stage in the decision-making, before any option is foreclosed.

*Therefore, I suggest that the word “all” be added to the sentence on options in the draft Principle on public participation.* This implies that at the stage of public participation, it should also be possible to turn down the application, proposal or draft decision.

Another measure to avoid *pro forma* participation is to require that the public authority responsible for the decision-making and for making the decision reports on how the comments were taken into account, keeping in mind that public participation does not amount to a veto. The right to access to justice and legal review of the decision, act or omission in question is yet another means to reduce the risk of *pro forma* participation. Finally, providing for some kind of international review mechanism, accessible for the public, can reduce the risk for *pro forma* participatory procedures.

#### B. NO DISCRIMINATION IN PUBLIC PARTICIPATION

The rationale of public participation is that those who are concerned by the decision-making shall have a right to voice their concerns, whether related to their own private interests or to public interests (such as protection of biological diversity or considerations of future generations). In this respect, when defining who is concerned, this must be done on the basis of the persons and the environment likely to be affected, and not by state borders. On this specific issue, Principle 10 of the Rio Declaration is too narrow and outdated, as it only refers to the “participation of all concerned citizens.” Rather, when implementing the principle for public participation, states must provide for equal access to the decision-making for everyone

concerned, without discriminating on the basis of citizenship, nationality, domicile or the place of the harm.

*Therefore, I recommend that a sentence to this effect be added to the draft Principle on public participation.*

#### C. NO PENALISATION, PERSECUTION OR HARASSMENT FOR PUBLIC PARTICIPATION

In light of the huge number of environmental and human rights activists and defenders being threatened, harassed and penalised – and even killed – when exercising their participatory rights, the principle of public participation must engage the duty of states to ensure their protection. This issue has been highlighted in some treaties promoting public participation (Aarhus Convention and Escazù Agreement) and also in the Human Rights Council.

*Therefore, I recommend that a sentence to this effect be added to the draft Principle on public participation.*

## Environmental Education and Training

QING Tianbao and ZHANG Meng

### Article 12 – Education and training

*The parties shall ensure that environmental education, to the greatest possible extent, is taught to members of the younger generation as well as to adults, in order to inspire in everyone a responsible conduct in protecting and improving the environment.*

*The parties shall ensure the protection of freedom of expression and information in environmental matters. They support the dissemination by mass media of information of an educational nature on ecosystems and on the need to protect and preserve the environment.*

### I. OVERVIEW

Public attention has been justifiably and increasingly attracted to environmental education and training (EET) which has become of major strategic importance. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) states that EET is vital in imparting an inherent respect for nature amongst society and in enhancing public environmental awareness. UNESCO emphasises the role of EET in safeguarding future global developments of societal quality of life (QOL), through the protection of the environment, eradication of poverty, minimization of inequalities and insurance of sustainable development.<sup>1</sup> In General, EET focuses on: engaging with citizens of all demographics to; think critically, ethically, and creatively when evaluating environmental issues; make educated judgments about those environmental issues; develop skills and a commitment to act independently and collectively to sustain and enhance the environment; and, to enhance their appreciation of the environment; resulting in positive environmental behavioural change.<sup>2,3</sup>

As one of the crucial principles in the context of ‘Global Pact for the Environment’(GPE), it can be used to assist in the emergence of an informed and ecologically responsible society,

<sup>1</sup> United Nations Educational, Scientific and Cultural Organization., 2014a. Ecological Sciences for Sustainable Development.

<sup>2</sup> Bamberg, S. and Moeser, G. (2007). "Twenty years after Hines, Hungerford, and Tomera: A new meta-analysis of psycho-social determinants of pro-environmental behaviour". *Journal of Environmental Psychology*. 27 (1): 14–25.

<sup>3</sup> Wals, A. E.; et al. (2014). ", 2014. Convergence Between Science and Environmental Education". *Science*. 344 (6184): 583–4.

which is essential for environmental transition by disseminating knowledge and raising general awareness of the urgency of the situation. This principle asserted here has two-fold purpose and meaning: first of all, it raising public awareness concerning the protection of the environment through information campaigns and educational programmes, and encouraging training for judges and civil servants on environmental matters.<sup>4</sup> And this principle, secondly, has a close relation and dynamic interaction with the principle of Public Participation, which serves as the supportive pillar, solid basis and effective protection for public participation concerning environmental affairs via insisting on protection of access to environmental information and the freedom of expression related to the environment.

This chapter focuses on analysing the key elements structured in the principle of EET, based on a deep insight to the sources and evolution of EET principle in course of global environmental movement, and then ends with looking forward to the prospects: how to formulate a better EET principle for GPE.

## II. SOURCES - THE EET PRINCIPLE IN THE EVOLUTION OF GLOBAL ENVIRONMENTAL MOVEMENT

The principle of EET has developed over the past two decades following with the trend of global environmental movement. Although this requirement calling for EET is not uniformly established internationally, it can be clearly found in some soft environmental conventions and authoritative international instruments, regional and national environmental legislation and even from the efforts of civil society.

Internationally, EET gained recognition for the first time when the UN Conference on the Human Environment held in Stockholm in 1972. The importance of EET was affirmed in the Stockholm Declaration which declared that environmental education must be used as a tool to address global environmental problems. Stockholm Declaration is widely considered as the constitutional moment of international environmental law,<sup>5</sup> as well as a catalyst for domestic environmental law.<sup>6</sup> Its Principle 19 states that: “Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its

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<sup>4</sup> Julie Ferrero, Yann Aguila. (2017). Introductory report on the draft Global Pact for the Environment, 43.

<sup>5</sup> See e.g. P.-M. Dupuy, J. E. Viñuales, *International Environmental Law* (Cambridge University Press, 2nd edn 2018), pp. 8-12; Ph. Sands, J. Peel, A. Fabra, R. MacKenzie, *Principles of International Environmental Law* (Cambridge University Press, 4th edn. 2018), pp. 29-32; J. Cretella Neto, *Curso de Direito Internacional do Meio Ambiente* (Sao Paulo: Saraiva, 2012), pp. 127-141; J. J. Ruiz, ‘Orígenes y Evolución del Derecho Internacional del Medio Ambiente’, in F. Sindico, R. Fernández Egea, S. Borràs Petinat (eds), *Derecho Internacional del Medio Ambiente* (London: Cameron May, 2011), pp. 3-30; U. Beyerlin, T. Marauhn, *International Environmental Law* (Oxford: Hart Publishing, 2011), pp. 7-8; D. Hunter, J. Salzman, D. Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 4th edn 2011), pp. 140-145; P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment* (Oxford University Press, 3rd edn 2009), pp. 48-50; L. Guruswamy, K. L. Doran, *International Environmental Law* (St Paul MN: Thomson-West, 2007), pp. 34-39; A. Kiss, J.-P. Beurier, *Droit international de l’environnement* (Paris: Pedone, 3rd edn, 2004), pp. 32-34.

<sup>6</sup> See e.g. Lutz, R. L., ‘The Laws of Environmental Management: A Comparative Study’ (1976) 24 *American Journal of Comparative Law* 447. For a statement of environmental law before the Conference, see Woodrow Wilson International Centre for Scholars (ed.), *The Human Environment, Vol II: Summary of National Reports submitted in preparation of the United Nations Conference on the Human Environment* (Washington D.C., 1972).

full human dimension". It also adds: "it is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminate information of an educational nature on the need to protect and improve the environment in order to enable man to develop in every respect".<sup>7</sup> During the 1980s, the efforts leading to the adoption of the World Charter for Nature. According to Principle 15 of the World Charter for Nature, "knowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education".<sup>8</sup> Based on the efforts by the full international community, a universal declaration came to fruition in the form of the 1992 Rio Declaration on Environment and Development.<sup>9</sup> At the time, some saw the Rio Declaration as a step backwards because of the prominent place it gives to development concerns.<sup>10</sup> And for some reason it forgets to mention this requirement for EET Principle. Moving into the 21st century, the principle of EET was furthered by United Nations as a part of the 2000 Millennium Development Goals and Sustainable Development Goals<sup>11</sup>.

Some binding international legal instruments expressly state this requirement in a sector-specific manner. Concerning the climate, the United Nations Framework Convention on Climate Change (UNFCCC) states that the Parties must "promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organisations"<sup>12</sup>. The Paris Agreement on Climate Change (preamble and Article 12) also insists on the need for State involvement in public education and training, as well as raising awareness of environmental matters. The same is true of the Convention on Biological Diversity (article 13)<sup>13</sup>.

On a regional and national level, the Maghreb Charter on Environmental Protection and Sustainable Development requires States to "integrate the environmental aspect in education programmes at all levels; encourage its "introduction in cultural and informative programmes relating to the environment, through the media."<sup>14</sup> As a pioneer for environmental protection, the European Union (EU) also pays more attention to EET. The role education has to play within environment policy was made explicit in the Resolution adopted by the Council of Ministers in 1988, which argued that the objective of environmental education is: "to increase the public awareness of the problems in this field, as well as possible solutions, and to lay the foundations for a fully informed and active participation of the individual in the protection of

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<sup>7</sup> The Declaration of the United Nations Conference on the Human Environment. (1972). United Nations Conference on the Human Environment, Stockholm. UN Doc. A/CONF 48/14/Rev.1.

<sup>8</sup> World Charter for Nature. (1982). UN Doc. A/RES/37/7.

<sup>9</sup> Rio Declaration on Environment and Development. (1992). UN Doc. A/CONF.151/26. Rev.1.

<sup>10</sup> See e.g. Mann, H., 'The Rio Declaration' (1992) 86 *American Society of International Law Proceedings* 405, at p. 409; Pallemmaerts, M., 'International Environmental Law from Stockholm to Rio: Back to the Future?' (1992) 1 *RECIEL* 254, at p. 256; Wirth, D. A., 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?' (1994/1995) 29 *Georgia Law Review* 599, at p. 648.

<sup>11</sup> Sustainable Development Goals. (2015). UNDP.

<sup>12</sup> The United Nations Framework Convention on Climate Change (UNFCCC). (1992). United Nations.

<sup>13</sup> The Convention on Biological Diversity (CBD). (1992). United Nations.

<sup>14</sup> Maghreb Charter For Environmental Protection And Sustainable Development. (1992).

the environment and the prudent and rational use of natural resources.”<sup>15</sup>In 1993, the European Parliament reinforced this approach in a Resolution which called on Member States and the Commission to “include the environmental dimension in all aspects of education at all levels and to emphasise the fundamental role of schools and their teachers in the development and implementation of policy”<sup>16</sup>.In addition, the Fifth European Community Environment Programme sought to integrate the environmental dimension in all major policy areas as a key factor in bringing about the behavioural changes required for sustainability. In this framework, information and education have become important components, complementing legislation and market-based instruments, in a drive to alter environmentally damaging behaviour and move towards sustainability<sup>17</sup>. US, the only super power in the international community, also highlights the role of EET for environmental protection. The National Environmental Education Act was passed by the US Congress in 1990, which placed the Office of Environmental Education in the U.S. Environmental Protection Agency and allowed the EPA to create environmental education initiatives at the federal level. The EPA has their own definition of what environmental education should be and it is as follows. “Environmental education is a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment. As a result, individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.”<sup>18</sup> As the biggest developing country, China enforced the revised Environmental Protection Law in 2014 of which the Article. 9 states that “The people's governments at all levels shall strengthen the publicity and dissemination of information on environmental protection, encourage basic-level self-governing organizations of the masses, social organizations, and environmental protection volunteers to conduct publicity of environmental protection laws and regulations and environmental protection knowledge, and create a favorable atmosphere for environmental protection; Education administrative departments and schools shall include environmental protection knowledge in school education to cultivate students' awareness of environmental protection; News media shall publicize environmental protection laws and regulations and environmental protection knowledge, and oversee environment-related illegal acts.”<sup>19</sup>

Civil society has also grasped this major issue, which affects the long-term effectiveness of environmental protection. While it is phrased in general terms, the Earth Charter nonetheless formulated detailed obligations with respect to its scope. It imposes the integration of environmental knowledge in formal education, taking the role of art, science and the media into consideration. The Johannesburg Principles recommend “the strengthening of

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<sup>15</sup> Resolution of the Council and the Ministers of Education Meeting with the Council on Environmental Education. (1988). 88/C 177/03

<sup>16</sup> Resolution of the Council and the Representatives of the Governments of the Member States. (1993). 93/C 138/01.

<sup>17</sup> Towards Sustainability: the European Community Programme of policy and action in relation to the environment and sustainable development. (2001). European Union; Eleanor Stokes, Ann Edge and Anne West. (2001). Synthesis Report: Environmental education in the educational systems of the European Union, Commissioned by the Environment Directorate-General of the European Commission.

<sup>18</sup> What is Environmental Education?. US EPA: <https://www.epa.gov/education/what-environmental-education>

<sup>19</sup> Environmental Protection Law of P.R. China. (2014).

environmental law education in schools and universities, including research and analysis as essential to realizing sustainable development”. Finally, the draft International Covenant on the Human Right to the Environment of the CIDCE declares that “everyone has the right to education and to lifelong environmental education”.<sup>20</sup>

### **III. ANALYSIS - THE KEY ELEMENTS STRUCTURED IN THE EET PRINCIPLE**

Those sources examined above serve as the solid basis and foundations to build the EET principle in GPE. Before we answer the question how to formulate this principle, it is better to figure out what we can imagine for a sustainable environmental education and training in a global context, which can be best answered not by zooming in to argue about the details but by zooming out to analyze the key elements structured in the EET principle.

#### **A. PUBLIC AWARENESS AND CAPACITY BUILDING FOR ENVIRONMENTAL PROTECTION**

As it was mentioned in the introduction part, the EET principle serves a two-fold function. This principle, at the first level, contribute to the emergence of environmental awareness (individual and collective, and promote the capacity building for every member in the society to effectively exercise their rights and duties concerning environmental affairs through information dissemination and educational training programmes. For this purpose, this principle emphasizes the EET for “everyone” and “to the greatest possible extent”. On the individual level, EET shall be an integral part pf general and formal education<sup>21</sup> to assist schools and organizations in developing and improving environmental education programs that provide citizens, especially younger generation, with an in-depth understanding of the environment. Furthermore, EET principle also highlights speciality training for experts such as judges and civil servants for environmental matters. On the collective level, EET is, to some extent, a social movement to improve the community’s environmental awareness, call for the actions from NGOs and encourage all the enterprises to better exercise their environmental duties.

#### **B. INTERACTION WITH PUBLIC PARTICIPATION**

The second significant meaning of EET principle is related to its dynamic interaction with public participation. It serves as the supportive pillar, solid basis and effective protection for public participation concerning environmental affairs via insisting on protection of access to environmental information and the freedom of expression related to the environment. According to Aarhus Convention, public participation in environmental matters includes three elements: access to information, public participation in decision making and access to

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<sup>20</sup> Julie Ferrero, Yann Aguila. (2017). Introductory report on the draft Global Pact for the Environment, 44.

<sup>21</sup> Earth Charter 14. (2000).

justice<sup>22</sup>. The information dissemination function of EET principle plays a role as preconditions for access to environmental information. And there is no doubt that without the EET of the effective exercising of environmental rights and duties, public participation in decision making and access to justice would definitely lose the solid foundation to grow up. It has been increasingly emphasized that the function of supporting public participation should be added as a crucial component for EET principle since the Rio Earth Summit in 1992, which is witnessed by a number of international environmental conventions such as UNFCCC and CBD. Moreover, due to the age of information explosion we are living in, mass media exert a remarkable influence on the dissemination of environmental information and also serves as an important tool for EET, which clearly explains why the GPE shall protect and support the dissemination by mass media of information of an educational nature on ecosystems.

### C. OBLIGATION AND LEEWAY

Shall the GPE keep the EET Principle flexible or legally binding? How to balance the obligation and leeway for the EET Principle is always a good question for legislator to think about. UNFCCC is the first environmental convention to specify the obligation of EET in its text<sup>23</sup>. However, in practice, we cannot ignore the gap and difference concerning EET between developing and developed countries. EET implemented in the South varies and addresses environmental issues in relation to their impact different communities and specific community needs. Whereas in the developed global North where the environmentalist sentiments are centered around conservation without taking into consideration “the needs of people living within communities”, the global South must push forth a conservation agenda that parallels with social, economic, and political development. Thus, it is important to give the Parties the leeway in the field of EET and it is for states to decide how to implement the EET Principle based on the specific limits of their national systems and their abilities.

### D. INTERNATIONAL COOPERATION AND CONCERNS OF DEVELOPING COUNTRIES

International Cooperation is another key pillar for EET, which can be illustrated by the Article 6 of UNFCCC.<sup>24</sup> EET has also began to make waves in the development of the global South, as the “First World” takes on the responsibility of helping developing countries to combat environmental issues produced and prolonged by conditions of poverty. The role of environmental education in the South is centered around potential economic growth in development projects, as explicitly stated by the UNESCO, to apply environmental education for sustainable development through a “creative and effective use of human potential and all

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<sup>22</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). (2001).

<sup>23</sup> Art.6 of the United Nations Framework Convention on Climate Change (UNFCCC). (1992). United Nations.

<sup>24</sup> Ibid

forms of capital to ensure rapid and more equitable economic growth, with minimal impact on the environment”.<sup>25</sup>

#### **IV. PROSPECTS: FORMULATING THE EET PRINCIPLE IN THE GPE**

Nowadays, if we are honest, there are several flaws can be seen within environmental education, particularly its failed efforts to “reach its potential in fighting climate change, biodiversity loss, and environmental degradation. And environmental education is not keeping pace with environmental degradation”<sup>26</sup>, which is the reason why we do need to formulate the GPE with EET Principle.

Education and the training on the environment are, in general, mentioned impersonally and non-prescriptively. There are relatively few texts establishing State requirements in this area (paragraph VI of Article 225 of the Brazilian Constitution, for example). The draft Global Pact for the Environment recognises the general nature of existing precedence and the need to keep this principle flexible, thus enabling States to act in accordance with the specific limits of their national systems and their abilities. This approach has led to the obligation to educate “to the fullest extent possible”, giving the Parties the leeway required in this field. The decision to have a distinct and independent duty to promote research and innovation arises from the authors’ desire to underline the importance of these tools when it comes to establishing the best environmental governance. The wording of the article is drawn directly from the Stockholm Declaration, which it nonetheless has intended to update by insisting on protection of freedom of expression and information with respect to the environment, which in particular affects the media.<sup>27</sup>

There is, although, much room for arguing about how to formulate the EET principle, nobody doubts that the EET should be one of the crucial pillars to build a solid framework for GPE. The process of drafting GPE is the joint efforts from several political figures, and a wider public of experts, diplomats, students and interested people, which actually is also a new wave and opportunity for public environmental education and promote the public awareness on global environmental protection by encouraging more individuals and organisations to pay more attentions and efforts to global green movement.

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<sup>25</sup> United Nations Educational, Scientific and Cultural Organization., 2014b. *Shaping the Future We Want: UN Decade of Education for Sustainable Development*. Paris: UNESCO.

<sup>26</sup> Nijhuis, Michelle (2011). *Green Failure: What's Wrong With Environmental Education?* - Yale E360.

<sup>27</sup> Julie Ferrero, Yann Aguila. (2017). *Introductory report on the draft Global Pact for the Environment*, 44–45.

## CHAPTER 14

# Research and Innovation

Guillaume Futhazar and Sandrine Maljean-Dubois

### Article 13 – Research and innovation

*The Parties shall promote, to the best of their ability, the improvement of scientific knowledge of ecosystems and the impact of human activities. They shall cooperate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies.*

## I. OVERVIEW

Article 13 has two components. Firstly, it requires States to promote “to the best of their ability” the improvement of scientific knowledge of ecosystems and the impact of human activities (both at the international and national levels). Secondly, they “shall cooperate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies”.

This broad provision underlines the importance of science and technology in the environmental field and the role States have to play in this respect. Indeed, improving the availability of environmental information and technology is a well-established objective as environmental action relies heavily on knowledge (the status and processes of the environment) and technology (replacement of unsustainable technology but also provision of tools to preserve and rehabilitate)<sup>381</sup>. However, while technology transfer can be a driver of environmental innovation, it can also constitute a risk when unsustainable methods are widely disseminated. This highlights the

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<sup>381</sup> Sands (Ph.), Peel (J.), Fabra (A.), MacKenzie (R.), *Principles of International Environmental Law* (Cambridge University Press, 2018) at 6.

importance of the States' international obligations of cooperation with regard to this specific issue.

Even though article 13 does not mention capacity building, it is evidently geared towards this notion. This term emerged in the lexicon of international organizations during the 1990s. Today, it is commonly used by the United Nations and mentioned in the programs of most international organizations working on development, such as the World Bank. It stands for the strengthening of skills, competencies and capabilities of States – or, at different levels, of people, communities and individuals – in their self-development. Here, scientific and technical cooperation are identified as two means serving the same end.

## II. HISTORICAL DEVELOPMENT

Article 13 of the draft for the Global pact echoes principle 20 of the Stockholm Declaration (1972), the World Charter for nature (1982) and principle 9 of the Rio Declaration (1992). According to principle 20 of the Stockholm Declaration<sup>382</sup>,

‘Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries’.

In 1982, the World Charter for Nature reiterated and broadened this provision<sup>383</sup> and the Rio Principle 9, in 1992, built on these previous instruments by stating that:

‘States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies’

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<sup>382</sup> ‘Declaration of the United Nations Conference on the Human Environment’, Stockholm, 16 June 1972, UN Doc. A/CONF 48/14/Rev.1.

<sup>383</sup> AG UN, A/RES/37/7, 28 October 1982, ‘World Charter for Nature’, §18.

As before, this principle aimed at encouraging scientific and technical cooperation between States in order to “*strengthen endogenous capacity-building for sustainable development*”. The 1992 wording is, however, softer. In 1972, Principle 20 of the Stockholm Declaration had been strongly influenced by calls for a new international economic order. Indeed the Stockholm Declaration used the word “*must*” where the Rio Declaration used “*should*”. Moreover, Stockholm Principle 20 referred to a “*free flow*” of scientific information and transfer of experience, a “*wide dissemination*” or even to the need not to cause “*an economic burden on the developing countries*”. Principle 9 of the Rio Declaration reflects a more balanced vision between expectations and claims of the North and the South.

The Global Pact’s draft builds on these previous instruments. However, Article 13 uses a stronger language than Principle 9 (*shall*) and aims at being politically neutral by referring to all States without putting an emphasis on developing countries.

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

The rationale of draft article 13 – the promotion, enabling and diffusion of research and innovation through international cooperation – can be found in all multilateral environmental agreements. Indeed, provisions encouraging scientific and technical cooperation between signatories are among the common minimal requirements of conventional international environmental law. Additionally, the establishment of expert scientific bodies to support implementation and development has become a common feature of modern international agreements. These bodies aim at establishing an interface between science and policy by providing advice on scientific matters to the parties. Among many other functions, they can highlight research priorities or provide assessments on the impact of new technologies<sup>384</sup>. As for technology transfer, this topic is addressed in very detailed provisions in several international regimes, each of them having their own specificities. For instance, the parties to the Convention on Biological Diversity (CBD) have elaborated a rich set of principles, rules and recommendations in order to address the numerous challenges of technology transfer for the conservation and sustainable use of biodiversity<sup>385</sup>. The

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<sup>384</sup> For instance, article 25 of the Convention on Biological Diversity states that the “Subsidiary Body on Scientific, Technical and Technological Advice” shall “*identify innovative, efficient and state-of-the-art technologies and know-how relating to the conservation and sustainable use of biological diversity and advise on the ways and means of promoting development and/or transferring such technologies*”.

<sup>385</sup> Ntona (M.), « Technology transfer », in Morgera (E.), Razaque (J.) (eds.), *Biodiversity and nature protection law* (Edward Elgar, 2017).

same goes for the United Nations Framework Convention on Climate Change under which specific mechanisms were set up for technology transfer<sup>386</sup>.

Beyond the provisions of international environmental agreements, the principle codified in article 13 has also led to an institutional and policy effervescence.

With regard to the promotion of environmental research and innovation, several international programs can be mentioned. For instance, at the European level, the H2020 program<sup>387</sup> has set several research priorities for the future development of the European Union (EU). Among these priorities, several have an environmental dimension and research projects that can contribute to these priorities are eligible to funding. In this way, the EU is promoting and orienting environmental research and innovation. At the international level, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) is also promoting research by specifically identifying knowledge gaps for environmental governance, and thus possibly orienting future research.

To favour the endogenous development of States, particularly developing ones, several funding mechanisms have been set up, both within multilateral agreements and independently. In this regard, the Global Fund for the Environment is a topical example of a multilateral initiative that can contribute to the goals of article 13. This institution was established in 1991 by the World Bank and gradually became a financial tool for the implementation of several environmental agreements. Its main purpose is to provide financial assistance to developing countries so they may successfully implement their environmental commitments. In doing so, the GEF can help to strengthen the capabilities of countries with regard to research and innovation.

Finally, the diffusion of the results of research and innovation has also been a primordial goal for several international initiatives. The diffusion of knowledge, in the form of research results, is favoured by institutions such as the Intergovernmental Panel on Climate Change (IPCC) or IPBES, that elaborate up-to-date scientific assessments on specific environmental matters. This diffusion is also favoured by the growing number of initiatives relating to open access of scientific results. This tendency has gained significant traction over the past years and is a precious tool for

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<sup>386</sup> Sarnoff (J.), « Intellectual property and climate change, with an emphasis on patents and technology transfer », in Carlane (C.), Gray (K.), Tarasofsky (R.) (eds.), *The Oxford Handbook of International Climate Change Law* (OUP, 2016).

<sup>387</sup> Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJEU L347, 20.12.2013).

a wide democratization of access to knowledge. As for technology transfer, multiple international initiatives aiming at supporting the effective diffusion of environmentally sound technologies can be mentioned. For instance, the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO) have been working on assisting states with regard to this matter.

These examples are, of course, non-exhaustive, but nevertheless highlight how fertile international cooperation is in the field of research and innovation for environmental governance.

#### **IV. CONCEPTUAL QUESTIONS**

On a conceptual level, draft article 13 raises several questions. Firstly, its interaction with other articles of the Global Pact and secondly, its normative nature among the other principles of international environmental law.

Article 13 on research and innovation has obvious ties with article 9 on public participation, article 12 on education and training and article 18 on cooperation. It could be said that article 13 should not be read in isolation from these articles: they are all dependent on their respective full implementation in order to effectively reach their goals. Without proper education and training, the development of research and innovation in the field of environment will be hindered. And without making the results of research and innovation available to the public, its participation will yield fewer results. Reaching the goals of article 13 is only possible through the fulfilment of these articles, and arguably of all the Global Pact (and vice-versa).

The principle codified in draft article 13 has a particular normative nature. To our knowledge, the principle of international cooperation for research and innovation has never been referred to in any judicial decisions. This is understandable as this principle cannot be read as one that specifically dictates a precise type of conduct from States, as, for instance the prevention principle or the polluter-pays principle. It calls for States to act to the best of their ability to promote research and innovation through international cooperation. As such, it is difficult to specifically identify a conduct that would constitute a breach of this principle. Therefore, the principle does not fit into a traditional approach to international law that tries to impose a precise type of conduct on states and hold them responsible in case of failure. Yet this does not mean that such a provision serves no legal purpose.

It could be said that article 13 is more strategic than normative. By strategic, we mean that this principle is a paradigm setter: it aims at shaping the context in which the other more normative principles are applied. For instance, by strengthening environmental research and innovation, parties will be better equipped to ensure the full effectiveness of rules such as the prevention of environmental harm, or the polluter-pays principle. The same could be said for the provisions on training and education or on cooperation. Consequently, although it does not display its effect in the same way as normative principles, it is nevertheless a primordial pillar of international environmental law in that it also contributes to the effectiveness of this legal branch.

## V. ASSESSMENT

Since the first formulation of the principle, and alongside its numerous reiterations, our knowledge of the environment has grown significantly<sup>388</sup>. But despite technological and scientific progress, several problems remain.

For instance, the interface between science and policy remains problematic when it comes to environmental decision-making<sup>389</sup>. Among many issues, we can mention the interactions between the scientific bodies of the various MEAs that are still insufficiently streamlined, with some duplication in the reporting, monitoring and assessment efforts<sup>390</sup>.

Also, the ‘[enhancement], development, adaptation, diffusion and transfer of technologies, including new and innovative technologies’ is often complicated. Indeed, the process of selecting and operating environmentally sound technologies is not a simple one, and as noted before:

‘Selecting a technology that is suitable for local needs, adapting it to local conditions, and maintaining it requires substantial skills and information. Yet, the recipients of technology transfers have limited access to information and limited technical capacity,

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<sup>388</sup> Though it is difficult to directly link this increase of knowledge to the influence of the principle.

<sup>389</sup> United Nations Environment Programme, *Strengthening the Science-policy Interface: A Gap Analysis* (UNEP, 2017).

<sup>390</sup> International institutions are currently trying to tackle this issue. See for instance, CBD, Decision XIII/24, Cooperation with other conventions and international organizations (December 2016).

underscoring the need for an information clearinghouse on various abatement technologies'.<sup>391</sup>

Additionally, intellectual property rights represent another concern with respect to technology transfer. These rights, that are strongly supported by industrialized countries, in particular the US, who see them as an 'essential component of any international technology cooperation [...] essential to provide incentives for innovation in the development of environmentally sound and appropriate technologies'<sup>392</sup>, can go against the logic of draft article 13. On the one hand, economic actors seek, quite naturally, to protect their own interests, supported by powerful institutions. And on the other hand, international regimes that aim at facilitating technology transfers suffer from weak and overlapping mandates<sup>393</sup>. Yet, capacity-building and technology transfers to developing countries have been a key for the green economy policies in past decades.<sup>394</sup>

From Rio 1992 to Rio 2012 or the 2015 climate COP 21, the calls to effectively transfer environmentally sound technologies<sup>395</sup> have been reiterated with little success. Reiterating this principle in the Global Pact is necessary in order to establish a better balance between private and public interests when it comes to research and innovation and thus facilitate the ecological transition of our societies at the Anthropocene<sup>396</sup>.

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<sup>391</sup> Esty (D.), Ivanova (M.), 'Revitalizing Global Environmental Governance: A Function-Driven Approach', in Esty (D.) Ivanova (M.) (eds.), *Global Environmental Governance: options & opportunities* (Yale School of forestry and environmental Studies, 2002), 16.

<sup>392</sup> See *Report of the United Nations Conference on Environment and Development*, A/CONF.151/26/Rev.1, Vol. II, *Proceedings of the Conference*, ONU, New York, 1993 at 18.

<sup>393</sup> Maljean-Dubois (S.), "Principle 9 Science and technology", in Vinuales (J.) *The Rio declaration on environment and development A Commentary* (OUP, 2015).

<sup>394</sup> See this document, Paragraphs 58, 65-66, 73-74, 277.

<sup>395</sup> AG UN, A/RES/66/288, 'The Future we want', 27 July 2012, §73.

<sup>396</sup> On the legal challenges of the Anthropocene to environmental law, see Kotzé (L.) (ed.), *Environmental law and governance for the Anthropocene* (Hart, 2017).

## CHAPTER 15

# Women, Children, Indigenous, Tribal and Other Communities

Nilufer Oral

### I. OVERVIEW

Women, children, indigenous peoples and their local communities play a fundamental role in conservation of natural resources and sustainable development. There some 370 million indigenous peoples who occupy 20 per cent of the earth's territory.

<sup>1</sup> Women account for some one- half of the population and 26 per cent is under age of 15.<sup>2</sup>

These three groups share common grounds in their close relationship with the environment, natural resources and their essential role in sustainable development. They also share a common history of exclusion from participation in policy-making and decision-making at all levels. The development of the history of environmental protection and sustainable development reflects recognition of the vital role of women, children and indigenous people and their communities.

### II. HISTORICAL DEVELOPMENT

The 1945 United Nations Charter begins with the overarching and inclusive words "We the *Peoples* of the United Nations" (emphasis added) and recognizes the equal rights of men and women and of nations large and small. However, the role of women and indigenous peoples in environmental protection and sustainable development was not expressly recognized until decades later. The importance of women in economic development of developing countries, however, was first articulated in a ground-breaking book published in 1972 by Ester Boserup entitled *Women's Role in*

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<sup>1</sup> United Nations Indigenous Peoples <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html>

<sup>2</sup> World Population Prospects The 2017 Revision Key Findings and Advance Tables (DESA 2017) see [https://esa.un.org/unpd/wpp/publications/files/wpp2017\\_keyfindings.pdf](https://esa.un.org/unpd/wpp/publications/files/wpp2017_keyfindings.pdf)

Economic Development.<sup>3</sup> This seminal work inspired the Women in Development (WID) work, the UN International Year for Women 1975, the UN Decade on Women 1976–1985 and world conferences on women.<sup>4</sup>

While a milestone in many ways for the global movement for protection of the environment and eventually sustainable development, the 1972 United Nations Conference on the Human Environment (Stockholm Conference) did not, however, include any express recognition of *women, children, indigenous, tribal and other communities*. Although arguably Principle 19 in its reference to the needs of education for the younger generation implicitly included children.

The 1987 Report of the World Commission on Environment and Development: Our Common Future, a landmark report which established the concept of sustainable development by incorporating environmental protection as part of economic and social development.<sup>5</sup> Moreover, the Report recognized women, children and indigenous peoples as core elements of sustainable development.

The first recognition of women, children, indigenous, tribal and other communities as principle came twenty years with the 1992 United Nations Conference on Environment and Development (Earth Summit) with Principles 20 for women, Principle 21 for youth for achieving sustainable development, and Principle 22 for indigenous People and their communities, and other communities.

Agenda 21 further incorporated *women, the role of youth and of indigenous people and local communities* into its developmental and environmental objectives for the 21<sup>st</sup> Century.<sup>6</sup> Section III specifically called for strengthening the role of major groups that included women,<sup>7</sup> children<sup>8</sup> and indigenous people and their communities.<sup>9</sup>

The *Earth Charter* adopted in 2000, also dedicated parts to include women<sup>10</sup> and indigenous peoples<sup>11</sup> within the context of as Social and Economic Justice.

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<sup>3</sup> Ester Boserup, *Women's Role in Economic Development*, New edition with Introduction by Nazneen Kanji, Su Fei Tan and Camilla Toulmin (Earthscan 2007)

<sup>4</sup> Ibid.

<sup>5</sup> Brundtland Commission, *Our Common Future* (Oxford University Press 1987)

<sup>6</sup> Para. 3.2

<sup>7</sup> Paras. 24.1 - 24.12

<sup>8</sup> Paras.25.1 - 25.17

<sup>9</sup> Paras. 26.1 - 26.9

<sup>10</sup> Part III, para.11

<sup>11</sup> Part III, para. 10

The 2002 Declaration of the World Summit on Sustainable Development and its Report<sup>12</sup> further provided detailed objectives for integration of women, children and indigenous *peoples* and their communities.

And lastly, the outcome document of the Rio +20 Conference “The Future We Want”<sup>13</sup> also recognized the role and importance to sustainable development and the environment of women, children, indigenous *peoples*, but did not refer to “tribal and other communities.” It also marked the first official UN document to mention the UN Declaration on the Rights of Indigenous Peoples.

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Collective or individual references to *women, children, indigenous, tribal or other communities* can be found in numerous international instruments that are either legally non-binding soft law instruments or part of legally binding agreements.

#### A. SOFT LAW INSTRUMENTS

As stated above the first global instrument to make express reference to *Women, children, indigenous peoples and their local communities* as principles was the 1992 Rio Declaration. Specifically, *Principle 20* simply states “Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.” For youth *Principle 21* states “The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.” And *Principle 22* states “Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

Agenda 21 recognized that the successful achievement of sustainable development required the participation of all major groups that included women, children and youth and indigenous people and their communities. Chapter 24 addressed women and highlighted that the effective implementation of a number plans of action and conventions for the” full, equal and beneficial integration of women in all

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<sup>12</sup> UN Doc. A/CONF.199/20

<sup>13</sup> UN doc. A/RES/66/288

development activities” depended “on the active involvement of women in economic and political decision-making” and would be critical to the successful implementation of Agenda 21. Chapter 25 addressing children and youth underlined that the involvement of “youth in environment and development decision-making and in the implementation of programmes is critical to the long-term success of Agenda 21. Chapter 26 of Agenda 21 addressed indigenous people and their communities stating, “National and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.”

The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>14</sup> in its preamble recognizes “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.” Article 29 recognizes inter alia that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources...” The Declaration lists several other related rights concerning such as the obligation of States “to take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

The 2030 Agenda (*Transforming Our World: the 2030 Agenda for Sustainable Development*) and the 2015 Sustainable Development Goals<sup>15</sup> includes Goal 5 on Gender Equality. While there is no individual SDG for indigenous peoples and their communities indigenous peoples are referred to 6 times: three times in the political declaration; two in the targets under Goal 2 on Zero Hunger (target 2.3) and Goal 4 on education (target 4.5) – and in the follow up section calling for indigenous peoples’ participation.<sup>16</sup> Children and youth are recognized overall in SDG 4 on Education.

## B. CONVENTIONS AND PROTOCOLS

*The Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (1971) does not make specific reference to women, children, indigenous peoples and their communities. However, the Fourth Ramsar Strategic Plan for the period covering 2016–2024 in Target 10 recognizes that the “traditional knowledge,

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<sup>14</sup> UN Doc. Res. 61/295, adopted 13 September 2007.

<sup>15</sup> UN Doc. [A/RES/70/1](#)

<sup>16</sup> <https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda/the-sustainable-development-goals-sdgs-and-indigenous.html>

innovations and practices of indigenous peoples and local communities relevant for the wise use of wetlands and their customary use of wetland resources are documented, respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention, with a full and effective participation of indigenous peoples and local communities at all relevant levels.<sup>17</sup>

The *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries*<sup>18</sup> specifically applies to tribal peoples and indigenous peoples.<sup>19</sup> The Convention requires the adoption of special measures “for safeguarding the persons, institutions, property, labour, cultures and *environment* of the peoples concerned.<sup>20</sup> (Emphasis added). Furthermore, governments are required to “assess the social, spiritual, cultural and environmental impact on them of planned development activities” by undertaking studies and consulting with the peoples.<sup>21</sup> and “take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”<sup>22</sup>

The *1992 Convention on Biological Diversity* only refers to in its preamble in “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.” There is no reference to women or children.

However, this lacunae was addressed with the adopted of the *The Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets*. *Target #14* of the Aichi Targets provides that by 2020, ecosystems that provide essential services, including services related to water, and contribute to health, livelihoods and well-being, are restored and safeguarded, taking into account the needs of *women, indigenous and local communities*, and the poor and vulnerable. (emphasis added).

*Target # 18* provides that by 2020, the traditional knowledge, innovations and practices of *indigenous and local communities* relevant for the conservation and

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<sup>17</sup> Adopted by the 12<sup>th</sup> Conference of the Parties, Resolution XII.2

1. <sup>18</sup> Adopted 27 June 1989 and entered into force 5 Sep 1991

<sup>19</sup> Article 1

<sup>20</sup> Article 4

<sup>21</sup> Article 7 (3)

<sup>22</sup> Article 7(4)

sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels. (emphasis added)

The Protocol to the Charter African Charter on Human and Peoples Rights on the Rights of Women (2003) provides a clear mandate that “Women shall have the right to live in a healthy and sustainable environment” (Article 18.1) and obligates State Parties “to take all appropriate measures to:(a) ensure greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels..” (Article 18.2.a)

Article 24 of the *Cartagena Protocol on Biosafety* expressly refers to *indigenous and local communities* in that Parties “may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities”

The preamble of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization* notes the “interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities.” The Nagoya Protocol contains numerous references to indigenous peoples and their local communities in relation to access and benefit sharing of genetic resources.

The *United Nations Framework Convention on Climate Change* (UNFCCC) does not refer to “women, children, indigenous peoples and their communities and other communities. However, a number of decisions was adopted by the Conference of the Parties specifically addressing gender issues. For example, in 2010 the Conference of the Parties adopted Decision 6/CP.16 that included a mandate for the Least Developed Countries Expert Group (LEG) to *strengthen* “gender-related considerations and considerations regarding vulnerable communities within least developed country Parties.”<sup>23</sup> Other examples include *Technical Guidelines for the*

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<sup>23</sup> FCCC/CP/2010/7/Add.2

*National Adaptation Plan (NAP) Process*<sup>24</sup> that included a key goal of *strengthening* gender considerations and considerations regarding vulnerable communities. Gender considerations were expressly included in Decision 2/CP.17 which urged Parties to consider the positive and negative impacts of the implementation of response measures to mitigate climate change on women and children. In addition, the Green Climate Fund<sup>25</sup> is the first climate financial mechanism to mainstream gender as an essential decision-making elements in resource deployment recognizing that “impacts of climate change affect women and men differently.

The Paris Agreement in its preamble calls on Parties “when taking action to address climate change, respect, promote and consider their respective obligations on *inter alia* the rights of indigenous peoples, local communities, children, gender equality, the empowerment of women and intergenerational equity.” In addition, the Conference of the Parties in 2015 adopted a decision to establish a platform for local communities and indigenous peoples.<sup>26</sup>

In 2017 under the *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)* · the International Indigenous Peoples’ Forum on World Heritage (IIPFWH) was established at the 41st session of the UNESCO World Heritage Committee.

#### IV. OPEN QUESTIONS

The existing principles for women, children (and youth) and indigenous peoples and their communities vary in the language used, the scope and the overall objectives. Principle 20 on women has been criticized for its lack of ambition failing to include any obligatory language, even of a hortatory nature.<sup>27</sup> By contrast, the Protocol on the African Charter states clearly the right of women to a healthy and the right to live in a healthy and sustainable environment.” Criticism has also been levied against Principle 22 on Indigenous People and Sustainable Development. The use of the singular “people” instead of “peoples” is understood as ignoring their collective rights

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<sup>24</sup> NATIONAL ADAPTATION PLANS Technical guidelines for the national adaptation plan process (LEG, 2012), available at [http://unfccc.int/files/adaptation/cancun\\_adaptation\\_framework/application/pdf/naptechguidelines\\_eng\\_high\\_res.pdf](http://unfccc.int/files/adaptation/cancun_adaptation_framework/application/pdf/naptechguidelines_eng_high_res.pdf)

<sup>25</sup> The Green Climate Fund was established an operating entity of the Financial Mechanism of the Convention under Article 11 by the Conference of the Parties in 2010 in Decision 1/CP.16

<sup>26</sup> Dec. 1/CP.21

<sup>27</sup> Claire Mahon, “Principle 20 The Role of Women”, in *The Rio Declaration on Environment and Development: A Commentary* (Jorge E. Vinuales, 2015) 509

to ancestral lands and self-determination.<sup>28</sup> However, the plural form has since been applied in the 2002 WSSD Declaration and the Rio +20 outcome document. Principle 22 has also been criticized for avoiding any “rights-based” language. By contrast, the ILO Convention no. 169 and the UNIDRIP adopted rights based language. The role of youth in environmental issues and sustainable development as highlighted in Principle 21 does not appear in other conventions and agreements in either preambular references or subsequent decisions adopted by the parties, with the exception of the climate instruments. Yet, the importance of youth and children for the future of the planet and achieving sustainable development has been stressed in the key UN instruments on sustainable development reviewed in this chapter.<sup>29</sup>

## **V. ASSESSMENT**

The current text of the Global Pact for the Environment refers to women, children, indigenous peoples and local communities in the preamble. Whereas, in this brief review of existing instruments it is clear that the international community has progressively recognized importance of these environmental protection and sustainable development. In some instruments, these categories have been referred to collectively, but for the most part individually. While these categories share common elements in relation to environmental protection and sustainable development each also carries its own dynamics and concerns. For these reasons, it would be advisable to adopt substantive principles for each category separately and not collectively.

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<sup>28</sup> Dinah Shelton, “Principle 22: Indigenous People and Sustainable Development,” *Ibid.*, 541.

<sup>29</sup> Magnus Jesko Langer, “Principle 21 The Role of Youth,” *Ibid.*519.

## CHAPTER 16

# Effective Implementation of Environmental Law

Yann Kerbrat

### **Article 15 – Effectiveness of environmental norms**

*The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.*

## **I. OVERVIEW AND CONTENT OF THE PRINCIPLE**

Article 15 of the draft Global Pact is a response, albeit a partial one, to one of the major challenges facing environment law: the challenge of making its norms more effective. It has been pointed out many a time that norms in this area, and especially those of international law, are very inadequately enforced and that many of the hundreds of treaties are barely if at all enforced.<sup>1</sup> In his report of 30 November 2018 entitled ‘Gaps in international environmental law and environment-related instruments: towards a global pact for the environment’, the United Nations Secretary General observed that ‘[t]he lack of effective implementation of many multilateral environmental agreements has been identified as a major gap in addressing environmental challenges’.<sup>2</sup>

The reason for this state of affairs comes down in part to the sheer number of norms and the fragmentation of international environmental law.<sup>3</sup> It is also the consequence of the unsuitability in many states of the national laws meant to implement them and of the national mechanisms guaranteeing their enforcement. It

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<sup>1</sup> See ‘Increasing the Effectiveness of International Environmental Law. Duties of States, Rights of Individuals’, Report of the Club des juristes, nov. 2015, <http://www.leclubdesjuristes.com/report-increasing-the-effectiveness-of-international-environmental-law-duties-of-states-rights-of-individuals/>

<sup>2</sup> UN Doc. A/73/419, §. 85, p. 30.

<sup>3</sup> See UN Environment, ‘Future shape of international law to address pollution of global significance affecting the Earth’s ecosystems: consolidated report of initial consideration by experts’, 6 April 2018.

is patently obvious that in a large number of states and for various reasons (lack of political will, poor coordination among public authorities, inadequate control and inspection, weak judicial procedures, etc.) environmental norms are inadequately enforced with the result that, behind the political grandstanding that goes on in enacting environmental laws, the truth about environmental protection is far darker.

In addressing this issue, article 15 sets out three obligations that are incumbent on states. First, states are bound to enact environmental “laws” (norms in the French version). This is an obligation to achieve a stated outcome and not a best-efforts obligation: it requires states to enact norms and not merely to discuss whether there is a sound basis for them or to negotiate their content. It should be observed that article 15 refers to environmental “laws”, but the French version uses the term “norms”, which has a broader meaning and potentially requires states to enact both national and international norms, as the case may be.

Second, article 15 requires states to ensure that the environmental norms they do enact (individually or collectively) are effective. Meeting an obligation of the kind presupposes that the norms enacted are clear and hard enough to be binding. In particular it means norms of a general character shall be specified in regulations made out for their enforcement. It further presupposes that the norms be adapted to changes in circumstances and to the advancement of scientific knowledge. ‘If the expected result is not forthcoming, the law will have to be readjusted so as take into account relevant socio-economic and environmental factors which were previously neglected, or simply such that it can be more easily implemented and monitored.’<sup>4</sup>

Third, article 15 requires states to ensure the effective implementation and enforcement of environmental norms. Fulfilling this obligation, which supplements the previous one, presupposes that proportionate and dissuasive sanctions are provided for violations of these norms, but also that effective supervisory mechanisms are in place. Court supervision is essential in this respect. This was emphasised in the Statement adopted in Johannesburg at the Global Judges Symposium on Sustainable Development and the Role of Law (20 August 2002): ‘an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and [...] members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial for

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<sup>4</sup> M. Kunz, ‘Principle 11, Environmental Legislation’, in J. Vinuales (ed.), *The Rio Declaration on Environment and Development: A Commentary*, OUP, 2015, esp. p. 315.

promoting compliance with, and the implementation and enforcement of, international and national environmental law.’<sup>5</sup>

Like the obligations incumbent on states in the area of human rights, the effective implementation and enforcement of environmental norms further requires that states take measures to ensure that environmental norms are observed even in relations between private-sector entities and not just by the public sector.<sup>6</sup> Lastly, in practical terms, it should be ensured too that resources, including financial resources, are made available by states both individually and collectively to ensure environmental norms are effectively enforced.

Article 15 specifies, though, that the implementation and enforcement of ‘laws’ (norms in the French version) should be ‘fair’. Article 15 is very imprecise in this respect. Does it mean making allowance for the circumstances of developing countries, as with the provisions of Principle 11 of the Rio Declaration? This would mean the reference to fairness echoes the concern in the preamble to the Pact Project (and taken up in article 20 of the Project) that ‘all States cooperate as closely as possible and participate in an international, effective and appropriate action according to their common but differentiated responsibilities and respective capabilities, in light of their different national circumstances’. Is it a question rather of promoting enforcement that respects individuals and entities, minorities and native peoples within each state? That would be in keeping with an equally legitimate concern. In any event, it would certainly be preferable for the final text to clarify the meaning of this reference to fairness so that it does not provide a comfortable excuse for states not to enforce the requirements of article 15.

## II. HISTORICAL DEVELOPMENT AND MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Article 15 of the draft Global Pact for the Environment (GPE) is very clearly inspired by Principle 11 of the Rio Declaration of 1992, the first sentence of which says: ‘States shall enact effective environmental legislation.’ This principle was included in the Declaration at the instigation of the countries of the global north and of the European Community. Its inclusion in the Declaration was designed to counterbalance a

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<sup>5</sup> ‘The Johannesburg Principles on the Role of Law and Sustainable Development’, Global Judges Symposium, Johannesburg, 18–20 August 2002.

<sup>6</sup> See, ECHR, *X and Y v. The Netherlands* case, n. A.91, judgment of the 26 March 1985, esp. pt. 23. On this case-law, see D. Spielmann, ‘Obligations positives et effet horizontal des dispositions de la Convention’, in *L’interprétation de la Convention européenne des droits de l’homme*, Bruxelles, Bruylant, 1998, p. 133 ff.

request from India that the Declaration should mention that ‘[e]nvironmental standards which are valid for the most advanced countries may be inappropriate and of unwarranted economic and social cost for the developing countries’.<sup>7</sup> India’s proposal was subsequently included in the second and third sentences of Principle 11, which read: ‘Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.’

By underscoring in this way the importance of internal law for effective environmental protection, the Rio Declaration was not wholly innovative when it was adopted in 1992. The necessity for internal norms was foreshadowed in the principles on planning in the 1972 Stockholm Declaration on the Human Environment.<sup>8</sup> It was also clearly expressed in 1982 in the preamble to the World Charter for Nature in which the UN General Assembly declared itself to be ‘[f]irmly convinced of the need for appropriate measures, at the national and international, individual and collective, and private and public levels, to protect nature and promote international co-operation in this field’.<sup>9</sup>

Although inspired by Principle 11 of the Rio Declaration, article 15 of the GPE Project is a more advanced version of it. First, in using the term ‘laws’ instead of the expression ‘environmental legislation’, the Project sets itself apart from the objective of the authors of the Rio Declaration who sought to push states into giving themselves legislation of a ‘comprehensive nature’ on environmental protection and not ‘ad hoc and/or piecemeal’ rules.<sup>10</sup> Emphasis fell on the internal legislation being complete, not effective. Besides, Principle 11 concerned national legislation alone, whereas article 15 of the Project, in the French version, refers to norms without further clarification and so potentially concerns both internal norms and international norms, both universal and regional.

Next, article 15 of the GPE Project lays more emphasis on the necessity of effective enforcement of internal laws. In this respect and inasmuch as it requires states to enact effective and effectively sanctioned laws, in particular for the enforcement of international treaty rules and international custom, article 15 goes further than

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<sup>7</sup> See Kunz *op. cit.*, p. 313-314.

<sup>8</sup> Principles 11 to 17. See C. Redgwell, ‘National Implementation’, in P. Birnie, A. Boyle et C. Redgwell, (dir.), *International Law and the Environment*, OUP, 3<sup>rd</sup> ed., 2009, esp. p.938.

<sup>9</sup> World Charter for the Nature, adopted and ‘solemnly proclaim[ed]’ by the General Assembly on 28 October 1982 (A/RES/37/7).

<sup>10</sup> See Kunz, *op. cit.* p.315.

Principle 11. It is in keeping with the current trend in international practice of requiring the effective enforcement of environmental norms. A significant number of treaties on environmental issues thus include express provisions requiring states to enact effective internal rules to meet the treaty obligations.<sup>11</sup> Several international tribunals have further adjudicated that states are bound to adopt such internal rules, to supervise compliance with them and to provide dissuasive sanctions in the event of their violation in such a way as to implement states' international obligations on environmental protection. In its advisory opinion on the *Request submitted by the Sub-Regional Fisheries Commission* (2 April 2015) the International Tribunal for the Law of the Sea interpreted the provisions of the United Nations Convention as imposing on the parties a due diligence obligation for vessels flying their flags to comply with the rules laid down by coastal states with respect to protection of the environment and fisheries when conducting activities in another state's Exclusive Economic Zone. It then indicated, first, that this due diligence obligation implies 'the obligation for the flag state to adopt the necessary measures prohibiting its vessels from fishing in the exclusive economic zones of the SRFC Member States, unless so authorized by the SRFC Member States' (pt. 134); and second, that 'while the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable to involvement in [illegal, unreported and unregulated] fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities' (pt. 138).

This interpretation of due diligence obligations was famously taken up by the arbitration tribunal in *The South China Sea Arbitration* case, dealing more broadly with states' obligations to protect and preserve the marine environment.<sup>12</sup>

### III. POTENTIAL IMPACT OF ARTICLE 15

#### A. IMPACT ON THE INTERNATIONAL LEGAL ORDER

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<sup>11</sup> See for example, among many other treaties: the CITES (1973, art. VIII), the Berna Convention (1979, art. 4-7), the UN Law of the Sea Convention (1992, art. 207), the Espoo (EIA) Convention (1991, art. 2), the Cartagena Protocol (2000, art. 2), or the Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003, art. 3).

<sup>12</sup> PCA, *In the matter of the South China Sea arbitration* (Philippines vs. China), case no. 2013-19, Final Award, 12 July 2016, pt. 944 s.

The rule in article 15 of the GPE Draft Project could contribute markedly to improving the effectiveness of international environment law for at least three reasons.

First, in relations among parties to the GPE, account may be taken of obligations that article 15 sets out in interpreting both bilateral and multilateral agreements, including those concluded before the GPE came into force. Pursuant to the rule codified in article 31(3)(c) of the Vienna Convention of 1969 on the Law of Treaties between States, allowance is made in the interpretation of treaties of ‘[a]ny relevant rules of international law applicable in the relations between the parties’.

Second, where there is a mechanism for monitoring the parties’ obligations, supervision will be tightened by the potential review of the relevance and efficiency of the internal laws enacted for implementing treaties. Where there is only a duty to report, the mere fact that the state has to make a report at regular intervals on the laws and regulations it has adopted and the measures it has taken to ensure their effective application would enable the state to make its own appraisal of how effective its internal legislation is and to be informed of the ways to improve it.

Third, in terms of international public action, the affirmation of such obligations in the GPE would be an incentive for states and international organisations to develop international cooperation and support from organisations for developing states to make their national legislation more effective. In this regard, article 15 of the GPE fits in with the sustainable development objectives set out in the *2030 Agenda for Sustainable Development* adopted by the UN Assembly on 25 September 2015.<sup>13</sup> Goal 16.b invites states to ‘promote and enforce non-discriminatory laws and policies for sustainable development’. It also fits in with one of the main missions of UN Environment, as set out under the Montevideo IV programme for the decade 2010<sup>14</sup>. Under this programme, the UN agency takes action to strengthen law and institutions, in particular by promoting, where appropriate, harmonized approaches to the development and implementation of environmental law, and providing legal technical assistance and capacity-building training to developing countries and countries with economies in transition to strengthen their capacity to develop and enforce environmental law.

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<sup>13</sup> A/RES/70/1.

<sup>14</sup> *Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV)*, adopted by the Governing Council of the United Nations Environment Programme in section I of its decision 25/11 of 20 February 2009, doc. UNEP/Env.Law/2010/1

## B. IMPACT ON INTERNATIONAL LEGAL SYSTEMS

By requiring states to introduce both environmental rules and mechanisms to ensure their effective enforcement, the adoption of article 15 may markedly improve national legislation for environmental protection.

Article 15 in particular would provide arguments in internal judicial proceedings against the state to ensure it acts effectively. Some internal judicial precedents are already moving in this direction. Evidence for this is the decision taken by Dutch courts in *Urgenda*<sup>15</sup>. Article 15 might provide an incentive to generalise this.

Lastly, the application of other provisions of the GPE, read in the light of article 15, might be facilitated. With the intervention of the courts as a guarantee that internal laws are effective (see part I above), article 15 and more specifically ‘the duty ... to ensure the effective implementation and enforcement of environmental laws’ could contribute to the effective application of article 11 of the GPE on access to environmental justice.

## IV. ASSESSMENT

The rule set out in the draft article 15 is essential and welcome especially in an instrument that has as one of its main objectives to bolster the effectiveness of environment law.

Even so, the text could be usefully clarified in terms of what is covered by the idea of ‘fair implementation and enforcement’.

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<sup>15</sup> See in particular The Hague Court of Appeal, *The State of the Netherlands vs Urgenda Foundation*, 09-10-2018, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>.

## CHAPTER 17

# The Principle of Resilience

Nicholas Robinson

### Article 16 – Resilience

*The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.*

## I. OVERVIEW

The principle of resilience reflects the natural capacity of ecological systems, humans, and societies to recover from disruptions. As a legal principle, it advances prudence in preparing for possible natural disasters, or anticipating other interruptions and dislocations, in order to give priority to restoring the stability and balance that previously existed. Ecological systems naturally tend toward rebalancing as they recover from disruptions.<sup>1</sup> Human communities have this capacity, and observing the principle of resilience aims to build up this inherent capacity.<sup>2</sup> In an era when societies are learning how to adapt to the impacts of climate change, observing the principle of resilience enables communities to withstand shocks and adapt and rebuild. The principle promotes readiness.<sup>3</sup> In short, the resilience principle contemplates that all appropriate and necessary measures should be undertaken in order to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.<sup>4</sup>

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<sup>1</sup> C.S. Hollings, “Resilience and Stability of Ecological Systems,” 4 (#1) *Annual Review of Ecological Systems* pp. 1-23 (1973),

<sup>2</sup> See Nicholas A. Robinson, “The Resilience Principle,” 5 *IUCN Academy of Environmental Law. eJournal* 19 (2014), and at <http://digitalcommons.pace.edu/lawfaculty/953/>.

<sup>3</sup> Judith Rodin, *The Resilience Dividend* (Rockefeller Foundation, Public Affairs, 2014).

<sup>4</sup> The principle is a guide, not a “blackletter” or clear rule. It is contextual and operates through its application and aspirations, rather than through formal doctrine. See Ronald Dworkin, [Taking Rights Seriously](#), 23-28

## II. HISTORICAL EVOLUTION AND MAIN FORMULATIONS

The Sendai Framework on Disaster Risk Reduction embodied the principle of resilience.<sup>5</sup> The Sendai Framework is the successor instrument to the Hyogo Framework for Action (HFA) 2005-2015: Building the Resilience of Nations and Communities to Disasters.<sup>6</sup>

Disasters, whether sudden as in either natural settings, with an earthquake or tsunami or technological, as in gas pipeline explosion or nuclear power plant meltdown, can be of catastrophic proportions, but they need not be irretrievably calamitous. The exercise of foresight allows the preparation of contingency plans for providing immediate disaster relief, and providing alternative services for those disrupted by allocating resources for redundancy and “back-up,” and then for recovery and rebuilding, thereby ensuring that resources to do so are available, such as through casualty insurance systems, mutual aid agreements, reserve funds, or allocating expertise to plan and implement recovery.<sup>7</sup> The designs of ways to implement and observe the resilience principle are necessarily contextual.<sup>8</sup> Nations or local authorities alike will apply the general mandate to enhance resilience differently, depending on local conditions.<sup>9</sup>

Application of the resilience principle supports practices and policies that further sustainable development, as envisioned by the United Nations’ Sustainable

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and 71-80 (1978). See also Gilles J. Martin, “Principles and Rules,” in 13-22, in Ludwig Kramer and Emanuela Orlando, *Principles of Environmental Law*, (Vol. VI in the Elgar Encyclopedia of Environmental Law 2018).

<sup>5</sup> See <https://www.unisdr.org/we/coordinate/sendai-framework>. The Sendai Framework has seven goals, each of which fosters resilience: “(a) Substantially reduce global disaster mortality by 2030, aiming to lower average per 100,000 global mortality rate in the decade 2020-2030 compared to the period 2005-2015. (b) Substantially reduce the number of affected people globally by 2030, aiming to lower average global figure per 100,000 in the decade 2020 -2030 compared to the period 2005-2015. (c) Reduce direct disaster economic loss in relation to global gross domestic product (GDP) by 2030. (d) Substantially reduce disaster damage to critical infrastructure and disruption of basic services, among them health and educational facilities, including through developing their resilience by 2030. (e) Substantially increase the number of countries with national and local disaster risk reduction strategies by 2020. (f) Substantially enhance international cooperation to developing countries through adequate and sustainable support to complement their national actions for implementation of this Framework by 2030. (g) Substantially increase the availability of and access to multi-hazard early warning systems and disaster risk information and assessments to the people by 2030.”

<sup>6</sup> See <https://www.unisdr.org/we/coordinate/hfa>.

<sup>7</sup> See, generally, the references compiled by the Stockholm Resilience Center, [www.stockholmresilience.org](http://www.stockholmresilience.org)

<sup>8</sup> See J.B. Ruhl, “General Design Principles for Resilience and Adaptive Capacity in Legal Systems” Applications to Climate Change Adaptation Laws, 89 *North Carolina Law Review* 1391 (2010), t [www.nclawreview.org/documents/89/5/ruhl.pdf](http://www.nclawreview.org/documents/89/5/ruhl.pdf)

<sup>9</sup> See Melinda Harm Benson and Robin Kundis Craig, *The End of Sustainability – Resilience and the Future of Environmental Governance in the Anthropocene* (2017, Univ. of Kansas).

Development Goals.<sup>10</sup> For example, the provision of energy depends on having reliable and sustainable sources. The International Energy Agency finds resilience is essential to all laws and policies on energy.<sup>11</sup> The supply of potable water requires observing the resilience principle.<sup>12</sup> Observing the Resilience Principle is evident also when national environmental protection laws are observed and as a consequence well-maintained ecosystems provide natural buffers against the worst impacts of disasters.<sup>13</sup> As the potential for disruptions increases with the impacts of climate change,<sup>14</sup> measurable benefits flow from promoting resilience principle.<sup>15</sup> Proactive measures should be taken to enhance the benefits of resilience rather than passively relying upon natural resilience to be sufficient.<sup>16</sup> Whatever the scale or ecological context, resilience will be required.

The principle of resilience is embedded in obligations to maintain Earth's ecological processes and life-support systems. Ever since the 1972 United Nations Conference on the Human Environment, States have cooperated toward safeguarding the Earth as the home for human civilization.<sup>17</sup> The UN General Assembly elaborated this duty in adopting in 1982 the World Charter for Nature.<sup>18</sup> The 1992 Rio Declaration on Environment and Development emphasized the primacy for sustaining human society.<sup>19</sup> These duties give rise to the principle of preventative action,<sup>20</sup> as does the customary obligation of international law for states to undertake

<sup>10</sup> See <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

<sup>11</sup> IEA, "Resilience," at <https://www.iea.org/topics/energysecurity/resilience/IEA>.

<sup>12</sup> Heather Smith, "Understanding Resilience: Implications for the Water Sector," *Global Water Forum*, at <http://www.globalwaterforum.org/2012/09/16/understanding-resilience-implications-for-the-water-sector/> (2012).

<sup>13</sup> Nicholas A. Robinson, "Legal Redress for Transboundary Pollution Through Environmental Cooperation," pp. 362-404 in S. Jayakumar, Tommy Koh, Robert Beckman and Hao Duy Phan, *Transboundary Pollution – Evolving Issues of International Law and Policy* (2015).

<sup>14</sup> See the Assessment Reports of the Intergovernmental Panel on Climate Change, [www.ipcc.ch](http://www.ipcc.ch), and Special Report 15, "Global Warming 1.5 C.," at <https://www.ipcc.ch/sr15/> (2018).

<sup>15</sup> Folke, C., Carpenter, S. R., Walker, B., Scheffer, M., Chapin, T. and Rockström, J. (2010), "Resilience Thinking: Integrating Resilience, Adaptability and Transformability", *Ecology and Society*, vol. 15, no. 4, pp. 20.

<sup>16</sup> D.R. Nelson, W.N. Adger, and K.Brown, "Adaptation to Environmental Change: Contribution of a Resilience Framework," *32 Annual Review of Environment and Resources* 395-419 (2007).

<sup>17</sup> UN Stockholm Declaration, Principle 2: "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments." At <http://www.un-documents.net/unchedec.htm>

<sup>18</sup> UNGA Res. 37/7 (28 October 1982).

<sup>19</sup> Rio Declaration on Environment and Development, Principle 1: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." At <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

<sup>20</sup> See Philippe Sands, "Principle of preventative action," in *Principles of International Environmental Law* at pp. 246-249 (Second Edition, 2003).

environmental impact assessments.<sup>21</sup> Through the analysis in an environmental impact assessment (EIA), governments can determine the most appropriate and efficacious steps to advance resilience, in specific circumstances. Best practices for EIA entail the close examination of alternatives and ways to avoid adverse impacts, with enhancing resilience providing effective insurance against risks.

### III. ASSESSMENT

The evolution of environmental legal principles provides the framework within which recognition of the Principle of Resilience is grounded.<sup>22</sup> The principle is recognized by experts,<sup>23</sup> including those who convened to draft a proposed global pact for the environment in 2017.<sup>24</sup> The global pact experts expressed the principle as follows: “ The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.”<sup>25</sup>

Resilience is a component of the Ecosystem Approach, which is embodied in biodiversity agreements.<sup>26</sup> It is applied in the procedures required for environmental impact assessment (EIA) and public participation, as provided in regional agreements such as the UN Economic Commission for Europe’s Espoo Convention on EIA in a

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<sup>21</sup> See Principle 17 of the Rio Declaration on Environment & Development, *supra*, and the ruling of the International Court of Justice in *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), <https://www.icj-cij.org/en/case/135>.

<sup>22</sup> Ben Milligan and Richard Macrory, “The History and Evolution of Legal Principles Concerning the Environment,” pp. 23-37, in Ludwig Kramer and Emanuela Orlando, *Principles of Environmental Law*, (Vol. VI in the Elgar Encyclopedia of Environmental Law 2018).

<sup>23</sup> See, e.g. Article 9 of the IUCN/ICEL Draft Covenant on Environment and Development (5<sup>th</sup> ed., 2015), which since 1995 has provided that “The capacity of natural systems and human communities to withstand and recover from environmental disturbances and stresses is limited, and shall be sustained or restored as fully as possible, When such disturbances and stresses occur, efforts shall be taken to sustain or restore the systems and communities as fully as possible.” See also Principle 4 of the IUCN World Declaration on the Environmental Rule of Law, (Rio de Janeiro, 2016), which recites that “Legal and other measures shall be taken to protect and restore ecosystem integrity and to sustain and enhance the resilience of socio-ecological systems. In the drafting of policies and legislation, and in decision-making, the maintenance of a healthy biosphere for nature and humanity should be primary consideration.”

<sup>24</sup> See the Club des Juristes, <http://www.leclubdesjuristes.com/toward-a-global-pact-for-the-environment-action-for-the-planet-action-through-law/>. See also IUCN World Commission on Environmental Law, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment>. On the genesis of the global pact, see <https://globalpactenvironment.org>.

<sup>25</sup> See Principle 16, “Resilience”: Draft Global Pact for the Environment. The UN Environment Programme circulated a French briefing paper for delegates at the UN General Assembly on the proposed pact, noted the inclusion of the resilience principle as innovative. See “Concept Note on the Global Pact for the Environment” (January 16, 2018) at <https://wedocs.unep.org/bitstream/handle/20.500.11822/22458/Global%20Pact%20for%20Environment%20Concept%20Note.pdf?sequence=2&isAllowed=y>.

<sup>26</sup> Viet Koester, “Environmental Principles and Concepts in Biodiversity Treaties,” pp.549-551, in Kramer and Orlando, *op. cit.*,

Transboundary Context<sup>27</sup> and Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>28</sup> and the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.<sup>29</sup> Each require the use of the ecological sciences and thus encompass and of necessity apply the resilience principle.

All States and communities have socio-ecological resilience, and recognizing the principles enables them to enhance that characteristic. Sustainable development is designed to attain a healthy environment for all, as the UN Sustainable Development Goals provide. However, when disasters or other disruptions interrupt pathways to sustainability, it is the most vulnerable communities whose sustainable development goals are frustrated. Without robust application of the resilience principle, these communities are less likely to realize their hopes and expectation for a healthy and sustainable life. Guided by the resilience principle, communities build adaptive capacities.

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<sup>27</sup> See [//www.unece.org/env/eia/about/eia\\_text.html#article2](http://www.unece.org/env/eia/about/eia_text.html#article2).

<sup>28</sup> See <https://www.unece.org/env/pp/treatytext.html>.

<sup>29</sup> See [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf).

## CHAPTER 18

# Non-Regression

Michel Prieur

### **Article 17 – Non-regression**

*The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law.*

## **I. OVERVIEW**

Since the 1970s there has been a period of growth of environmental legal norms with the main objective to achieve a better environment through strict legal obligations. After more than 40 years, in a period of economic and political crisis, there is pressure to stop and to reduce the progress of environmental law.

The consequences of simplification or fitness or abolishment of the existing environmental law would be a disaster for human beings and nature, which are interdependent. Reduction of the protection of biodiversity, and the increase in pollution, would be a dramatic back-track for mankind and for future generations. We are consuming the earth's bio- capacity faster than it is regenerated, a clear sign of unsustainability. Today we all, citizens and governments, are accountable for the survival of planet earth, our common good.

If we continue to allow regression in environmental protection, environmental degradation will cause further economic and social problems in the long term. This is why a new commitment to non-regression is needed to ensure well-being for present and future generations of people and all life.

To stop the risk of collective disaster, the international community needs clear objectives and rules.

## II. HISTORICAL DEVELOPMENT AND MAIN FORMULATIONS

Rio Principle 11 of 1992 declares that: « States shall enact effective environmental legislation ». International and national environmental laws, treaties and policies seek to reduce pollution and to protect and enhance biodiversity, using the best pollution control technologies. Effective environmental regulation seeks continual improvement. Non regression of levels of environmental protection is consistent with Principle 11.

With Paragraph 20 of the outcome document « The future we want » adopted by the Rio +20 United Nations Conference on sustainable Development in 2012 by United Nations members states, the principle of non-regression prevents any rollback of existing levels of environmental protection. It is increasingly clear that civil society wants to see a strong commitment to the principle that environmental protection and sustainable development in general, should continually advance, and should not slide backwards.

Non- regression in environmental law is not an innovation. Human rights law already prohibits regression. In its General Comments of 1990, the UN Committee for Economic, Social and Cultural Rights (CESCR) condemns « any deliberately retrogressive measures »<sup>1</sup>. The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major instruments on human rights<sup>2</sup>. As human right to a healthy environment is nowadays recognised by eight international treaties<sup>3</sup> and by more than one hundred constitutions<sup>4</sup>, the requirement of non-regression as part of human rights protection can be applied to all environmental issues<sup>5</sup>.

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<sup>1</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) General Comments n°3 : The nature of States Parties obligations, Art. 2, Para.1 of the Covenant, 14 December 1990, E/1991/23, para.9.

<sup>2</sup> Cf. Universal Declaration of Human Rights (1948), Art. 30 ; European Convention on Human Rights (1950), Arts. 17 and 53 ; Art. 5 of the two 1966 Covenants ;

<sup>3</sup> African Charter on human and people's rights (1981) ; Additional San Salvador Protocol to the American Convention on Human Rights in the area of economic, social and cultural Rights (1988) ; Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters (1998) ; Maputo Protocol to the African Charter on Human and People rights on the Rights of Women in Africa (2003) ; African Maputo Convention on the conservation of nature and natural resources (2003) ; Arab Charter on Human Rights (2004) ; Inter-American Convention on protecting the Human Rights of older persons (2015) ; Escazu Regional Agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean (2018).

<sup>4</sup> Boyd, David R. *The Environmental Rights Revolution :A global study of Constitutions, Human Rights and the Environment*. UBC Press, 2012 ; James R. May and Erin Daly, *Global Environmental Constitutionalism*, Cambridge University Press, 2015.

<sup>5</sup> On 15 November 2017 the inter American Court of Human Rights gave an Advisory Opinion showing clearly that environmental issue is strongly linked with Human Rights (Opinion n°OC-23/17).

The non-regression principle is already part of international, regional and national law.

#### A. INTERNATIONAL AND REGIONAL INSTRUMENTS

In international law, the non-regression principle is indirectly or directly part of international conventions in international labor law, free trade agreements and environmental law treaties. Article 29 of the 1946 Constitution of the International Labour Organization (ILO) guarantees for workers better conditions which prohibit lower conditions. In the free trade agreements in relation to the environment, the Marrakech Agreement establishing the World Trade Organization (WTO) in 1994 requires in the Preamble: « seeking both to protect and preserve the environment and to enhance means for doing so »<sup>6</sup>. Since 1994 North American Free Trade Agreement (NAFTA), United States, Mexico and Canada commit themselves not to reduce the level of protection of the environment. The new 30 September 2018 United States-Mexico-Canada Agreement (USMCA) requires in the Preamble, as NAFTA did, to « promote high level of environmental protection » and the new art. 24-3-2 on « levels of protection »: « recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties ». Nearly in the same wording, all free trade agreements signed by the United States, by the European Union or by China require a high level of environmental protection and forbid reducing the existing national environmental legislation<sup>7</sup>. The Trans –Pacific partnership signed on 4 February 2016 in Auckland by 12 States of America and Pacific also includes a requirement to not reduce the environmental protection.

All international treaties on the environment are in favor of an increased environmental protection. The mention « amelioration of environmental protection » is a common phrasing. That forbids diminution or reduction of the level of protection considered as a back-track contrary to the general objectives of all environmental policies. It is a clear commitment not to back-track in environmental law, considered

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<sup>6</sup> See too « Trade and Environment Décision » of 14 April 1994.

<sup>7</sup> See US-Chile 2003 ; US US- Colombia 2006 ; US Central America and republica dominicana, CAFTA, 2004 ; European Union-South Korea 2010 ; European Union – Colombia and Peru, 2012 ; China- Korea and China Switzerland 2014.

now as a general rule of international law in environmental matters. In the Uruguay River Convention of 1975, Argentina and Uruguay are obliged to: « not diminish legal standards and sanctions »<sup>8</sup>. The 1982 Montego -Bay Convention on the law of the sea is very strict about the common heritage of mankind. Art. 311-6 forbids any modification to the fundamental principle of art. 136 and States cannot be party to any derogative agreement. Article 11-1 of the Basel 1989 Convention on the control of transboundary movements of hazardous wastes and their disposal requires that regional agreements of implementation : « shall stipulate provisions which are not less environmentally sound than those provided for by this Convention » In the Rio Convention on biological diversity of 1992, art.8-K requires States Parties to : « maintain protection of species ». The Cartagena Protocol of 2000 on Biotechnology Security requires no diminution of the level of protection. The Convention on landscape of 2000 mentions in art. 12 that there should not be less protection of landscapes in any other treaty or any future national law. This Convention, according to a protocol of 2016 will soon apply to all landscapes in the world<sup>9</sup>.

The European Union takes in consideration the non-regression through the concept of « Community acquis » and the requirement of a « high level of protection and improvement of the quality of the environment » and the need of « reinforced cohesion and environmental protection »<sup>10</sup>. Non-regression is even an integral element in the ongoing Brexit negotiations<sup>11</sup>

## B. DOMESTIC INSTRUMENTS

National law recognizes too the legal requirement of non-regression in environmental matters. In Constitutions: art 5-3 of the 2008 Constitution of Boutan where 60% of the forests are protected ad aeternum; in Ecuador Constitution of 2008, art. 11-8 and 423; in many others Constitutions where human rights and therefore environment as human right are considered as *clausula petrea* (Brazil, Portugal Germany, Japan, Norway, Mexico, Tunisia...). A growing number of national or regional laws introduce a non-regression principle among the environmental principles : 2012 Environmental Act of Vera Cruz (Mexico) ; 2012 Municipal law of

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<sup>8</sup> Art. 4-1

<sup>9</sup> Protocol amending the European Landscape Convention, Strasbourg 1-08-2016, [www.coe.int](http://www.coe.int), treaties n° 219.

<sup>10</sup> See Preamble and art. 3-3 of the Treaty on the European Union; art. 37 of the Charter of fundamental rights.

<sup>11</sup> Article 2, Part 2 Environmental Protection “Non-regression in the level of environmental protection”, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, 14 November 2018.

Villa Mercedes (Argentina); 2014 Environmental law of Ivory Coast; 2014 Air quality law of Paraguay; 2016 French biodiversity and landscape law; 2016 environmental Code of Loyauté Island in New Caledonia.

The United States already introduced the non-regression principle in American legislation both in international treaties as we have seen *supra* in all free trade agreements signed by United States, and in national law through « non-degradation » policy and law called anti-backsliding laws, in the Clean Water Act and Clean Air Act<sup>12</sup>.

### C. JURISPRUDENTIAL RECOGNITION

Courts are applying the principle of non-regression. This principle has never been considered as being absolute without any exceptions. As with all legal principles judges benefit from a wide margin of interpretation. Generally tribunals apply the non-regression principle when a regulation or a law constitutes a serious or important back-track in environmental protection, or when the reduction of the environmental protection is not really justified by specific consideration of public interest. Several Constitutional Courts considered that an interdiction of back-track is necessary for the preservation of the environment: Hungarian Constitutional Court, n°28, 20 May 1994; Belgian Court of Arbitration, 14 September 2006; Brazil, Superior Tribunal de Justicia, 2000, 2008, 2010; Spanish Supreme Tribunal, 23 February and 29 March 2012. Many other applications of the non-regression principle by South American tribunals are explained in Mario Pena Chacon's books<sup>13</sup>.

### D. RECENT TRENDS

A comparative overview on the non-regression principle shows that there is a world movement in favor of the non-regression principle<sup>14</sup>. Several official declarations and Congress statements stress the necessity to recognize such a new principle to be able to stop or reduce the ongoing degradation of the environment : European Parliament Resolution of 29 September 2011 about Rio +20 ( §97); 1 November 2011 Brazilian government report for the Rio + 20 Conference ; Call for action by the French speaking world Organization (OIF), Lyon , 13 February 2012 ; Resolution WCC-

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<sup>12</sup> N. William Hines, A Decade of non degradation policy in Congress and the Courts, 62 Iowa L. Rev. 643 1976-1977.

<sup>13</sup> Mario Pena Chacon (ed), El principio de no regression ambiental en el derecho comparado Latinoamericano, PNUD, San Jose de Costa Rica, 2013 ; El principio de no regression ambiental en Iberoamérica, IUCN , Gland, 2007.

<sup>14</sup> M. Prieur and G. Sozzo, La non régression en droit de l'environnement, Bruylant, Bruxelles, 2012.

2012-Res-128 of the IUCN Congress in Jeju, 15 September 2012 ; Human Rights for all, post 2015, Bonn, May 2013 ; Vienna +20 Declaration on Advancing the protection of human rights, June 2013 ; World Declaration on the Environmental Rule of Law, 1st IUCN World Environmental law Congress, Rio, 29 April 2016 ; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for the thirty first session of the Human Rights Council, 1 February 2016 which refers three times to « non retrogressive » national and international standards<sup>15</sup> ; Resolution 074 of the IUCN World Congress, Hawaii, September 2016.

Finally two recent international law agreements refer to non-regression. First in a universal treaty: the Paris Agreement on Climate Change of December 2015. If the expression is not used there is an implicit reference to non-regression through the principle of progression considered as a commitment of not backsliding. In the Preamble, mention is made of the necessity « for an effective and progressive response to the urgent threat of climate change ». In article 3, it is stated that: « the effort of all Parties will represent a progression over time ». In article 7-14-d it refers to « the overall progress made in achieving the global goal on adaptation ». Article 9-3 refers to « a progression beyond previous effort ». Article 13-11 mentions « Progress achieved according to art. 9. Article 14 « assess the collective progress ». In the Decision 1/CP21 the word « Progress » appears 12 times showing that all the climate change process is towards a better environment preventing any back-track. The final Déclaration of Parties in Marrakech for the COP 21 in December 2016 is very clear: « this momentum is irreversible ». The G20 meeting in Hamburg on 8 July 2017 states that: « the Paris Agreement is irreversible ».

Secondly in a regional treaty. On 4 March 2018, in Escazu (Costa Rica) a regional agreement has been adopted on access to information, participation and justice in environmental matters in Latin America and the Caribbean. Article 3 refers to general principles. The third one is: « principle of non-regression and principle of progressive realization ».

### III. ASSESSMENT

As we have seen through all these illustrations, the principle of non-regression is not a new idea. It has been recognized already in several legal instruments of international law and of national law. It can be considered as a barrier to increasing

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<sup>15</sup> A/HRR/31/52 n° 67, 68 and 75.

environmental degradation. It both responds to the need of legal security for economic actors and to our commitments towards future generations. The non-regression principle is a tool for safeguarding the existing levels of environmental protection. It does not forbid progress, modifications or amendment of the law. It does not forbid adaptation of existing environmental law to new scientific discoveries and progress in technology.

The general recognition of the non-regression principle is a step forward towards a more safe, clean, healthy and sustainable environment. The existence of a general international consensus on the importance of such a principle in environmental policy and law creates the path towards a universal confirmation and recognition.

We all have a collective responsibility not to harm the rights of present and future generations to life and to a sound environment. To this end, States should take the necessary steps to guarantee that no measure may diminish the existing level of environmental protection in conformity with the requirement of all international and national legal instruments. Environmental law always pursues « the amelioration of the environment » because it is the key to ongoing progress for mankind and continuous improvement of the environment, along with social progress and combatting poverty.

Considering the call of the General Assembly of the United Nations at its 19th special Session in 1997 to « continue the progressive development and, as and when appropriate, codification of international law related to sustainable development », it is today appropriate and necessary to recognize the non-regression principle in international law as a collective guarantee for a true sustainable development for all.

## CHAPTER 19

# Cooperation in a Transboundary and Global Context

Laurence Boisson de Chazournes and Jason Rudall

### Article 18 – Cooperation

*In order to conserve, protect and restore the integrity of the Earth's ecosystem and community of life, Parties shall cooperate in good faith and in a spirit of solidarity and global partnership for the implementation of the provisions of the present Pact.*

## I. OVERVIEW

Cooperation is a cornerstone principle of international law, enshrined in customary international law and treaties. Moreover, the case law of international courts and tribunals is replete with references to international cooperation. It finds application in a wide variety of domains, including peace and security, human rights, international economic relations, as well as playing a critical role in environmental protection. Indeed, States cooperate to protect global public goods, manage shared resources, and solve challenges that can only be achieved through bilateral or multilateral action.

Cooperation has many facets in the area of environmental protection. Cooperation is aimed at mitigating transboundary risks and emergencies,<sup>1</sup> and it is closely connected with the obligation of prevention and the no-harm rule. It also includes, amongst other aspects, the duty to consult and negotiate, and reflects the need for institutional cooperation.

## II. HISTORICAL DEVELOPMENT

The UN Charter clearly sets out that a central objective of the UN is to 'achieve international cooperation in solving international problems of an economic, social,

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<sup>1</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3<sup>rd</sup> ed., Oxford University Press, 2009), at 137.

cultural, or humanitarian character...’,<sup>2</sup> while Articles 2, 55 and 56 of the UN Charter go on to provide further for cooperation among states. Cooperation was reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States of 1970 and various resolutions of the General Assembly, notably in the resolutions containing the Declaration of the United Nations Conference on the Human Environment of 1972 (Stockholm Declaration) and the Rio Declaration on Environment and Development of 1992 (Rio Declaration).

Cooperation has played an increasingly significant role in the context of international environmental law. The scale and nature of environmental challenges mean that protection of the environment can only occur through international cooperation and, thus, an obligation to cooperate has become a feature of numerous multilateral environmental agreements. This is evident, for example, in the major environmental conventions, such as the 1992 Convention on Biological Diversity, the 1992 UN Framework Convention on Climate Change (UNFCCC), as well as the 1982 UN Convention on the Law of the Sea (UNCLOS) aimed at protecting the marine environment. Moreover, in multilateral environmental agreements the principle of cooperation can play a role in the progressive development of treaty law through various additional legal instruments and norms adopted by the conferences of the parties.<sup>3</sup>

The principle has similarly been referred to in many cases of international courts and tribunals, including the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). This case law serves to confirm that cooperation is a fundamental principle at the heart of international law and that states are under an obligation to cooperate in good faith.

### III. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Numerous international environmental treaties refer to the general duty to cooperate. Specific manifestations of the principle might include the exchange of information between states, the conduct of scientific research and systematic

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<sup>2</sup> Article 1(3), Charter of the United Nations, 26 June 1945, 1 UNTS XVI; see also: Jason Rudall, *Altruism in International Law* (PhD Thesis, The Graduate Institute, Geneva, 2018), at 141-171.

<sup>3</sup> Peter H. Sand, ‘Principle 27: Cooperation in a Spirit of Global Partnership’, in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development* (Oxford University Press, 2015), at 618; Thomas Gehring, ‘Treaty-Making and Treaty Evolution’, in David Bodansky, Jutta Brunnée, and Ellen Hey (eds.), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), at 467; Annecoos Wiersema, ‘The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements’ (2009) 31 *Michigan Journal of International Law* 231.

observations, prior notification, consultation, prior informed consent, notification in the case of an emergency or emergency assistance, for example.<sup>4</sup> Many treaties also have provisions requiring cooperation in investigating, identifying, and avoiding environmental harm. As for the scope of cooperation in international environmental law, this can range from the requirement to offer ‘economic and technical assistance’ in the context of climate change or the ‘exchange of data and information’ to protect water resources, amongst others.

The Stockholm and Rio Declarations provide for cooperation as a means of achieving environmental objectives. Principle 24 of the Stockholm Declaration articulates that:

‘(i)nternational matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation ... is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.’

Principle 27 of the Rio Declaration provides that:

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Moreover, the Preamble of the Rio Declaration speaks of ‘the creation of new levels of cooperation among States, key sectors of societies and people’. In this way, cooperative efforts should manifest themselves in different forms, at various levels, and with diverse actions through, for example, public-private partnership programmes.<sup>5</sup>

Institutions can play a significant role in facilitating cooperation, as is evident in the area of transboundary water resources. Indeed, cooperation through institutional structures and mechanisms helps to ensure that international water resources are

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<sup>4</sup> See Laurence Boisson de Chazournes, Richard Desgagne, Cesare Romano and Makane Moïse Mbengue (eds.), *Protection internationale de l’environnement* (A. Pedone, 2005); David Hunter, Julia Sommer and Scott Vaughan, ‘Concepts and Principles of International Environmental Law: An Introduction’, *Environment and Trade* (CIEL, UNEP, 1994).

<sup>5</sup> Sand, ‘Principle 27: Cooperation in a Spirit of Global Partnership’, *op. cit.*, at 622.

managed effectively.<sup>6</sup> Cooperation can take various forms in these institutions, from the interaction between different stakeholders to the facilitation of joint activities between States. Moreover, such institutions serve as important mechanisms for dialogue and consultation, which helps to prevent tension that could lead to disputes. When disputes do arise, these institutions can help to resolve them.<sup>7</sup>

As for the climate change regime, the 1992 UNFCCC refers to cooperation in several provisions, including its Preamble, Articles 3, 7 and 9, while the Kyoto Protocol does so in its Article 2(b), and the Paris Agreement in Articles 6, 7, 10, 12. Under Article 6 of the Paris Agreement, provision is made for voluntary cooperation among Parties so that more ambitious nationally determined contributions may be set. Article 7 of the Paris Agreement is concerned with adaptation and it foresees a role for cooperation in strengthening national adaptation efforts. The Paris Agreement also envisages cooperation in technology development and transfer under Article 10. Article 12 provides for cooperative efforts around climate change education, awareness, public participation and public access to information.

The 2030 Agenda for Sustainable Development, which includes the Sustainable Development Goals, recognises the centrality of cooperation to climate change action: '(t)he global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global greenhouse gas emissions and addressing adaptation to the adverse impacts of climate change'.<sup>8</sup>

In the area of the law of the sea, States are similarly obliged to cooperate. Indeed, the 1982 UNCLOS requires that States cooperate, at the universal and regional levels, directly or through international organisations, to ensure the protection of the marine environment, the conservation and management of living resources, as well as the conservation of marine mammals, for example. Parties are also obliged to cooperate in the field of marine scientific research, and in the development and transfer of marine technology.

In the field of industrial accidents and emergencies, States must also cooperate. Under the 1992 Convention on the Transboundary Effects of Industrial Accidents, for example, States in which accidents occur must draft contingency plans in

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<sup>6</sup> Laurence Boisson de Chazournes, *Fresh Water in International Law*, (Oxford University Press, 2013), at 30-31.

<sup>7</sup> See *ibid.*, at 48-53; Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: A Legal Perspective* (Brill, 2016), at 29-31

<sup>8</sup> Transforming our world: The 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015, at para 31.

cooperation with affected States in responding to emergencies. Article 17 of the Convention requires States to notify other affected states of an emergency.

Alongside international instruments, international courts and tribunals have developed the concept of cooperation through their case law. In the *Pulp Mills* case, for example, the ICJ said:

‘(i)t is by co-operating, that the States concerned can jointly manage the rules of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question.’<sup>9</sup>

The Court went on to elaborate the related obligations to notify, consult and conduct environmental impact assessments, in turn giving colour and texture to the obligation of cooperation. Moreover, the Court noted that there was a customary international law obligation to conduct an environmental impact assessment (EIA) where a particular project poses a risk to the environment. In a transboundary context, the conduct of an EIA will require cooperation with other States:

‘(EIAs) must be notified by the party concerned to the other party.... This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts’<sup>10</sup>

In a similar way, the ICJ said of the obligation to give prior notification to the relevant basin organization that ‘the obligation to inform ... allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention’.<sup>11</sup>

In the *Kasikili/Sedudu* case, the ICJ emphasized that the parties should cooperate to avoid hampering the socio-economic activities routinely performed by the communities of the area.<sup>12</sup> In the *MOX Plant* case of ITLOS, the Tribunal noted that

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<sup>9</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, at para 77.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at para 102.

<sup>12</sup> *Case Concerning the Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999. See also Laurence Boisson de Chazournes, ‘The Uses of International Watercourses and Equity’ in *Agua, recurso natural limitado: Entre el desarrollo sostenible y la seguridad internacional* (Marcial Pons, 2018), at 41-54.

‘(t)he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the (UNCLOS), and general international law.’<sup>13</sup>

ITLOS has reiterated the fundamental nature of the principle of cooperation in international law on several occasions, in particular the *Southern Bluefin Tuna* cases,<sup>14</sup> the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*,<sup>15</sup> and the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*.<sup>16</sup>

#### IV. OPEN QUESTIONS

While the obligation to cooperate and its many facets, such as the duties to consult and negotiate, can be found in a wide variety of international instruments, the legal contours of the obligation are not precisely defined. This has an impact on the implementation of cooperation, particularly in terms of what is required of States in discharging their obligation to cooperate.<sup>17</sup> Such requirements are dependent on the specifics of the relevant regime.<sup>18</sup> Greater precision around cooperation obligations has been achieved in contexts beyond international environmental law. In the implementation of economic, social and cultural rights, for example, the Committee on Economic, Social and Cultural Rights has illustrated the types of cooperative activities expected of States under the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>19</sup> More precise cooperation obligations in international environmental law would ensure better environmental protection, particularly regarding the management of shared resources.

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<sup>13</sup> *MOX Plant Case (Ireland v. United Kingdom)*, ITLOS Request for Provisional Measures, 1999, at para 20.

<sup>14</sup> *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v. Japan)*, ITLOS Order of 27 August 1999; for an overview of these cases, see also Laurence Boisson de Chazournes, ‘The International Tribunal for the Law of the Sea’ in Chiara Giorgetti, *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff, 2012), 111-132.

<sup>15</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Order of 8 October 2003.

<sup>16</sup> *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS Advisory Opinion of 2 April 2015.

<sup>17</sup> See Malgosia Fitzmaurice, ‘Legitimacy of International Environmental Law. The Sovereign States Overwhelmed by Obligations: Responsibility to React to Problems Beyond National Jurisdiction’, 77 (2017) *ZaōRV* 339-370, at 347.

<sup>18</sup> See Robert Steenkamp, ‘UNCLOS, CITES and the IWC – A Tailored International Duty to Cooperate’, *EJIL: Talk!* 26 November 2018.

<sup>19</sup> See, for example, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on the Nature of States Parties’ Obligations*, at paras 9-12.

Similarly, the central role of good faith in cooperation must be better established. Good faith should, for example, guide states when they conduct EIAs, the customary obligation for which as yet has a legal content to be clarified. Good faith is also important when States are requested to cooperate with recommendations from international bodies regarding the protection and preservation of the environment and natural resources.

Another open question is the extent to which the duty of cooperation is shaped by the principle of common but differentiated responsibilities. How these two concepts interact should be carefully spelt out in specific regimes. In a different context, the Committee on Economic, Social and Cultural Rights has underscored that cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States, but also that those States with plentiful resources bear a heavier commitment.<sup>20</sup> Inroads have already been made and financial mechanisms intended to facilitate cooperation between developing and developed countries do reflect the principle of common but differentiated responsibilities. This is the case, for example, with the Global Environment Facility (GEF) and the Forest Carbon Partnership Facility, which promote capacity-building and financial assistance.<sup>21</sup>

## V. ASSESSMENT

Cooperation is a cornerstone principle of international law, and particularly international environmental law. It is multifaceted and is manifested in a variety of ways through customary international law, treaties, as well as soft law instruments. International courts and tribunals have also helped to elaborate the principle of cooperation. In practical terms, it is much broader than the pursuit of efforts at the diplomatic level. It includes a duty to notify, to take positive action and to commit resources. Moreover, it can imply specific action such as offering technological assistance, capacity building or information sharing, for example.

In light of a rapidly changing geopolitical landscape, it should be emphasised that the legal framework around cooperation dictates that it must occur despite any political, economic or social differences that States may have. Despite the progress that has been made in expanding the principle of cooperation, greater precision can

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<sup>20</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on the Nature of States Parties' Obligations*, at para 14.

<sup>21</sup> See Laurence Boisson de Chazournes, 'Is there Room for Coherence in Climate Financial Assistance', (2015) 4 *Laws* 541-558.

be achieved in spelling out the scope of cooperative activities that States are required to undertake. Moreover, in defining the scope of cooperation obligations incumbent on States, good faith and equity should play a more prominent role. The recent approach of the Paris Agreement, emphasising that developed countries owe a special responsibility to developing countries in respect of financial and technical assistance, is a step in this direction.

## CHAPTER 20

# Environmental Dimensions of Armed Conflict

Marie Jacobsson\*

### Article 19 – Armed conflicts

*States shall take pursuant to their obligations under international law all feasible measures to protect the environment in relation to armed conflicts.*

### CONCEPT PAPER

Article 19 regarding the obligations on States to take all feasible measures to protect the environment *in relation to* armed conflicts is a particularly important and relevant article.

The importance of protecting the environment *during* armed conflict was reflected already in the Stockholm Declaration on the Human Environment (1972) as well as in the subsequent Rio Declaration on Environment and Development (1992). The laws of war reflect the views of States that certain rules with the aim of protecting the environment are applicable both as treaty obligations and as customary international law.

International law also recognizes that other rules of international law may well continue to be applicable during armed conflict. The United Nations International Law Commission has clearly declared that, as a general principle, the “existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties”<sup>1</sup>. The Commission provides an indicative list “of treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict”.<sup>2</sup> Treaties concerning the protection of the environment, human rights, international watercourses and related installations and facilities, and treaties

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\* *The comments below are personal and do not necessarily reflect the position of the Swedish Ministry for Foreign Affairs.*

<sup>1</sup> Article 3 in the Draft Articles on the Effects of Armed Conflicts on Treaties (2011).

<sup>2</sup> *Ibid.*, Article 7.

relating to aquifers and related installations and facilities are listed as examples of such treaties. The Commission is presently in the stage of concluding its work on the topic *Protection of the environment in relation to armed conflicts*. The Commission has provisionally adopted 18 draft principles that address how the protection of the environment can be improved before, during and after an armed conflict. The work of the Commission reflects the legal development that has taken place in recent decades and it is recognized and welcomed by States in the United Nations General Assembly.

A number of international organs and organisations are working to improve the situation for the environment and for people living in conflict affected areas. This includes the UN, UN Environment, the ICRC, the EU, AU and NATO – just to mention a few. Individual States are regulating or legislating to sharpen their tools to ensure that the effect on the environment in relation to armed conflicts is kept to a minimum, albeit without compromising their legitimate military requirements. The need to do so is recognized also at the political level. In December 2018, the United Nations Security Council held an “Arria Meeting” on the environmental impact of war. The starting point was that environmental damage during conflict can impede sustainable development and potentially lead to a relapse of conflict. There is a clear gender dimension connected to the need to act.

It is therefore pertinent and unavoidable, that the draft Global Pact for the Environment reflects the need to protect an environment affected by armed conflict. This can be done through preparatory and remedial measures.

## CHAPTER 21

# Environmental Displacement

Walter Kälin and Jane McAdam

### I. OVERVIEW

On average, more than 24 million people are displaced within their countries each year<sup>1</sup> on account of sudden-onset disasters triggered by natural hazards. This means that environmental displacement now affects more people than conflict.<sup>2</sup> While the overall number of people moving as a consequence of the adverse effects of climate change, such as drought, eroding coastlines and other slow-onset events, is unknown, it is certainly substantial.<sup>3</sup> While most of these people remain within their own countries, some cross international borders to seek protection and assistance or sustainable livelihoods.<sup>4</sup> It is expected that these numbers will grow in the context of global warming, even if it can be limited to 1.5°C.<sup>5</sup>

The nexus between the environment and migration creates challenges for different branches of international law, in particular human rights, migration and refugee law. Certain branches of environmental law, in particular agreements on climate change and the protection of ecosystems, as well as general principles of international law relating to the duty to cooperate, the duty to protect and the duty to take positive action, are important in this context to ensure the protection and assistance of those

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<sup>1</sup> See the annual figures at Internal Displacement Monitoring Centre (IDMC), *GRID 2018: Global Report on Internal Displacement* (Geneva: IDMC 2018) 2.

<sup>2</sup> *Ibid.*, 6 f. In 2017, 11.8 million people were internally displaced by conflict and compared to 18.8 million by in the context of disasters.

<sup>3</sup> In 2017, eg, almost 0.9 million people were newly displaced in Somalia on account of drought and other disasters. See <<http://www.internal-displacement.org/countries/somalia>>, accessed 22 November 2018. In 2018, for the first time, the IDMC was able to estimate the number of new displacements associated with drought in sub-Saharan Africa: IDMC 2018 (n 1) 18, 80.

<sup>4</sup> See Dina Ionesco, Daria Mokhnacheva and François Gemenne, *The Atlas of Environmental Migration* (London and New York: Routledge 2017), and The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change', Vol. II (Geneva: Nansen Initiative, December 2015) 8–34, <<https://disasterdisplacement.org>> accessed 24 November 2018.

<sup>5</sup> IPCC, 'Global Warming of 1.5 °C', 3-101, <<http://www.ipcc.ch/report/sr15/>> accessed 24 November 2018. Kanta Kumari Rigaud et al, *Groundswell: Preparing for Internal Climate Migration* (Washington DC: The World Bank 2018).

who are displaced, or who are at risk of being displaced, by environmental degradation, disasters or the adverse effects of climate change.

There is no principle of international environmental law expressly pertaining to environmental displacement. However, several environmental law principles enshrined in the Draft Global Pact for the Environment would, if fully implemented, help to mitigate displacement risks in important ways and thus help to protect people affected by environmental factors.

## II. GROWING INTERNATIONAL RECOGNITION OF THE ENVIRONMENT–DISPLACEMENT NEXUS

While environmental factors have displaced people since time immemorial, the term ‘environmental refugee’ entered the international discourse as late as 1985 when it was coined in a report published by UNEP.<sup>6</sup> This, as well as the related notion of the ‘climate refugee’, has been criticized by UNHCR and others as having no basis in international refugee law and potentially jeopardizing its legal regime.<sup>7</sup> IOM’s notion of ‘environmentally displaced persons’<sup>8</sup> avoids this difficulty and recognizes that in most cases such displacement is multi-causal despite the crucial role of environmental factors.

Sound policies to address this challenge require measures at three levels: (i) helping people to stay in their homes through disaster risk reduction, climate change adaptation and resilience-building; (ii) helping people to move out of harm’s way through the provision of migration pathways and planned relocation; and (iii) protecting people displaced within their countries or across international borders. Since 2010, several international soft law instruments have started to address these issues. In that year, States Parties to the UN Framework Convention on Climate Change (UNFCCC) called on States to cooperate with regard to ‘climate change induced displacement, migration and planned relocation’ as a particular adaptation challenge,<sup>9</sup> and subsequent recommendations by the UNFCCC Task Force on Displacement under the Warsaw Mechanism on Loss and Damage<sup>10</sup> reflect this

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<sup>6</sup> Essam El-Hinnawi, *Environmental Refugees* (Nairobi: United Nations Environment Programme 1985).

<sup>7</sup> See, eg, UNHCR, ‘Climate change, natural disasters and human displacement: A UNHCR perspective’ (23 October 2009) 7.

<sup>8</sup> IOM, ‘Glossary on Migration’, 2<sup>nd</sup> edn, International Migration Law No. 25, 2016, 34.

<sup>9</sup> UNFCCC, Decision 1/CP.16, *The Cancún Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, UN Doc. FCCC/CP/2010/7/Add.1, para. 14(f).

<sup>10</sup> *Adoption of the Paris Agreement*, Decision 1/CP.21, UN Doc FCCC/CP/2015/L.9/Rev.1, 12 December 2015, para. 49.

holistic approach.<sup>11</sup> These recommendations include, among others, an invitation to States to ‘strengthen preparedness, including early warning systems, contingency planning, evacuation planning and resilience-building strategies and plans, and develop innovative approaches, such as forecast-based financing, to avert, minimize and address displacement related to the adverse impacts of climate change’; to ‘integrate climate change related human mobility challenges and opportunities into national planning processes’; and to ‘facilitate orderly, safe, regular and responsible migration and mobility of people’ affected by the adverse impacts of climate change.

Prevention of displacement is a priority: most people wish to remain in their homes for as long as possible. The Sendai Framework on Disaster Risk Reduction 2015–30 highlights the need to develop disaster risk reduction policies based on information about persons and communities particularly exposed to disaster risks, and to formulate ‘public policies, where applicable, aimed at addressing the issues of prevention ... of human settlements in disaster risk zones’.<sup>12</sup> It also calls for the promotion of ‘transboundary cooperation ... to build resilience and reduce disaster risk, including ... displacement risk’.<sup>13</sup>

The most comprehensive treatment of the topic to this date can be found in the 2018 Global Compact for Safe, Orderly and Regular Migration.<sup>14</sup> Under the subtitle ‘Natural disasters, the adverse effects of climate change, and environmental degradation’, the Migration Compact lists five sets of measures to achieve its Objective 2 to ‘Minimize the adverse drivers and structural factors that compel people to leave their country of origin’. They range from enhancing data and knowledge, to integrating ‘displacement considerations into disaster preparedness strategies’, and strengthening humanitarian responses to disaster affected persons.<sup>15</sup> For those displaced across borders, the Migration Compact suggests the creation of migration ‘pathways’ and other schemes to enable temporary or permanent admission, provided ‘adaptation in or return to their country of origin is not possible’.<sup>16</sup>

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<sup>11</sup> Annex to COP24 (2018), Decision *\*/CP.24 Report of the Warsaw International Mechanism for Loss and Damage associated with Climate Change*.

<sup>12</sup> Sendai Framework for Disaster Risk Reduction 2015–2030, UN Doc A/RES/69/283 (23 June 2015) para 27.

<sup>13</sup> *Ibid*, para 28.

<sup>14</sup> Global Compact for Safe, Orderly and Regular Migration, Annex to General Assembly Resolution A/RES/73/195 (19 December 2018).. The Global Compact on Refugees, Annex to UN General Assembly Resolution A/RES/73/151 (17 December 2018) addresses the issue only marginally (see paras 8, 9, 12, 53, 63, 79). Para 63 does, however, note the importance of ‘guidance and support for measures to address other protection and humanitarian challenges’, including ‘measures to assist those forcibly displaced by natural disasters’.

<sup>15</sup> *Ibid*, para 18(h)–(i).

<sup>16</sup> *Ibid*, para 21(g); see also para 21(h).

### III. LEGAL FRAMEWORK

#### A. INTERNATIONAL HUMAN RIGHTS LAW<sup>17</sup>

Under existing international and regional human rights law, States have *duties to respect, protect and fulfil human rights* so as to protect persons from foreseeable harms emanating from the impacts of disasters, climate change and other environmental harms.<sup>18</sup> Any policies and strategies addressing human mobility must therefore be developed and executed in a manner fully consistent with the minimum standards of protection articulated under human rights law in a range of international and regional instruments and principles.

With respect to people displaced within their own countries, States should provide them with protection and assistance, and establish the conditions and means for them to find durable solutions, in accordance with the UN Guiding Principles on Internal Displacement. Despite being legally non-binding, the Guiding Principles are based upon and reflect binding international law and thus provide detailed guidance for the protection and assistance of persons displaced within their own countries.<sup>19</sup> In order to give effect to the Guiding Principles, they need to be better integrated into domestic laws and policies.

People displaced across borders in the context of climate change, disasters and environmental degradation do not qualify as refugees *per se*.<sup>20</sup> Nevertheless, disasters may provide a context in which other kinds of harm do engage existing international protection regimes – for instance, where the disaster triggers armed conflict or leads to a breakdown of law and order,<sup>21</sup> or is used by a government as pretext for persecutory acts against certain groups.<sup>22</sup> In other cases, in accordance with

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<sup>17</sup> For a detailed discussion see Bruce Burson, Walter Kälin, Jane McAdam and Sanjula Weerasinghe, 'The Duty to Move People out of Harm's Way in the Context of Climate Change and Disasters' (2018) 37 *Refugee Survey Quarterly* 379.

<sup>18</sup> For a comprehensive overview on human rights obligations relating to climate change, see Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/31/52 (1 February 2016) paras 33–84.

<sup>19</sup> See Protection of and Assistance to Internally Displaced Persons: Note by the Secretary-General, UN Doc A/64/214 (3 August 2009) paras 18–86.

<sup>20</sup> See Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford: Oxford University Press 2012) ch 2.

<sup>21</sup> In some of these situations, the broader regional refugee definitions might apply: see Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, para 1(2); Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984) in Annual Report of the Inter-American Commission on Human Rights (1984–85), OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev 1, 190–93.

<sup>22</sup> Judicial bodies, particularly in New Zealand, have begun to map the contours of applicability of international refugee and human rights law to disaster situations in a series of cases. See *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013), upheld on appeal in *Teitiota v The Chief Executive of the Ministry of Business, Innovation*

international human rights law, States must not return people to territories where they face a serious risk to their life or safety or serious hardship, including where they cannot access necessary humanitarian assistance or protection. Regional human rights law acknowledges that return to situations of very serious destitution or dire humanitarian conditions may amount to cruel, inhuman or degrading treatment.<sup>23</sup> However, cases where binding international law prohibits forcible return to disaster situations are rather rare. The ensuing protection gap is mitigated by the fact that, as analysis of existing practice shows,<sup>24</sup> States are often willing to admit – or refrain from – returning people who are seriously and personally affected by the relevant harm where: (i) an on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to their life or safety; (ii) as a direct result of the disaster, they have been wounded, lost family members, and/or lost their livelihoods; and/or (iii) they would face very serious hardship or even risks to their life or health in their country of origin, in particular due to the fact that they cannot access necessary humanitarian protection and assistance there.<sup>25</sup>

However, instead of waiting until people have to flee, a more appropriate and human rights sensitive approach would be to help them move out of harm's way before disasters strike, particularly in situations where the risk of displacement is high. This requires measures such as evacuation, planned relocations and migration to enable people to cope with, or adapt to, adverse environmental impacts.

The duty to protect the right to life may oblige States to temporarily *evacuate* persons at imminent risk of harm from environmental impacts and hazards, but only where there is no other way to save lives.<sup>26</sup> In more extreme cases, State may need to undertake *planned relocations*. As a preventive measure, planned relocations can help persons move away permanently from dangerous areas in advance of anticipated

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*and Employment* [2013] NZHC 3125 (26 November 2013), *Teitiota v The Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 173 (8 May 2014), *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 (20 July 2015); see also *AC (Tuvalu)* [2014] NZIPT 800517-520.

<sup>23</sup> See eg *MSS v Belgium and Greece*, App No 30696/09 (Grand Chamber, 21 January 2011) para 249; *Sufi and Elmi v United Kingdom*, App Nos 8319/07 and 11449/07 (28 June 2011), applying the European Convention on Human Rights.

<sup>24</sup> The Nansen Initiative (Vol II) (n 4) 40–41; David J Cantor, 'Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters: Background Paper: States of the Regional Conference on Migration and Others in the Americas, Regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disaster, San José, Costa Rica (10–11 February 2015), 42–54 < [http://disasterdisplacement.org/wp-content/uploads/2015/07/150715\\_FINAL\\_BACKGROUND\\_PAPER\\_LATIN\\_AMERICA\\_screen.pdf](http://disasterdisplacement.org/wp-content/uploads/2015/07/150715_FINAL_BACKGROUND_PAPER_LATIN_AMERICA_screen.pdf)>.

<sup>25</sup> The Nansen Initiative (Vol I) (n 4) paras 33.

<sup>26</sup> See, in particular, *Budayeva and Others v Russia*, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECHR 2008-II, paras 148ff.

disasters or longer-term environmental degradation. They may also provide a durable solution for those who were displaced or evacuated in the context of a sudden-onset event by resettling them in safer areas if return home is not possible.<sup>27</sup> However, planned relocations must be approached with considerable care and caution and as a measure of last resort, since they entail a complex and fraught process, requiring in-depth consultation and planning to avoid greater vulnerability, impoverishment and social fragmentation.<sup>28</sup> Although international jurisprudence on planned relocations is scarce,<sup>29</sup> relevant expert guidance is available.<sup>30</sup>

*Migration* can be an important adaptation and risk management strategy to assist people to cope with changes to the environment that disrupt their livelihoods or inhibit their living conditions,<sup>31</sup> and can potentially reduce or avoid displacement at a later stage. International law does not explicitly address the right of admission and stay of persons who migrate in anticipation of, or in response to, disasters. The extent to which persons can migrate therefore depends upon the legal and policy frameworks in place, and the resources available to them. States should therefore consider creating new domestic and regional laws and agreements to facilitate temporary, circular and permanent migration, in accordance with applicable international human rights law and international labour law standards, to give people a degree of agency over when and where to go before they are displaced.

## B. INTERNATIONAL ENVIRONMENTAL LAW

People are displaced if they are *exposed to hazards* and *too vulnerable* to withstand their impact. International environmental law has a limited, albeit important, role to play in addressing the factors that lead to displacement.

Unlike human rights law and its principles guiding evacuations, planned relocation and the protection of migrants, international environmental law has little

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<sup>27</sup> The Nansen Initiative (Vol I) (n 4) paras 94–98, 121–22.

<sup>28</sup> See eg, Jane McAdam and Elizabeth Ferris, ‘Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues’ (2015) 4 *Cambridge Journal of International and Comparative Law* 137.

<sup>29</sup> On relocation as a consequence of development projects, see *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, App No. 276/2003, African Commission on Human and Peoples’ Rights.

<sup>30</sup> Brookings Institution, Georgetown University and UNHCR, ‘Guidance on Protecting People from Disasters and Environmental Change Through Planned Relocation’ (7 October 2015) <<https://georgetown.app.box.com/s/pe2txj1giauyvzebiw4fhznguz1lld9e>>, principles 5–8; ‘The Peninsula Principles on Climate Displacement within States’ (2013) <<http://displacementsolutions.org/wp-content/uploads/2014/12/Peninsula-Principles.pdf>>.

<sup>31</sup> Cancún Adaptation Framework (n 9) para 14(f); Global Compact for Safe, Orderly and Regular Migration (n 14) para 18(h)–(l).

relevance for reducing exposure. However, it plays an important role regarding the two other elements. First, full implementation of measures provided for by the Paris Agreement to reduce greenhouse gas emissions would go a long way in mitigating the adverse effects of climate change and thus reducing related hazards. Secondly, with regard to reducing vulnerability, and thus helping people to stay in their homes, article 7(9)(e) of the Paris Agreement provides an important entry point by obliging States to build resilience not only through economic diversification, but also as part of the ‘sustainable management of natural resources.’

In this regard, the Convention on Biodiversity<sup>32</sup> is particularly relevant. Ecosystems can, as highlighted by UNEP, ‘play a crucial role in climate change mitigation, for example through carbon sequestration and the reduction of greenhouse gas emissions’.<sup>33</sup> They may also buffer ‘societies from the impacts of climate change’, such as when flood plains and mangrove forests ‘provide natural protection against extreme weather events and rising sea levels’.<sup>34</sup> Consequently, intact or restored ecosystems provide important contributions to reducing displacement risk.

The implementation of the UN Convention to Combat Desertification (UNCCD),<sup>35</sup> which aims to prevent land degradation in arid, semi-arid and dry sub-humid areas and to mitigate drought,<sup>36</sup> also helps to address key drivers of displacement and migration. The UNCCD 2018–2030 Strategic Framework explicitly recognizes its potential to substantially reduce migration forced by desertification and land degradation as a consequence of a broader objective to ‘improve the living conditions of affected populations’.<sup>37</sup>

#### IV. ASSESSMENT

Displacement and migration in the context of disasters, the adverse effects of climate change and environmental degradation are among the biggest challenges of the 21<sup>st</sup>

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<sup>32</sup> United Nations Convention on Biodiversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

<sup>33</sup> UNEP WCMC, ‘Addressing climate change: Why biodiversity matters’ (Cambridge: UNEP World Conservation Monitoring Centre 2014) 2.

<sup>34</sup> *Ibid.*

<sup>35</sup> United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) (adopted 17 June 1994, entered into force 26 December 1996) 1954 UNTS 3.

<sup>36</sup> *Ibid.*, arts 1 and 2. National (art 10) and subregional or regional (art 11) action programmes are the main instruments to achieve these goals.

<sup>37</sup> ‘UNCCD 2018–2030 Strategic Framework’, Annex to Decision 7/COP.13 ‘The future strategic framework of the Convention’, UN Doc ICCD/COP(13)/21/Add.1, para 5.

century. Although international environmental law does not specifically address displacement and other forms of human mobility, many of the principles enshrined in the Draft Global Pact for Environment are directly relevant for people at risk of displacement. If the right to an ecologically sound environment (article 1) and the duty to take care of the environment (article 2) were fully realized, nobody would have to move because of environmental factors. Systematic integration of the requirements of environmental protection into development plans, programs and projects (article 3) and measures to prevent environmental harm (article 5) contribute to reducing vulnerabilities of people and communities at risk of displacement. Adequate remediation of environmental damages (article 7) and access to environmental justice (article 11) can contribute in important ways to the protection of displaced persons. Finally, without access to environmental information and public participation (articles 9 and 10), communities will not be able to adapt to the challenges of environmental change and thus contribute to the reduction of displacement risks. To have these principles enshrined in binding international law would complement and strengthen more specific soft law instruments such as the Sendai Framework and the Migration Compact, mentioned above.

## CHAPTER 22

# Differentiation

Lavanya Rajamani\*

### Article 20 - Diversity of National Situations

*The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special attention.*

*Account shall be taken, where appropriate, of the Parties' common but differentiated responsibilities and respective capabilities, in light of different national circumstances.*

## I. OVERVIEW

Differentiation in favour of developing countries is a central, pervasive and cross-cutting feature of international environmental law. Differentiation addresses equity and fairness concerns in the distribution of burdens and benefits of global environmental regulation. It ensures that treaty obligations are tailored to the contributions of states to global environmental harm as well as to their capacities and resources, such that those who have contributed more to harm pay more to address it, and that even poor and less able states are able to participate in the global effort to address environmental harm. In doing so, differentiation fosters goodwill, a sense of community and ownership, and encourages universal participation. This in turn ensures treaties are effectively implemented and the number of free-riders are reduced.

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\* This chapter draws from and builds on previous work including L Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006); L Rajamani, 'The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime' in N Dubash (ed), *Handbook of Climate Change and India: Development, Politics and Governance* (Oxford University Press 2011); L Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *International and Comparative Law Quarterly* 493; L Rajamani, J Brunnée and D Bodansky, *International Climate Change Law* (Oxford University Press 2017); L Rajamani, 'Common but Differentiated Responsibilities and Respective Capabilities' in Ludwig Krämer and Emanuela Orlando (eds), *Principles of Environmental Law: Elgar Encyclopedia of Environmental Law series* (Edward Elgar 2018).

Differentiation in favour of some, however, can limit participation in the treaty by those not so favoured, as the US rejection of the 1997 Kyoto Protocol demonstrates. Differentiation can also lead to perceptions of unfairness and to discontent, where, for instance, a developing country grows dramatically over time and is on par with major developed countries in relation to contribution to environmental harm, resources and capabilities yet continues to receive preferential treatment. In this sense, differentiation has the potential, if poorly calibrated and static over time, to detract from the environmental goals of the treaty.

## II. FORMS OF DIFFERENTIATION

Differentiation takes many forms in international environmental agreements. An agreement may prescribe differentiation between developed and developing countries, as the 1997 Kyoto Protocol<sup>1</sup> does, or it may allow countries to differentiate themselves from each other by choosing their own commitments, as some provisions of the 2015 Paris Agreement<sup>2</sup> do.

Where an agreement prescribes differentiation, it may contain:

- provisions that differentiate between developed and developing countries with respect to the central obligations contained in the treaty, i.e., those that relate to the object and purposes of the treaty, such as emissions reduction targets and timetables;<sup>3</sup>
- provisions that differentiate between developed and developing countries with respect to implementation, in particular in relation to stringency or timing of implementation, such as delayed compliance schedules,<sup>4</sup> permission to adopt subsequent base years,<sup>5</sup> delayed reporting schedules,<sup>6</sup> flexibility in implementation<sup>7</sup> and softer approaches to non-compliance;<sup>8</sup> and,

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<sup>1</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 (Kyoto Protocol).

<sup>2</sup> UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) Annex (Paris Agreement)

<sup>3</sup> Kyoto Protocol (n 1) art 3.

<sup>4</sup> See, e.g., Kyoto Protocol (n 1) art 3(5); Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 (Montreal Protocol) art 5.

<sup>5</sup> See, e.g., United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (FCCC) art 4(6); Montreal Protocol (n 2) art 5(3)(a).

<sup>6</sup> See, e.g., FCCC (n 5) art 2(5).

<sup>7</sup> See, e.g., Paris Agreement (n 2) art 13(2).

<sup>8</sup> See, e.g., Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol in 'Report of the Conference of the Parties on its Seventh session, Addendum. Part two: Action taken by the Conference of the

- provisions that differentiate among countries in relation to commitments to provide, and eligibility to receive, financial<sup>9</sup> and technological assistance<sup>10</sup>.

Agreements typically prescribe differentiation by matching categories of Parties to categories of commitments. Categories of Parties include, among others, developed countries, developing countries, least developed countries, and small island developing states. In determining which Parties are entitled to differential treatment, the agreement may choose to create a list of Parties belonging to a particular category.<sup>11</sup> This may correlate with membership in a club such as the OECD or EU, or be populated through self-identification by Parties. Alternatively, the agreement may allow Parties to identify themselves as belonging to one category or another, without the use of lists.

A newer form of differentiation, characterized as ‘self-differentiation,’ is reflected in some provisions of the 2015 Paris Agreement. Self-differentiation refers to norms that permit Parties to self-select their commitments and thus differentiate themselves from others. The Paris Agreement requires Parties to communicate their nationally determined contributions, but does not dictate what these contributions should be.<sup>12</sup> As Parties contributions are self-selected and tailored to national circumstances, in practice these are different from each other. Self-differentiation contains elements of self-selection (of commitments or contributions) and self-identification (as developed or developing countries). But, the autonomy Parties enjoy is gently circumscribed through normative expectations that the Paris Agreement places on Parties in relation to their contributions - expectations that each successive contribution will

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Parties at its Seventh Session’ FCCC/CP/2001/13/Add.3 (vol III) (21 January 2002).

<sup>9</sup> See, e.g., Paris Agreement (n 2) arts 9(1) and 9(3); Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entry into force 17 May 2004) 2256 UNTS 119 (Stockholm Convention) art 13(2); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entry into force 26 December 1996) 1954 UNTS 3 (Convention to Combat Desertification) art 20(2); Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 art 20; FCCC (n 5) art 4(3).

<sup>10</sup> See, e.g., Paris Agreement (n 2) art 10(6); Convention on Biological Diversity (n 9) art 15; FCCC (n 5) art 4; Convention to Combat Desertification (n 9) art 18; Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entry into force 22 September 1988) 1513 UNTS 293 (Vienna Convention) art 4(2); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entry into force 5 May 1992) 1673 UNTS 57 (Basel Convention) art 10(3); Montreal Protocol (n 4) art 10A.

<sup>11</sup> See, e.g., FCCC (n 5) Annex I; Kyoto Protocol (n 1) Annex B.

<sup>12</sup> Paris Agreement (n 2) art 4(2).

reflect a progression and that Party's highest possible ambition,<sup>13</sup> and that developed countries should continue taking the lead.<sup>14</sup>

### III. PRINCIPLED BASIS FOR DIFFERENTIATION

The principled basis for differentiation in favour of developing countries is the 'principle of common but differentiated responsibilities' (CBDR). This principle has from the inception of the international environmental dialogue underpinned the efforts of states to address environmental harm. In a world of states with vastly different contributions to global environmental harm, and differing resources to address it, this principle, built on non-reciprocity, provides the ethical and pragmatic basis for sovereign nations to collectively address global environmental harm.

The 'principle of common but differentiated responsibilities' was first articulated in Rio Principle 7, and has been much cited and endorsed since, including in the Johannesburg Plan of Implementation, 2002,<sup>15</sup> and the Outcome of the Rio+20 conference, *The Future We Want*, 2012.<sup>16</sup> It is also reflected in the preambular recitals of instruments such as the 2001 Stockholm and 2013 Minamata conventions.<sup>17</sup>

It is in the UN climate regime - the 1992 Framework Convention on Climate Change, its 1997 Kyoto Protocol, 1997, and the 2015 Paris Agreement - however, that the CBDR principle finds its full and distinct expression. In this regime, unlike in others, the CBDR principle is referred to in operational provisions of its legally binding treaties,<sup>18</sup> and differentiation cuts across the central obligations in these instruments. It is also in this regime that the CBDR principle, and the differentiation it has birthed, have provoked the most controversy and conflict.

### IV. MAIN FORMULATIONS IN INTERNATIONAL INSTRUMENTS

Rio Principle 7 contains the authoritative formulation of the CBDR principle. It reads: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries

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<sup>13</sup> Paris Agreement (n 2) art 4(3).

<sup>14</sup> Paris Agreement (n 2) art 4(4).

<sup>15</sup> See Plan of Implementation of the World Summit on Sustainable Development in 'Report of the World Summit on Sustainable Development, Johannesburg, South Africa 26 August-4 September 2002' UN Doc A/CONF.199/20 (2002) paras 2, 14, 20, 38, 39 & 81.

<sup>16</sup> UNGA 'The Future We Want' UN Doc A/RES/66/288 (11 September 2012) Annex.

<sup>17</sup> Stockholm Convention (n 9); Minamata Convention on Mercury (adopted 10 October 2013, entry into force 16 August 2017).

<sup>18</sup> FCCC (n 5) art 3.

acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’

The terms of Rio Principle 7 clearly identify the rationale for the CBDR principle - different contributions to global environmental degradation. Even at the time, however, this rationale was disputed. The United States entered a declaration to Rio Principle 7 stating that while it accepted a leadership role for developed countries, it believed this role was ‘based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities.’<sup>19</sup> Their position was reflected in the articulation of the CBDR principle in the FCCC, negotiated in parallel with the Rio Declaration. In part due to various US-led amendments to the negotiating text, the FCCC refers to ‘respective capabilities’ of Parties rather than to contribution-based responsibility, and its legal potential is carefully circumscribed.<sup>20</sup>

FCCC Article 3 reads: ‘The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.’

The dispute over the rationale for the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) articulated in the FCCC - whether differentiated responsibilities are based on levels of economic development alone,<sup>21</sup> or on differing contributions to global environmental degradation<sup>22</sup> - has led to lingering discord over differentiation in the UN climate negotiations. If the CBDR principle is based on levels of economic development alone then differentiation in favour of developing countries would take the form primarily of support and assistance. If however the CBDR principle is also (or principally) based on contributions to environmental harm then irrespective of their development levels, commitments of developing countries, in particular to mitigate green house gas

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<sup>19</sup> US Declaration on Principle 7 in ‘Report of the United Nations Conference on Environment and Development, Rio de Janeiro 3-14 June 1992’ UN Doc A/CONF.151/26 (vol IV) (28 September 1992) Chapter IV.B, para 16.

<sup>20</sup> D Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 Yale Journal of International Law 451.

<sup>21</sup> B Kellersmann, *Die gemeinsame, aber differenzierte Verantwortlichkeit von Industriestaaten und Entwicklungsländern für den Schutz der globalen Umwelt* (Springer 2000) 335.

<sup>22</sup> International Law Association, International Committee on Legal Aspects of Sustainable Development ‘Report of the Sixty-Sixth Conference, Buenos Aires’ (1995) 116.

(GHG) emissions, would be scaled down in line with their reduced contributions. In addition, developed countries may be required to compensate for loss and damage occurring in developing countries due to climate impacts.

Arguably, Rio Principle 7 and FCCC Article 3 reinforce each other. If CBDR, as some argue, refers to differentiation based on capability alone the use of the term ‘respective capabilities’ would be superfluous. It follows that FCCC Art 3 highlights differentiation based on two markers –capability and contribution to environmental harm (drawing from Rio Principle 7). It is also worth noting that these two distinct markers for differentiation in the CBDRRC principle are linked. Enhanced capabilities are a direct result of industrialization, which in turn resulted in the spike in GHG emissions that is causing climate change.<sup>23</sup>

The 2015 Paris Agreement introduced an important new dimension or qualification to the FCCC’s CBDRRC principle - ‘in light of different national circumstances’.<sup>24</sup> This qualification represents a compromise arrived at between the United States and China,<sup>25</sup> and arguably introduces dynamism in the interpretation of the CBDRRC principle. As national circumstances evolve, so too will the common but differentiated responsibilities of states. However, it is also arguable that since ‘respective capabilities’ are based on national circumstances this qualification merely reiterates an element of the principle.

This qualification to CBDRRC - ‘in light of different national circumstances’ - arrived at between the US and China, broke a multi-year impasse on the principle of CBDRRC in the climate regime. The Durban Platform that launched the negotiating process towards the 2015 agreement<sup>26</sup> contained no reference to CBDRRC, unusually so. Developed countries had argued that this principle must be interpreted in the light of contemporary economic realities, and many developing countries had resisted. The text of the decision was therefore drafted such that the 2015 agreement would be ‘under the Convention,’<sup>27</sup> thereby implicitly engaging its principles, including CBDRRC. The Doha and Warsaw decisions in 2012 and 2013, continuing this

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<sup>23</sup> For an extended discussion see L Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press 2006) 129-162.

<sup>24</sup> Paris Agreement (n 2) arts 2.1, 4.3 and 4.19.

<sup>25</sup> White House, US-China Joint Announcement on Climate Change, Beijing, China, 12 November 2014 (Office of the Press Secretary, 11 November 2014) para 2.

<sup>26</sup> UNFCCC ‘Decision 1/CP.17, Establishment of an Ad-Hoc Working Group on the Durban Platform for Enhanced Action’ UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012).

<sup>27</sup> *ibid*, para 2.

impasse, contained a general reference to ‘principles’ of the Convention,<sup>28</sup> but no specific reference to the CBDRRC principle. It was only in the Lima Call for Climate Action of 2014, which arrived hot on the heels of a US-China bilateral statement, that an explicit reference to the CBDRRC principle, albeit ‘in light of different national circumstances’ was reintroduced in the climate process.<sup>29</sup>

## V. EVOLUTION OF THE CBDR PRINCIPLE AND DIFFERENTIATION

While the Rio formulation of the CBDR principle has been repeatedly endorsed over the years, the CBDR principle has evolved in the UN climate regime from the principle of ‘common but differentiated responsibilities and respective capabilities’ in the FCCC to the principle of ‘common but differentiated responsibilities and respective capabilities, in light of different national circumstances’ in the Paris Agreement. This evolution is reflected in the shift in the nature and extent of differentiation from the 1997 Kyoto Protocol to the 2015 Paris Agreement.

The 1997 Kyoto Protocol contained cross-cutting prescriptive differentiation, in that, it matched categories of Parties to categories of commitments. Developed countries listed in Kyoto Annex B had GHG mitigation targets set to timetables, backed by a compliance system with an enforcement branch. Developing countries did not. The 2015 Paris Agreement took a decisive turn away from cross-cutting prescriptive differentiation towards tailored differentiation, in that different issue areas in the Paris Agreement reflect different forms of differentiation. For instance, in the context of GHG mitigation commitments the Paris Agreement embraces ‘self-differentiation,’ albeit constrained by normative expectations,<sup>30</sup> while in the area of finance, it contains a more conventional form of differentiation, requiring developed countries to take the lead in providing and mobilizing finance.<sup>31</sup>

## VI. OPEN QUESTIONS

The CBDR principle enjoys seemingly widespread endorsement, but the core content of this principle, the nature of the obligation it entails, as well the applications it lends

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<sup>28</sup> See c 1/CP.18, Agreed Outcome Pursuant to the Bali Action Plan’ UN Doc FCCC/CP/2012/8/Add.1 (28 February 2013) preambular recital 7; UNFCCC ‘Decision 1/CP.19, Further Advancing the Durban Platform’ UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) preambular recital 9.

<sup>29</sup> UNFCCC ‘Decision 1/CP.20, Lima Call for Climate Action’ UN Doc FCCC/CP/2014/10/Add.1 (2 February 2015) para 3.

<sup>30</sup> Paris Agreement (n 2) art 4.

<sup>31</sup> Paris Agreement (n 2) art 9.

itself to, are deeply contested, which in turn raises questions about its legal status and operational significance.

There are disputes, discussed earlier, over the core content of this principle, in particular on whether differentiated responsibility is based principally on differing levels of economic development or on differing contributions to environmental harm. It is worth considering whether this narrow view could be expanded to include other bases for differentiation, for instance environmental vulnerability.

There are contestations over the nature of the obligation this principle entails - is it persuasive, recommendatory, or determinative? This depends, in part, on the legal character of the provision in which it occurs. In the FCCC, the CBDRRC principle occurs in an operational provision yet it is drafted in recommendatory (Parties 'should') rather than mandatory (Parties 'shall') terms, and is prefaced with language indicating that Parties are to be 'guided, inter alia,' by the CBDRRC principle. This suggests that the CBDRRC principle is one among many principles that Parties are to be guided by. It does not offer any guidance in mediating among these principles, or indicate that this principle trumps others. In the Paris Agreement, the CBDRRC-NC principle appears in Article 2, the 'purpose' of the Agreement,<sup>32</sup> and is thus a central cross-cutting feature of the Agreement. It is, however, drafted in predictive (Parties 'will') rather than mandatory or recommendatory language.<sup>33</sup> The precise nature of the obligation, if any, it creates is thus unclear.

It is also unclear what applications the CBDR principle lends itself to - does the CBDR principle favor one form of differentiation over another? Both the 1997 Kyoto Protocol and the 2015 Paris Agreement pay homage to this principle but reflect distinct forms of differentiation. Even if this principle favors a particular form of differentiation, how are categories of Parties to be determined? The diversity of national situations, many argue, cannot be captured in the blunt distinctions between developed and developing countries, and even Least Developed Countries. There are considerable disparities among developing countries - Singapore is in the top 10 in terms of Human Development Index (HDI) ranking, above the majority of developed and all developing countries, and countries like Qatar, Saudi Arabia, Bahrain and Chile, are in the top 50.<sup>34</sup> The vast majority of developing countries, however, are still languishing at the bottom of the HDI list. A further question, prompted by the

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<sup>32</sup> Art 3 identifies art 2 as the 'purpose' of the Paris Agreement.

<sup>33</sup> Paris Agreement (n 2) art 2(2).

<sup>34</sup> United Nations Development Programme 'Human Development Reports: HDI Index and its Components' <<http://hdr.undp.org/en/composite/HDI>>

rapid economic growth of some developing countries in the last few decades, relates to the extent to which the CBDR principle is dynamic. Should the differential treatment enjoyed by a country be calibrated to its economic status at a fixed point in time, or to its changing economic status?

The legal status of this principle, given the contestations at the heart of this principle, is a matter of debate. Is it 'soft law--a nonbinding norm--or has it already emerged as a robust, acknowledged principle of international environmental law'?<sup>35</sup> Has it reached the status of customary international law binding on all states? Scholars have differing views. Brown Weiss describes CBDR as an 'emerging principle of international environmental law'.<sup>36</sup> Birnie, Boyle and Redgwell describe it as 'framework principle' that is 'legally significant'<sup>37</sup> whilst Stone denies that 'a new normative 'principle' is in play'.<sup>38</sup> Cullet argues that the 'key issue is not its status as a separate customary principle but the extent to which it has provided the basis for the development of a fresh approach to international legal obligations that need not be based strictly and exclusively on reciprocity.'<sup>39</sup>

## VII. ASSESSMENT

Although the precise legal status of the CBDR principle is in dispute, this principle is a fundamental part of the conceptual apparatus of international environmental law. It forms the basis for the compact between developed and developing countries in addressing global environmental harm. In its least contentious avatar it reflects solidarity and pragmatism in pursuit of a common environmental goal, and in its most contentious avatar it requires those who have caused greater harm to bear a greater responsibility in addressing that harm, and compensate those to whom harm is caused.

These broad notions of commonality of purpose and obligations tailored to national resources, constraints, capabilities and conditions (of which contribution to environmental harm could form one), form the basis for the interpretation of existing

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<sup>35</sup> CC Joyner, 'Common but Differentiated Responsibilities' (2002) 96 *American Society of International Law Proceedings* 358, 359-359.

<sup>36</sup> E Brown-Weiss, 'The Rise or the Fall of International Law?' (2000) 69 *Fordham Law Review* 345, 350.

<sup>37</sup> P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009)135.

<sup>38</sup> C Stone, 'Common But Differentiated Responsibilities in International Law' (2004) 98 *American Journal of International Law* 276, 300.

<sup>39</sup> P Cullet, 'Principle 7: Common but Differentiated Responsibilities' in J Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 236.

obligations and the elaboration of future international legal obligations.<sup>40</sup> The CBDR principle thus has considerable and enduring operational significance. The vast majority of multilateral environmental agreements, whether or not they contain an explicit reference to the CBDR principle, contain differentiation in favor of developing countries. Each agreement is governed by its unique politics and challenges, contains its own form of burden and benefit sharing, and thus its own tailored mix of norms of differentiation. The best example of this is offered by the UN climate regime where the CBDR principle, and the differentiation it has birthed, has come to acquire a distinctive character. Its evolution from the 1992 FCCC and 1997 Kyoto Protocol to the 2015 Paris Agreement is a product of particular politics reflected in deeply contentious multi-year negotiations. Every word of the CBDRRC-NC formulation agreed to in the 2015 Paris Agreement is carefully chosen, and captures a host of interpretative possibilities and underlying politics.<sup>41</sup> The forms of differentiation reflected in the Paris Agreement, in particular its embrace of ‘self-differentiation’ is a result of difficult and time consuming efforts to strike a delicate balance between seemingly incompatible positions. Even as it continues to develop and take distinctive shape in each regime, the CBDR principle, and differentiation, is and will continue to be a central pillar of international environmental law.

In addressing the CBDR principle in the context of the Global Pact, it may be worth considering to what extent, if at all, a departure from Rio Principle 7 is justified. If reformulated, will the new formulation strengthen or weaken the principle as it has evolved? If a departure is deemed necessary, which elements of it require reformulation, and to what ends? To what extent should negotiators take their cue from the UN climate regime? In this context it is worth considering if the formulation of the CBDRRC-NC principle in the climate regime, a product of particular politics, lends itself to generalization across international environmental agreements? If yes, the risk that such a reformulation will lead to reinterpretation within particular regimes, and recalibration of the delicate balances struck in these regimes must also be explored and addressed.

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<sup>40</sup> Rajamani (n 23).

<sup>41</sup> See for an extended discussion L Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *International and Comparative Law Quarterly* 493.

## CHAPTER 23

# Institutional Options for a Global Pact for the Environment

Ginevra Le Moli and J. E. Viñuales

### **Article 21 – Monitoring the implementation of the Pact**

*A monitoring mechanism to facilitate implementation of, and to promote compliance with, the provisions of the present Pact is hereby established.*

*This mechanism consists of a Committee of independent experts and focuses on facilitation. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall pay particular attention to the respective national circumstances and capabilities of the Parties.*

*One year after the entry into force of the present Pact, the Depositary shall convene a meeting of the Parties which will establish the modalities and procedures by which the Committee shall exercise its functions.*

*Two years after the Committee takes office, and at a frequency to be determined by the meeting of the Parties, not exceeding four years, each Party shall report to the Committee on its progress in implementing the provisions of the Pact.*

## **I. OVERVIEW**

One of the aspects that negotiators of a Global Pact for the Environment will need to consider is the institutional machinery of the instrument. Depending on whether the purpose is to create a new set of comprehensive institutions or, rather, to rely on existing ones or, still, to select one of the many variations in-between, the sources of inspiration will differ significantly. This chapter provides an overview of a range of options.

These options concern two main levels: the general institutional arrangements and the implementation mechanisms. The two levels are interlocked in that some

options can only be envisaged together. Before examining in more detail the options at each level, it is useful to provide an integrated overview of the full range of possibilities.

**Figure 1: Institutional options for the Global Pact for the Environment**

INSTITUTIONAL ARRANGEMENTS (A)						
Option A.1: Reliance on existing arrangements		Option A.2: New limited arrangements		Option A.3: New international organisation		
World Environmental Assembly/UNEP		Conference of the Parties/Bureau/Secretariat/Subsidiary Bodies		World Environment Organisation		
IMPLEMENTATION MECHANISMS (M)						
Option M.1: Reporting		Option M.2: Quasi-adjudication		Option M.3: Adjudication		
Reporting to a new (e.g. Committee or COP) or existing body (e.g. UNEA or HLPF).		Compliance Committee (e.g. Montreal or Aarhus)	Stand-alone Committee (e.g. HRC)	Permanent Court	Permanent list of adjudicators (e.g. CPA)	Consent clause to ICJ
COMBINATIONS (C)						
Option C.1: Low-level institutionalisation		Option C.2: Medium-level institutionalisation		Option C.3: High-level institutionalisation		
		C.2.1	C.2.2			
Reporting (only) to existing body		Stand-alone Committee (including reporting)	Compliance Committee relying on a COP (including reporting)	World Environmental Organisation (full set of arrangements)		

Figure 1 identifies and assigns a tag to each option. Letters A, M and C are used to refer, respectively, to options at the level of Institutional Arrangements (A.1, A.2, A.3), Implementation Mechanisms (M.1, M.2, M.3), and Combinations thereof (C.1, C.2.1, C.2.2, C.3). In the following sections, we first introduce each level in general and then discuss each option, with its own variations. Although this overview does not encompass every possible option, it does cover those that appear most relevant for a Global Pact for the Environment. The examination is intended to be self-contained and readable by a wide range of users. We therefore avoid unnecessary technicalities and focus on the main architectural components.

## II. INSTITUTIONAL ARRANGEMENTS

General institutional arrangements relate to the management of the treaty rather than, more specifically, to its implementation. Three broad options can be identified. They are presented from more to the less frequent in international practice (A.2, A.1 and A.3).

### A. COP/BUREAUX/SECRETARIATS/SUBSIDIARY BODIES

Although the terminology may vary, multilateral environmental agreements (MEAs) often provide for three types of general institutional arrangements: a Conference (or Meeting) of the Parties (COP); an Executive Body (e.g. Bureau); a Secretariat; and a range of subsidiary bodies dealing with technical and implementation matters.<sup>1</sup>

Existing COPs meet at regular intervals, which may vary normally between 1-3 years. Depending on the political importance of the issue, State delegations consist of representatives or sometimes of ministers or even heads of State or government. Some adopt their decisions by consensus<sup>2</sup> whereas others can act at a qualified majority of the parties present and voting.<sup>3</sup> Executive Bodies, such as Bureaux, typically gather representatives of a sub-set of State parties and meet much more regularly than COPs. The States participating in such bodies are elected at regular intervals by the COP on a rotation basis, following a geographical or other rotation key. Secretariats, instead, can be small or large and, in some cases, they have been merged for efficiency reasons to service several treaties at the same time.<sup>4</sup> Lastly, subsidiary bodies may consist of State representatives (e.g. intersessional working groups or committees) or of independent experts (e.g. some – albeit not all – compliance committees).

### B. A NEW INTERNATIONAL ORGANISATION

In other contexts, the institutional arrangements differ significantly. Certain specialised international organisations have been established to manage certain

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<sup>1</sup> See P.-M. Dupuy, J. E. Viñuales, *International Environmental Law* (Cambridge University Press, 2<sup>nd</sup> edn 2018), chapter 2.

<sup>2</sup> See e.g. the COP of the United National Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (the provision in the rules of procedure on voting was never formally adopted and, as a result, the practice of the COP is to adopt decisions by consensus).

<sup>3</sup> See e.g. the COP of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, United Nations, 993 UNTS 243 (e.g. for the amendment of Appendices I and II, Art. XV(1)(b) of CITES requires a 2/3 majority of the parties present and voting).

<sup>4</sup> See e.g. see K. Kummer Peiry, 'The Chemicals and Waste Regime as a Basis for a Comprehensive International Framework on Sustainable Management of Potentially Hazardous Materials?' (2014) 23 *RECIEL* 172.

activities or specific areas of technical cooperation (e.g. the World Trade Organization, the International Maritime Organization, the World Health Organisation, the International Civil Aviation Organization, etc.).

These organisations are established by a constitutive treaty that define the area of work, the institutions and the powers of the organisation and its bodies. The constitutive treaty may rely on a range of treaties, including pre-existing ones, such as the Agreement establishing the World Trade Organization.<sup>5</sup> In the past, there were efforts to follow a similar approach with respect to the environment, but they were resisted by some States and, as a result, there was not sufficient political support to achieve concrete results.<sup>6</sup>

The main considerations in designing such an organisation are the definition of its mandate and of the powers to discharge it. The positions with respect to these two components vary widely. Possible mandates range from the administration of a range of existing treaties in different areas, to that of a single umbrella treaty (e.g. the Global Pact), to simply an advisory function coordinating the efforts in different sectors to ensure their consistency. Regarding powers, they would range from standard-setting, to non-compliance management, to international dispute settlement. A significant step in the institutionalisation of global environmental governance was taken in 2012 at the Rio+20 Conference, with the extension of UNEP's Governing Council to all UN members, which became the UNEA.

### C. RELIANCE ON EXISTING ARRANGEMENTS

A third approach would be to rely on existing institutions. For example, UN Environment (formally UNEP) hosts the Secretariats of some MEAs either in its global headquarters located in Nairobi<sup>7</sup> or in its European headquarters located in Geneva.<sup>8</sup> In addition, the governing bodies of UNEP could discharge the function of

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<sup>5</sup> Agreement Establishing the World Trade Organization, Marrakech, 15 April 1994, 1867 UNTS 154.

<sup>6</sup> On the merits and challenges of this option see: F. Francioni and P.-M. Dupuy, 'Preliminary Feasibility Study for the Establishment of a UN Environmental Organisation or Agency', Study commissioned by the French Ministry of Foreign Affairs, European University Institute, Florence, 2005; F. Biermann, 'The Emerging Debate on the Need for a World Environmental Organisation: A Commentary' (2001) 1 *Global Environmental Politics* 45; S. Charnowitz, 'A World Environmental Organization' (2002) 27 *Columbia Journal of Environmental Law* 321; R. G. Tarasofsky and A. L. Hoare, *Implications of a UNEO for the Global Architecture of the International Environmental Governance System* (London: Chatham House, 2004); B. Desai, *International Environmental Governance: Towards UNEPO* (The Hague: Brill, 2014).

<sup>7</sup> See e.g. the Ozone Secretariat of the Vienna Convention on the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293, and the Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 29.

<sup>8</sup> See e.g. the Secretariats of treaties such as Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10

the COP for a Global Pact for the Environment. UNEP is governed by the biennial UN Environment Assembly (UNEA)(consisting of Environment Ministers), the UNEA President and Bureau (composed of Ministers or other high-rank officials), and the intersessional Committee of Permanent Representatives (consisting of accredited officials from permanent missions). Given the global character of these institutions and that of the proposed Global Pact for the Environment, they could also serve as governing bodies of the Pact. Those States represented in UNEP governing bodies who would not be parties to the Pact could attend as observers.

The selection of one of the above options (or a combination thereof, e.g. a COP convened together with the UNEA to cost-saving and logistical reasons) has implications for the options available downstream, at the level of implementation mechanisms.

### III. IMPLEMENTATION MECHANISMS

Implementation mechanism are less focussed on the overall administration and management of the treaty regime and more on the overseeing the discharge of the obligations undertaken by States parties. The range of mechanisms that can be used for this purpose can be organised along the compliance process:

**Figure 2: Stages in the compliance process**

Monitoring/Reporting	Assistance	Management of non-compliance	Adjudication
Option M.1: Reporting	Option M.2: Consultation process or Interpretive powers	Option M.2: General compliance and specific instances of non-compliance	Option M.3: Adjudication

Figure 2 summarises three aspects. First, it spells out the main purpose or ‘stage of intervention’ of the mechanism, i.e. to monitor/report information, assist in the discharge of the obligations, manage situations of non-compliance, and adjudicate disputes. Secondly, it situates the three options (M.1, M.2, M.3) under the most appropriate stage of intervention. But in order to do so, it is necessary to clarify in option M.2, whether for a stand-alone Committee or for a Compliance Committees

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September 1998, 2244 UNTS 337, Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119, Minamata Convention on Mercury, 10 October 2013.

relying on a COP, the types of functions that they may perform. This third aspect will become clearer in the discussion of each option.

## A. REPORTING

Reporting is very widely used at the international level as a soft means of inducing compliance but its main purpose is not only some degree of oversight. In fact, the obligation to report information implies the need to monitor the evolution of a given variable and hence also to establish a system capable of gathering the relevant information. Reporting also seeks to build trust among State parties, particularly for treaty regimes addressing problems which require action by all parties. This explains why reports must be submitted at regular intervals, to provide evidence of how the situation in each country is evolving, and they must follow a pre-defined format, which makes the information comparable across countries.

Once submitted, the reports must be examined by a body and, in some cases, States are subject to a questions & answers session to explain progress or lack thereof. The nature – political or technical – of the body reviewing the reports and of the reviewing process – with or without questions – are important features of the process. In the context of a Global Pact for the Environment, the reporting process could either be managed by a new institution, e.g. a COP (assisted by a Compliance Committee) or a stand-alone Committee, or it could rely on existing bodies (e.g. the UNEA or the High-Level Political Forum) or processes (e.g. reporting to the HLPF on progress in achieving the Sustainable Development Goals).

## B. QUASI-ADJUDICATORY COMMITTEES

*Stand-alone Committees* - Ten stand-alone committees represent the core of the UN Treaty bodies' system.<sup>9</sup> They are integral part of the UN human rights frame, considering that treaties themselves were adopted by the UN General Assembly and the committees have to annually report to it, through the Economic and Social Council. They are composed of independent experts that monitor implementation of international human rights treaties. In this institutional landscape, the Human Rights

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<sup>9</sup> (i) Human Rights Committee (CCPR); (ii) Committee on Economic, Social and Cultural Rights (CESCR); (iii) Committee on the Elimination of Racial Discrimination (CERD); (iv) Committee on the Elimination of Discrimination against Women (CEDAW); (v) Committee against Torture (CAT); (vi) Committee on the Rights of the Child (CRC); (vii) Committee on Migrant Workers (CMW); (viii) Committee on the Rights of Persons with Disabilities (CRPD); (ix) Committee on Enforced Disappearances (CED); (x) and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

Committee ('HRC' or 'Committee') provides a particularly representative example. Four main aspects, summarised in Figure 3, deserve closer attention.

**Figure 3: Essential components of the HRC**

Human Rights Committee			
Composition	Monitoring general compliance	Interpretive powers	Communications
18 independent experts selected by State parties by secret ballot for 4-year terms	Initial report and then periodic reports (approx. every 4 years), followed by Committee conclusions	Adoption of General Comments on specific provisions or themes	Submitted by either other States parties or – under an Optional Protocol – by individuals

The Committee is a body of eighteen independent experts that monitors and oversees the implementation by States parties of the International Covenant on Civil and Political Rights (ICCPR).<sup>10</sup> Its members must be nationals of parties to the Covenant and must be 'persons of high moral character and recognized competence in the field of human rights.'<sup>11</sup> Traditionally, they have been selected amongst those with legal expertise, coming from academia or practice, and they are elected by States parties by secret ballot to four-year terms. Once elected, they serve in their personal capacity and regularly maintain a dialogue on issues of concern through the forum of meetings with States parties that the Committee regularly plans during its yearly sessions. The Committee meets in Geneva and, every year, it holds three plenary sessions, each lasting three weeks. The members nominate the Committee's officers (Chair and Vice-chair) for a term of two years<sup>12</sup> and three special rapporteurs,<sup>13</sup> who are appointed for the same terms to perform specific functions.

In carrying out its monitoring functions, the Committee has four major responsibilities. First, all States parties are asked to submit regular reports to the Committee on the implementation of the rights recognised in the Covenant. In this respect, States must initially report one year after acceding to the Covenant. Subsequent reports, known as 'periodic reports', are due only at the request of the Committee (usually every four years). The Committee must then review each report

<sup>10</sup> International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>11</sup> ICCPR, Art 28.

<sup>12</sup> Namely, the Committee's Chairperson, three Vice-Chairpersons, and the Rapporteur in charge of preparing the Committee's annual report to the General Assembly.

<sup>13</sup> On 'New Communications', 'Follow-up to Views', and 'Follow-up to Concluding Observations'.

and ultimately address its main concerns and recommendations to the State party in the form of ‘concluding observations’.

In addition, the Committee has the power to elaborate its interpretation of the content of human rights provisions and to clarify the scope and meaning of the Covenant’s articles through so-called ‘general comments’ on thematic issues. They are designed to assist States parties to implement the Covenant by extensively and comprehensively analysing a specific article and detailing states’ substantive and procedural obligations.

Lastly, in addition to the reporting procedure, the Committee can receive and consider two types of complaints, also known as ‘communications’. A State party may submit a communication to the Committee alleging that another State party is not fulfilling its obligations under the Covenant. These complaints may only be made in respect of those States parties that have declared that they recognize the competence of the Committee to receive and consider such inter-State complaints. Additionally, under the Optional Protocol, the HRC can also consider complaints lodged by individuals who claim violations of their Covenant rights by a State party. If the Committee considers the case to be admissible, it adopts ‘Views’ on the substance, or merits, of the complaint, which consist of either an assessment of violation, or of a non-violation (or both, if the complaint included various allegations).

As a result, whether in its review of States parties’ reports, its adoption of general comments, or its examination of complaints by individuals or States alleging violations of the Covenant, the Committee’s main responsibility is to perform the essential function of overseeing the enjoyment of the rights set out in an international treaty.

*Compliance Committees* - A number of Compliance Committees have been established following the introduction of the first such body by the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>14</sup> These Committees are subsidiary bodies of a COP established to handle matters of compliance through the exercise of a range of possible functions: provision of assistance (e.g. in the form of a Consultation

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<sup>14</sup> See Montreal Protocol, Article 8 and ‘Non-compliance Procedure’, Decision IV/5, 25 November 1992, UNEP/OzL.Pro/4/15, Annex IV (Report of the Parties) as subsequently amended. On these see T. Treves *et al.* (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (The Hague: TMC Asser Press, 2009); J. E. Viñuales, ‘Managing Abidance by Standards for the Protection of the Environment’, in A. Cassese (ed.), *Realizing Utopia* (Oxford University Press, 2012), pp. 326–39.

Process<sup>15</sup>); general management of compliance issues; power to consider specific cases of non-compliance; power to issue interpretations of the underlying agreement.<sup>16</sup>

The different options relating to their institutional organisation and operation can be summarised in Figure 4. It is important to note that each of these options has been recognised in at least one and often several treaty contexts. Thus, they are all realistic options that merit consideration.

**Figure 4: Components of Compliance Committees and procedures**

Components	Options	
<b>Legal basis of the Committee and process</b>	Explicit treaty clause	
	Decision of the COP	
<b>Composition of the Committee</b>	State representatives	
	Independent experts	
<b>Functions of the Committee</b>	General review of compliance	
	Consideration of specific instances of non-compliance	
	Consultation process	
	Interpretive powers	
<b>Trigger of specific instances</b>	States parties	Other States
		State in a situation of non-compliance
	Treaty bodies	Secretariat
		Compliance Committee ( <i>proprio motu</i> )
	Public	
<b>Outcomes of specific instances</b>	Provision of assistance	
	Requests for information	
	Warnings, sanctions and relief	

There are only a few Compliance Committees and procedures that possess the full range of powers or significant part thereof (e.g. those of the 1999 Protocol on Water<sup>17</sup> and Health or of the 1998 Aarhus Convention<sup>18</sup>), and they tend to be more recent than the those with more limited powers. Indeed, there has been significant institutional experimentation in relation to Compliance Committees and, in this process, some advanced features have been retained (e.g. the possibility for the public, broadly defined, to trigger a specific instance of non-compliance) and others have

<sup>15</sup> This function is rarely conferred. See Protocol on Water and Health, Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, 2331 UNTS 202, Consultation Process of the Compliance Committee under the Protocol on Water and Health, Terms of Reference as amended by the Committee at its tenth meeting (Geneva, 25 November 2014).

<sup>16</sup> This function is implicit in the general compliance powers, but it is seldom used.

<sup>17</sup> Protocol on Water and Health, 'Review of Compliance', Decision I/2, 3 July 2007, ECE/MP.WH/2/Add.3, EUR/06/5069385/1/Add.

<sup>18</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447, 'Review of Compliance', Decision I/7, 2 April 2004, ECE/MP.PP/2/Add.8, Annex.

been abandoned (e.g. the establishment of an ‘enforcement branch’ within a Compliance Committee, which is at odds with the facilitative nature of such bodies).

### C. ADJUDICATION

For over thirty years, there have been discussions in academic circles regarding the possibility of establishing a specialised international environmental court. Although some attempts have been made equip existing international courts and tribunals with better means to adjudicate environmental disputes (e.g. the Special Chamber on environmental matters that was convened for some time by the ICJ, but never used, or the special chamber of the ITLOS), the project to established a specialised international environmental court, akin to the International Criminal Court, the WTO Dispute Settlement Body or the ITLOS, never gained sufficient support and traction to be genuinely considered by States.

We do not see this possibility as a realistic institutional arrangement and throughout the discussions of the draft Pact, this possibility was never part of the initiative. The main problems, aside from gathering the necessary political support, are the lack of definition of what is an ‘environmental’ dispute and the potentially major overlaps with the jurisdiction of other international courts and tribunals.

## IV. COMBINATIONS

### A. COMBINATION APPEARING IN THE CURRENT DRAFT GLOBAL PACT

The Draft Global Pact for the Environment envisages, in Article 21, a Compliance Committee inspired in Article 15 of the Paris Agreement. Article 21, entitled ‘Monitoring the implementation of the Pact’, states the following:

‘A monitoring mechanism to facilitate implementation of, and to promote compliance with, the provisions of the present Pact is *hereby established*.

This mechanism consists of a Committee of *independent experts and focuses on facilitation*. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall *pay particular attention to the respective national circumstances and capabilities of the Parties*.

One year after the entry into force of the present Pact, the Depository shall convene *a meeting of the Parties which will establish*

*the modalities and procedures by which the Committee shall exercise its functions.*

Two years after the Committee takes office, and *at a frequency to be determined by the meeting of the Parties, not exceeding four years*, each Party shall report to the Committee on its progress in implementing the provisions of the Pact.’

The approach followed in this provision is of a hybrid nature. We have placed in Italics certain noteworthy features. The first paragraph of Article 21 states that the mechanism is ‘hereby established’, which suggests that it has a stand-alone nature, i.e. that it is established by the constituent power (the States adopting the treaty) rather than by the meeting of the parties. Moreover, in referring to ‘a meeting of the parties’, the third paragraph implies that, rather than an institutionalised COP, the Draft envisions a lighter structure, namely conferences convened by the Secretariat. The latter functions are entrusted to either the UN Secretary-General or to the UNEP Executive Director, further emphasising the hybrid nature of the Draft. This is significant. In MEAs, the Secretariat organises the COPs but it does not have a convening (or non-convening) power. COPs take place at regular intervals normally set by a treaty provision or by a decision of the COP itself. The absence of an institutionalised COP further highlights the stand-alone nature of the Committee contemplated in Article 21.

Yet, the Committee is described much in the same way as a Compliance Committee of a MEA. The second paragraph of Article 21 mentions that it will be composed of ‘independent experts’ and that it will focus on ‘facilitation’. The latter point is further emphasised by the second sentence, which stresses the non-adversarial and non-punitive operation of the mechanism. An area where this provision innovates, following Article 15(2) of the Paris Agreement, is in the differentiated nature of compliance, which ‘shall pay particular attention to the respective national circumstances and capabilities of the Parties’. It is, however, unclear what this would mean in practice. It could indeed be interpreted in several ways, including as a basis for the Committee to be more lenient in its review, or to interpret the entire Pact in a due diligence light that takes into account differentiation, or, still, as an opening for the Committee to operate in equity (a development-sensitive *ex aequo et bono* approach). Article 21 does not mention the parameters of eligibility or appointment of the independent experts. This is left for the meeting of the parties convened by the Secretariat to decide, as part of the ‘modalities and procedures by which the Committee shall exercise its functions’.

Such functions also remain to be defined at such occasion. Article 21 only mentions general compliance oversight through a reporting mechanism. Yet, it only clarifies the parameters of the obligation to report and not the Committee powers to review or to derive consequences from the content of the reports. No mention is made of interpretive powers or specific instances of non-compliance. Such matters also remain to be decided by the meeting of the parties.

Thus, overall, the provisions of the Draft Global Pact are a hybrid that still requires significant clarification. It is highly likely that these provisions will be closely scrutinised in any potential negotiation and that they will undergo fundamental modifications. All in all, what the Draft Global Pact conveys is a preference for an agile and light institutional arrangement rather than a heavy and costly one.

## B. PROPOSED COMBINATIONS

In our view, the most adapted format for a future Global Pact would be broadly similar but with some noticeable variations. Within the options in Figure 1, we would favour a combination of reliance on existing arrangements (A.1) with a stand-alone Committee (M.2). That combination is described as option C.2.1. Yet, from the perspective of the Committee functions, the most suitable option in our view would be a combination of the components and powers of the Committees in Figures 3 and 4, so as to empower the stand-alone Committee with a wider range of facilitative tools. The proposed mechanism is summarised in Figure 5:

**Figure 5: Proposed institutional arrangement for a Global Pact**

Institutional arrangements	Implementation mechanism	Features and components				
Existing arrangements: - UNEP as Secretariat - UNEA as COP	Stand-alone Committee	Based on an explicit treaty clause				
		Composed of independent experts				
		Functions	General compliance (regular reporting and ability to issue conclusions) Specific instances of non-compliance triggered by either:	States parties (including State in non-compliance) Treaty bodies (secretariat and Committee <i>proprio motu</i> ) Public	And potentially leading to:	Provision of assistance Requests for information Warnings, sanctions and relief
		Interpretive functions				
		Consultation process (advisory powers before any matter of compliance is raised)				

The legal basis of the proposed mechanism would rely on two main sources. The arrangements appearing in the outer quadrant would be specifically set by the treaty itself, whereas the functions of the mechanism would be defined by a decision of the UNEA acting in its capacity as COP of the Global Pact, with only those States having ratified the Pact enjoying voting powers.

Two key powers of the Committee would be the ability to decide specific instances of non-compliance and, even more importantly, its ability to provide authoritative interpretations of the provisions of the Pact or of certain thematical questions. The former power would require significant reflection from States because opening the Compliance process to the public could require substantial resources along the way, if the Committee were to face high numbers of communications. An alternative would be to follow the approach of the HRC, where inter-State complaints are only possible against those States that have agreed in advance to such procedure and communications from the public are only open if a State has become a party to an Optional Protocol (i.e. an additional treaty). As for the interpretive powers, in our opinion their fundamental in view of the nature of the Pact. Indeed, the Global Pact is expected to be a normative rather than a regulatory instrument. It will set general overarching principles, not a procedural framework to manage certain specific variables. The normative nature of the Pact is also important for its articulation with existing regulatory instruments.

# Afterword

John H. Knox

Former UN Special Rapporteur on Human Rights and the Environment

The Global Pact would do more than clarify and codify the foundational principles of international environmental law. By explicitly recognizing the links between human rights and the environment, it would help to shift international environmental law from its traditional state-to-state axis. Human beings, not just states, would be recognized as rights-holders under international environmental law.

Many of the provisions of the Global Pact have links to human rights norms. Its preamble recognizes the need to respect, promote and consider obligations on human rights, and it includes specific references to gender equality and to the rights and knowledge of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations. The rights of access to environmental information, participation in environmental decision-making, and access to justice in articles 9, 10 and 11 have roots not only in Principle 10 of the Rio Declaration and in the Aarhus and Escazú conventions, but also in human rights agreements such as the International Covenant on Civil and Political Rights.

Some other links to human rights in the Pact are less evident but no less important. Human rights agreements have been construed to require states to protect against environmental harm to many human rights, including the rights to life and health.<sup>1</sup> To protect against such harm, human rights bodies have identified obligations of states that overlap with the principles of the Global Pact in many respects, such as carrying out environmental and social impact assessment of proposed actions, adopting and enforcing effective environmental standards, and engaging in international cooperation to address transboundary and global environmental threats such as climate change and the loss of biodiversity. Human rights bodies have cited the precautionary principle and have urged states to adhere to the principle of non-regression.

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<sup>1</sup> See Framework Principles on Human Rights and the Environment, UN Doc. A/HRC/37/59 (24 January 2018) (setting out the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment).

In this fusion of human rights and environmental norms, the most important provision of the Global Pact is its very first article, which states that “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment”. This article provides a lens through which the entire Pact may be read, so that the principles in the Pact reflect rights not just of states vis-à-vis one another, but also of rights held by human beings against states. In effect, the first article ensures that the Pact is seen as a human rights treaty as well as an environmental convention.

The rights-based perspective has been immanent in international environmental law ever since the Stockholm Declaration, which recognized “the 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”. However, it has too often been obscured or forgotten. By explicitly recognizing the interdependence of human rights and the environment, the Global Pact would re-energize the field of international environmental law, by making clear that a healthy and sustainable environment is necessary to human well-being, dignity, equality and freedom, and that the exercise of human rights is vital to the protection of the environment on which they depend.

# **Draft Global Pact for the Environment**

**Compilation of texts**

## FOREWORD

The present compilation of texts is a working document prepared in 2017 with the help from the team of rapporteurs who assisted the Group of Experts for the Pact (GEP) and the Environmental Commission of the *Club des juristes* in the preparation of the draft of a Global Pact for the environment. This document is not all-encompassing, but instead gathers the relevant texts that inspired the drafters. For the sake of clarity, these texts are presented article by article.

This compilation is up to date as of 24 June 2017, when the project was officially presented, and therefore does not incorporate later legal developments, be they international treaties (e.g.: Escazú Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018), or case law (e.g.: ICJ, Certain activities carried out by Nicaragua in the border region (Costa Rica v. Nicaragua) 2 February 2018; IACHR, Opinión consultiva oc-23/17 solicitada por la República de Colombia - Medio ambiente y derechos humanos, 7 February 2018).

Yann AGUILA

Secretary General of the Group of Experts for the Pact

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## 1. PREAMBLE

### *Preamble to the Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972*

“The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,

Proclaims that:

1. Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.

2. The protection and improvement of the human environment is a major issue, which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.

4. In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized

countries should make efforts to reduce the gap themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development.

5. The natural growth of population continuously presents problems for the preservation of the environment, and adequate policies and measures should be adopted, as appropriate, to face these problems. Of all things in the world, people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability of man to improve the environment increases with each passing day.

6. A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference, we can do massive and irreversible harm to the earthly environment on which our life and well being depend. Conversely, through fuller knowledge and wiser action, we can achieve, for ourselves and our posterity, a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.

7. To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest. The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity”

***Preamble to the Rio Declaration on Environment and Development, 1992***

“The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and people,

Working towards international agreements, which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that: (...).”

***Preamble to the Paris Agreement, 2015***

“The Parties to this Agreement,

Being Parties to the United Nations Framework Convention on Climate Change, hereinafter referred to as "the Convention",

Pursuant to the Durban Platform for Enhanced Action established by decision 1/CP.17 of the Conference of the Parties to the Convention at its seventeenth session,

In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,

Also recognizing the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention,

Taking full account of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology,

Recognizing that Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it,

Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty,

Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities,

Acknowledging that climate change is a common concern of humankind,

Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

Recognizing the importance of the conservation and enhancement, as appropriate, of sinks and reservoirs of the greenhouse gases referred to in the Convention,

Noting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of "climate justice", when taking action to address climate change,

Affirming the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement,

Recognizing the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change,

Also recognizing that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change,

Have agreed as follows: (...)".

## 2. ARTICLE 1 - Right to an ecologically sound environment

*Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.*

### *I/ Stockholm and Rio Declarations*

#### **Stockholm Declaration, 1972**

**Principle 1:** “Man has the 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 he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated”.

#### **Rio Declaration on Environment and Development, 1992**

**Principle 1:** “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.

### *II/ Other texts enacted in the framework of international organisations*

#### **Johannesburg Declaration, 2002**

“18. We welcome the focus of the Johannesburg Summit on the indivisibility of human dignity and are resolved, through decisions on targets, timetables and partnerships, to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity (...)”.

#### **United Nations Declaration on the rights of Indigenous Peoples, 2007**

**Article 29:** “1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.  
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.  
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented”.

### **III/ *Regional Treaties***

#### **African Charter on Human and People's Rights, 1981:**

**Article 24:** "All peoples shall have the right to a general satisfactory environment favourable to their development".

#### **Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", 1988**

**Article 11:** "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment".

#### **Aarhus Convention, 1998**

**Article 1:** "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention".

#### **Arab Charter of Human Rights, 2004**

**Article 38:** "Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights".

### **IV/ *Texts drafted by civil society***

#### **Resolution "Environment", The Institute of International Law, 1997**

**Article 2:** "Every human being has the right to live in a healthy environment".

#### **Earth Charter, 2000**

"12. Uphold the right of all, without discrimination, to a natural and social environment supportive of human dignity, bodily health, and spiritual well-being, with special attention to the rights of indigenous peoples and minorities".

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 15:** "1. Parties undertake to achieve progressively the full realization of the right of all persons to live in an ecologically sound environment adequate for their development, health, well-being and dignity. They shall devote immediate and special attention to the satisfaction of basic human needs".

#### **Universal Declaration of Humankind Rights, 2016**

V: “Humanity, like all living species, has the right to live in a healthy and ecologically sustainable environment”.

**IUCN World Declaration on the Environmental Rule of Law, 2016**

**Principle 2:** “Each human and other living being has a right to the conservation, protection, and restoration of the health and integrity of ecosystems. Nature has the inherent right to exist, thrive, and evolve”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 1:** “1. Everyone, including future generations, has the right to live in an ecologically balanced environment capable of assuring his or her health, security, and wellbeing”.

**V/ Case-Law**

**ICJ, Advisory opinion on the legality of the threat or use of nuclear weapons, 8 July 1996:**

“The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.

### 3. ARTICLE 2 - Duty to take care of the environment

*Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem.*

#### I/ *Stockholm and Rio Declarations*

##### **Stockholm Declaration, 1972**

**Principle 2:** “The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate”.

**Principle 3:** “The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved”.

**Principle 4:** “Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development”.

**Principle 7:** “States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea”.

##### **Rio Declaration on Environment and Development, 1992**

**Principle 2:** “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that 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”.

**Principle 7:** “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.

#### II/ **Other texts enacted in the framework of international organisations**

**Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, The International Law Commission, 2006**

**Principle 3:** “The purposes of the present draft principles are: (b) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement”.

**III/ *International Treaties***

**Convention on Long-Range Transboundary Air Pollution, 1979:**

**Article 2:** “The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution”.

**United Nations Convention on the Law of the Sea, 1982**

**Article 192:** “States have the obligation to protect and preserve the marine environment”.

**Convention on Biological Diversity, 1992**

**Preamble:** “Reaffirming also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner”.

**IV/ *Texts drafted by civil society***

**New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002**

**1.3** The protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind. The resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 2:** “Nature as a whole and all life forms warrant respect and are to be safeguarded. The integrity of the Earth’s ecological systems shall be maintained and where necessary restored”.

**Article 14:** “2. States have the right and the duty, in accordance with the Charter of the United Nations and principles of international law, to take lawful action to protect the environment under their jurisdiction from significant harm caused by activities outside their national jurisdiction. If such harm occurs, they are entitled to appropriate and effective remedies.

3. States shall take all appropriate measures to avoid wasteful use of natural resources and ensure the sustainable use of renewable resources”.

**Article 15:** “2. Parties shall ensure that all physical and legal persons have a duty to protect and conserve the environment”.

#### **Oslo Principles on Global Climate Change Obligations, 2015**

**Preamble:** “(...) all States and enterprises have an immediate moral and legal duty to prevent the deleterious effects of climate change. While all people, individually and through all the varieties of associations that they form, share the moral duty to avert climate change, the primary legal responsibility rests with States and enterprises (...)”.

#### **Universal Declaration of Humankind Rights, 2016**

**III:** “The principle of continuity of human existence guarantees the preservation and protection of humanity and the Earth through human activities that shall be prudent and respectful of nature, particularly of life, both human and non-human, and making every effort to prevent all serious or irreversible transgenerational consequences”.

#### **IUCN World Declaration on the Environmental Rule of Law, 2016**

**Principle 1:** “Each State, public or private entity, and individual has the obligation to care for and promote the well-being of nature, regardless of its worth to humans, and to place limits on its use and exploitation”.

#### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 1:** “2. To that end, every person has the obligation to protect the environment and to contribute to its improvement”.

**Article 2:** “1. Everyone has the right to a heightened level of protection of the environment and to non retrogression in the levels already attained.

2. The State Parties adopt measures necessary to effectively combat threats to the environment.

3. These measures should be adapted to the state of the environment and ensure a heightened level of protection.

4. These measures may not result, directly or indirectly, in the relation or transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health (...)”.

#### **V/ Case-Law**

##### ***Trail Smelter arbitral sentence, 11 March 1941***

“No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the proper- ties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”.

**ICJ, Advisory opinion on the legality of the threat or use of nuclear weapons, 8 July 1996**

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or other areas beyond general control is now part of the corpus of international law relating to the environment”.

#### 4. ARTICLE 3 – Integration principle and sustainable development

*Parties shall integrate the requirements of environmental protection into the planning and implementation of their policies and national and international activities, especially in order to promote the fight against climate change, the protection of oceans and the maintenance of biodiversity.*  
*They shall pursue sustainable development. To this end, they shall ensure the promotion of public support policies, patterns of production and consumption both sustainable and respectful of the environment.*

##### ***I/ Rio Declaration***

###### **Rio Declaration on Environment and Development, 1992**

**Principle 4:** “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.

**Principle 8:** “To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies”.

##### ***II/ Other texts enacted in the framework of international organisations***

###### **WTO, Marrakesh Agreement, 1994**

**Preamble:** “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so”.

###### **ILO, Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All, 2015**

###### **II. Our vision**

“2. Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs. Sustainable development has three dimensions – economic, social and environmental – which are interrelated, of equal importance and must be addressed together”.

##### ***III/ International Treaties***

###### **United Nations Framework Convention on Climate Change, 1992**

**Article 3:** “4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-

induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change”.

**Convention on Biological Diversity, 1992**

**Article 8:** “Each Contracting Party shall, as far as possible and as appropriate: e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas”.

**United Nations Convention to Combat Desertification, 1994**

**Article 1:** “The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas”.

**International Tropical Timber Agreement, 2006**

**Article 1:** “(...) the objectives of the International Tropical Timber Agreement, 2006 (...) are to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests by: (...) (c) Contributing to sustainable development and to poverty alleviation; (...)”.

**Paris Agreement, 2015**

**Article 7:** “1. Parties hereby establish the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2. (...)”

9. Each Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include: (...)”

(e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources”.

**IV/ *Regional Treaties***

**Treaty on the Functioning of the European Union, 2007**

**Article 11** “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”.

## *V/ Texts drafted by civil society*

### **Resolution “Environment” The Institute of International Law, 1997**

**Article 3:** “The effective realization of the right to live in a healthy environment should be integrated into the objectives of sustainable development”.

### **Earth Charter, 2000**

**“10.** Ensure that economic activities and institutions at all levels promote human development in an equitable and sustainable manner”.

### **Draft IUCN Covenant (5th Edition), 2015**

**Article 11:** “The right to development is universal and inalienable and entails the obligation to meet environmental, as well as social and economic needs of humanity in a sustainable and equitable manner”.

**Article 17:** “1. Parties shall pursue integrated policies aimed at eradicating poverty, encouraging sustainable consumption and production patterns, and conserving biological diversity and the natural resource base as overarching objectives of, and essential requirements for, sustainable development.

2. Parties shall, at all stages and at all levels, integrate environmental conservation into the planning and implementation of their policies and activities giving full and equal consideration to environmental, economic, social and cultural factors. To this end, the Parties shall:

- a) conduct regular national reviews of environmental and developmental plans, programmes and policies;
- b) enact, periodically review, and enforce laws and regulations; and
- c) establish or strengthen institutional structures and procedures to integrate environmental and developmental issues in all spheres of decision-making .

3. Parties, through their membership in international organizations, undertake to pursue within such organizations policies which are consistent with the provisions of this Covenant”.

### **Universal Declaration of Humankind Rights, 2016**

**VI:** “Humanity has the right to a responsible, equitable, inclusive and sustainable development”.

**XV:** “All States and other public and private stakeholders and entities have the duty to integrate the long-term perspective in their policies and to promote sustainable human development. This development, as well as the principles, rights and duties set forth in this Declaration shall be advanced through awareness raising, education and implementation initiatives”.

### **IUCN World Declaration on the Environmental Rule of Law, 2016**

**Principle 4:** “Legal and other measures shall be taken to protect and restore ecosystem integrity and to sustain and enhance the resilience of social-ecological systems. In the drafting of policies and legislation, and in decision-making, the

maintenance of a healthy biosphere for nature and humanity should be a primary consideration”.

## 5. ARTICLE 4 - Intergenerational equity

*Intergenerational equity shall guide decisions that may have an impact on the environment.*

*Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.*

### ***I/ Stockholm and Rio Declarations***

#### **Stockholm Declaration, 1972**

**Principle 1:** “Man has the 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 he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated”.

**Principle 2:** “The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate”.

#### **Rio Declaration, 1992**

**Principle 3:** “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”.

### ***II/ Texts drafted by civil society***

#### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 25:** “Where damage is irreparable for physical, technical or economic reasons, additional criteria should be made available for the assessment of damage. Impairment of use, aesthetic and other non-use values, domestic or international guidelines, intergenerational equity, and generally equitable assessment should be considered as alternative criteria for establishing a measure of compensation”.

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 5:** “Equity and justice shall guide all decisions affecting the environment and shall oblige each generation to qualify its environmental conduct by anticipating the needs of future generations”.

#### **Universal Declaration of Humankind Rights, 2016**

**I:** “The principle of intragenerational and intergenerational responsibility, equity and solidarity demands that the human family and in particular its States shall endeavor, in a common and differentiated manner, to safeguard and preserve humanity and Earth”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 17:** ”1. States Parties undertake to ensure that the rights and duties contained in the present Covenant shall be exercised with fairness and solidarity for the benefit of present and future generations”.

## 6. ARTICLE 5 - Prevention

*The necessary measures shall be taken to prevent environmental harm.*

*The Parties have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environments of other Parties or in areas beyond the limits of their national jurisdiction.*

*They shall take the necessary measures to ensure that an environmental impact assessment is conducted prior to any decision made to authorise or engage in a project, an activity, a plan, or a program that is likely to have a significant adverse impact on the environment.*

*In particular, States shall keep under surveillance the effect of an above-mentioned project, activity, plan, or program which they authorise or engage in, in view of their obligation of due diligence.*

### ON THE PREVENTION OF TRANSBOUNDARY HARMS

#### I/ *Stockholm and Rio Declarations*

##### **Stockholm Declaration, 1972**

**Principle 21:** “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

##### **Rio Declaration on Environment and Development, 1992**

**Principle 2:** “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that 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.

**Principle 14:** “States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health”.

**Principle 18:** “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted”.

**Principle 19:** “States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith”.

## ***II/ Other texts enacted in the framework of international organisations***

### **World Charter for Nature, 1982**

“21. States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: (...)

(d) Ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction”.

### **Draft articles on Prevention of transboundary harm from hazardous activities, The International Law Commission, 2001**

**Article 1:** “The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences”.

**Article 3:** “The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”.

## ***III/ International Treaties***

### **United Nations Convention on the Law of the Sea, 1982**

**Article 194:** “1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention”.

### **Convention on Environmental Impact Assessment in a Transboundary Context, “Espoo Convention”, 1991**

**Preamble:** “(...) Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context (...)”.

**Article 2:** “1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”.

### **Convention on Biological Diversity, 1992**

**Preamble:** “Noting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source”.

**Article 3:** “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

#### **United Nations Framework Convention on Climate Change, 1992**

**Preamble:** “(...) Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that 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 (...)”.

#### **IV/ *Regional Treaties***

##### **ASEAN - Agreement on the Conservation of Nature and Natural Resources, 1985**

**Article 20:** “1. Contracting Parties have in accordance with generally accepted principles of international law the responsibility of ensuring that activities under their jurisdiction or control do not cause damage to the environment or the natural resources under the Jurisdiction of other Contracting Parties r f areas beyond the limits of national jurisdiction.

2. In order to fulfill this responsibility Contracting Parties shall avoid to the maximum extent possible and reduce to the minimum extent possible adverse environmental effects of activities under their Jurisdiction or control, including effects n natural resources, beyond the limits of their national jurisdiction (...)”.

#### **V/ *Texts drafted by civil society***

##### **Resolution “Environment”, The Institute of International Law, 1997**

**Article 6:** “Every State, when intervening on the basis of decisions taken in the exercise of its sovereignty in fields of activity where the effects of such decisions on the environment are clear, has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may affect the lives of the present and future generations. [...] If the activities referred to above involve the risk of causing significant damage to the environment, the State shall provide prior and timely notification to potentially affected States”.

##### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

“Noting in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration on the responsibility of States to ensure that 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”

**Draft IUCN Covenant (5th Edition), 2015**

**Article 14:** “1. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to utilize their resources to meet their environmental and developmental needs, and the duty to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond the limits of national jurisdiction”.

**Article 41:** “Parties shall take appropriate measures to prevent or minimize the risk of harm to the environment of other States or of areas beyond national jurisdiction (...).”

**VI/ Case-Law**

**ICJ, Corfu Channel Case (United Kingdom v. Albania), 9 April 1949**

“The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.

**ICJ, Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia), 25 September 1997**

“The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage”.

**ICJ, Pulp Mills on the River Uruguay case (Argentina v. Uruguay), 20 April 2010**

“A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.

## ON THE GENERAL PRINCIPLE OF PREVENTION

### *I/ Stockholm Declaration*

#### **Stockholm Declaration, 1972**

**Principle 24:** “International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States”.

### *II/ Other texts enacted in the framework of international organisations*

#### **World Charter for Nature, 1982**

“**13.** Measures intended to prevent, control or limit natural disasters, infestations and diseases shall be specifically directed to the causes of these scourges and shall avoid adverse side-effects on nature”.

“**19.** The status of natural processes, ecosystems and species shall be closely monitored to enable early detection of degradation or threat, ensure timely intervention and facilitate the evaluation of conservation policies and methods”.

### *III/ International Treaties*

#### **Convention on Environmental Impact Assessment in a Transboundary Context, “Espoo Convention”, 1991**

**Preamble:** “(...) Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context (...)”.

### *IV/ Regional Treaties*

#### **Treaty on the Functioning of the European Union, 2007**

**Article 191** “2. Union policy on the environment (...) shall be based on the precautionary principle and on the principles that preventive action should be taken (...)”.

### *V/ Texts drafted by civil society*

#### **Resolution “Environment”, The Institute of International Law, 1997**

**Article 6:** “Every State, when intervening on the basis of decisions taken in the exercise of its sovereignty in fields of activity where the effects of such decisions on the environment are clear, has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may affect the lives of the present and future generations”.

**Article 9:** “States, regional and local governments and juridical or natural persons shall, to the extent possible, ensure that their activities do not cause any damage to the environment that could significantly diminish the enjoyment of the latter by other persons. In this respect, they shall take all necessary care. The obligation to prevent damage exists independently of any obligation to make reparation”.

**Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 2:** “Without precluding the application of rules of general international law, environmental regimes should include specific rules on responsibility and liability in order to ensure their effectiveness in terms of both encouraging prevention and providing for restoration and compensation. The object and purpose of each regime should be taken into account in establishing the extent of such rules”.

**Earth Charter, 2000**

**“6.** Prevent harm as the best method of environmental protection and, when knowledge is limited, apply a precautionary approach. (...)

**d.** Prevent pollution of any part of the environment and allow no build-up of radioactive, toxic, or other hazardous substances”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 6:** “Prevention of environmental harm shall have priority over environmental remediation. The costs of pollution prevention, control and reduction measures are to be borne, to the fullest extent possible, by the originator”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 4:** “1. Everyone has a right to have preventive measures taken.

2. To this end, every person has a duty to prevent damage he or she is likely to cause to the environment.

3. The costs of prevention, pollution reduction, and the fight against pollution, as well as the costs of repairing environmental damage, must be borne by the polluter.

4. Everyone, including States within the limits of their jurisdictions, must ensure that their activities and those activities under their control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

***I/ Rio Declaration***

**Rio Declaration on Environment and Development, 1992**

**Principle 17:** “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.

***II/ International Treaties***

**United Nations Convention on the Law of the Sea, 1982**

**Article 206:** “When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment”.

**Convention on Environmental Impact Assessment in a Transboundary Context, “Espoo Convention”, 1991**

**Preamble:** “(...) Mindful of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context (...)”.

**Article 2:** “1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”.

**Convention on Biological Diversity, 1992**

**Article 14:** “1. Each Contracting Party, as far as possible and as appropriate, shall:  
(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;  
(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account (...)”.

***III/ Texts drafted by civil society***

**Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 13:** “Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms such as notification and consultation, regular exchange of information

and the increased utilization of environmental impact assessments. The implications of the precautionary principle, the “polluter pays” principle and the principle of common but differentiated responsibility in the context of responsibility and liability should also be considered under such regimes”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 46:** “1. Parties shall establish or strengthen environmental impact assessment procedures to ensure that all activities and technologies which pose significant risks or are likely to have a significant adverse effect on the environment are evaluated before they are authorized”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 5:** “1. Projects, plans or programs must undergo an assessment of their impact on the environment.

2. This evaluation must also include transboundary impacts. In this context, States must notify concerned States of their projects and hold consultations promptly and in good faith”.

**IV/ Case-Law**

**ICJ, Pulp Mills on the River Uruguay case (Argentina v. Uruguay), 20 April 2010:**

“(…) a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works”.

## 7. ARTICLE 6 - Precaution

*Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.*

### **I/ Rio Declaration**

#### **Rio Declaration on Environment and Development, 1992**

**Principle 15:** “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

### **II/ Other texts enacted in the framework of international organisations**

#### **World Charter for Nature, 1982**

“11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular: (...)

(b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed”.

### **III/ International Treaties**

#### **Vienna Convention for the Protection of the Ozone Layer, 1985:**

**Preamble:** “(...) Mindful also of the precautionary measures for the protection of the ozone layer which have already been taken at the national and international levels (...)”.

#### **London Convention on International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990**

**Preamble:** “(...) Mindful of the importance of precautionary measures and prevention in avoiding oil pollution in the first instance, and the need for strict application of existing international instruments dealing with maritime safety and marine pollution prevention, particularly the International Convention for the Safety of Life at Sea, 1974 (...) and also the speedy development of enhanced standards for the design, operation and maintenance of ships carrying oil, and of offshore units (...)”.

### **United Nations Framework Convention on Climate Change, 1992**

**Article 3:** “3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties”.

### **Convention on Biological Diversity, 1992**

**Preamble:** “Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”.

### **Oslo Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, 1994**

**Preamble:** “The parties (...) Resolved to take precautionary measures to anticipate, prevent or minimise emissions of air pollutants and mitigate their adverse effects (...)”.

### **Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1996**

**Preamble:** “(...) Noting in this regard the achievements within the framework of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and especially the evolution towards approaches based on precaution and prevention (...)”.

**Article 3:** “In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects”.

### **Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000**

**Article 10:** “6. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the

import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects”.

**Article 11:** “8. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects”.

#### **Stockholm Convention on Persistent Organic Pollutants, 2001**

**Preamble:** “(...) Acknowledging that precaution underlies the concerns of all the Parties and is embedded within this Convention (...)”.

**Article 1:** “Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants”.

**Article 8:** “7. If, on the basis of the risk profile conducted in accordance with Annex E, the Committee decides:

(a) That the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted, the proposal shall proceed. Lack of full scientific certainty shall not prevent the proposal from proceeding. The Committee shall, through the Secretariat, invite information from all Parties and observers relating to the considerations specified in Annex F. It shall then prepare a risk management evaluation that includes an analysis of possible control measures for the chemical in accordance with that Annex (...)”.

#### **IV/ *Regional Treaties***

##### **Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992**

**Article 2:** “2. The Contracting Parties shall apply:

(a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects”.

##### **Treaty on the Functioning of the European Union, 2007**

**Article 191** “2. Union policy on the environment (...) shall be based on the precautionary principle and on the principles that preventive action should be taken (...)”.

## *V/ Texts drafted by civil society*

### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 13:** “Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms [...]. The implications of the precautionary principle [...] should also be considered under such regimes”.

### **Draft IUCN Covenant (5th Edition), 2015**

**Article 7:** “Precautionary measures shall be taken to anticipate, prevent and monitor the potential risks of serious or irreversible environmental harm, even in the absence of scientific certainty”.

### **Oslo Principles on Global Climate Change Obligations, 2015**

**“1. Precautionary Principle:** There is clear and convincing evidence that the greenhouse gas (GHG) emissions produced by human activity are causing significant changes to the climate and that these changes pose grave risks of irreversible harm to humanity, including present and future generations, to the environment, including other living species and the entire natural habitat, and to the global economy.

a. The Precautionary Principle requires that:

- 1) GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and
- 2) The level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts.

b. The measures required by the Precautionary Principle should be adopted without regard to the cost, unless that cost is completely disproportionate to the reduction in emissions that will be brought about by expending it”.

### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 3:** “1. Everyone has a right to proportional precautionary measures in case of risk of serious or irreversible damage and in the absence of scientific certainty regarding the effects of a legal act or activity on the environment.

2. To this end, everyone has a duty to take necessary precautionary measures”.

## *VI/ Case-Law*

### **ICJ, Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia), 25 September 1997**

“56. (...) The peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural

processes, the effects of which could not easily be assessed. (...) However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989".

**International Tribunal for the Law of the Sea, Southern Bluefin case (New Zealand v. Japan and Australia v. Japan), 27 August 1999**

**77.** Considering that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern blue fin tuna; (...)

**79.** Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern blue fin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern blue fin tuna".

**ICJ, Pulp Mills on the River Uruguay case (Argentina v. Uruguay), order 13 July 2006**

"In the Court's view, there is, however, nothing in the record to demonstrate that the actual decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river" (§73).

"The Court observes that Argentina has not persuaded it that the construction of the mills presents a risk of irreparable damage to the environment; nor has it been demonstrated that the construction of the mills constitutes a present threat of irreparable economic and social damage. Furthermore, Argentina has not shown that the mere suspension of the construction of the mills, pending final judgment on the merits, would be capable of reversing or repairing the alleged economic and social consequences attributed by Argentina to the building works" (§74).

## 8. ARTICLE 7 – Environmental damages

*The necessary measures shall be taken to ensure an adequate remediation of environmental damages.*  
*Parties shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Parties shall promptly cooperate to help concerned States.*

### *I/ Stockholm and Rio Declarations*

#### **Stockholm Declaration, 1972**

**Principle 22:** “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction”.

#### **Rio Declaration, 1992**

**Principle 13:** “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction”.

**Principle 18:** “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted”.

### *II/ Other texts enacted in the framework of international organisations*

#### **Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, The International Law Commission, 2006**

**Principle 5:** “Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

- (a) the State of origin shall promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary damage;
- (b) the State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology;
- (c) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(d) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage;

(e) the States concerned should, where appropriate, seek the assistance of competent international organizations and other States on mutually acceptable terms and conditions”.

### ***III/* Texts drafted by civil society**

#### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 14:** “Environmental regimes should provide for additional mechanisms which ensure that operators shall undertake timely and effective response action, including preparation of the necessary contingency plans and appropriate restoration measures directed to prevent further damage and to control, reduce and eliminate damage already caused”.

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 59:** “1. States Parties shall take the necessary measures to ensure that prompt and adequate compensation is available to victims of significant transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control”.

#### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 6:** “Everyone who is responsible for damage to the environment is obligated to restore to its original state. This obligation exists within and between States”.

## 9. ARTICLE 8 – Polluter-Pays

*Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.*

### *I/ Rio Declaration*

#### **Rio Declaration on Environment and Development, 1992**

**Principle 16:** “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment”.

### *II/ Regional treaties*

#### **Treaty on the Functioning of the European Union, 2007**

**Article 191:** “2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the (principle) that the polluter should pay”.

#### **Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992**

**Article 2:** “2. The Contracting Parties shall apply: (...)

(b) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter”.

### *III/ Texts drafted by civil society*

#### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 13:** “Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms [...]. The implications of the precautionary principle, the “polluter pays” principle [...] should also be considered under such regimes”.

#### **Earth Charter, 2000**

“6. b. Place the burden of proof on those who argue that a proposed activity will not cause significant harm, and make the responsible parties liable for environmental harm”.

**New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002**

“3.1 States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle”.

**Draft International Covenant on Environment and Development, IUCN, 2015**

**Article 6:** “(...) The costs of pollution prevention, control and reduction measures are to be borne, to the fullest extent possible, by the originator”.

## 10. ARTICLE 9 - Access to information

*Every person, without being required to state an interest, has a right of access to environmental information held by public authorities.*

*Public authorities shall, within the framework of their national legislations, collect and make available to the public relevant environmental information.*

### *I/ Rio Declaration*

#### **The Rio Declaration on Environment and Development, 1992**

**Principle 10:** “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

### *II/ Other texts enacted in the framework of international organisations*

#### **World Charter for Nature, 1982**

“18. Constant efforts shall be made to increase knowledge of nature by scientific research and to disseminate such knowledge unimpeded by restrictions of any kind”.

“21. States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall:

(a) Co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations; (...).”

#### **Draft articles on Prevention of transboundary harm from hazardous activities, The International Law Commission, 2001**

**Article 13:** “States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views”.

### *III/ International Treaties*

#### **Paris Agreement, 2015**

**Article 12:** “Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to

enhancing actions under this Agreement”.

#### ***IV/ Regional Treaties***

##### **Convention On Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 1998**

**Article 1:** “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention”.

##### **African Convention On the Conservation Of Nature And Natural Resources, 2003**

**Article XVI:** “The Parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate:

- a) dissemination of environmental information;
- b) access of the public to environmental information; (...).”

#### ***V/ Texts drafted by civil society***

##### **Earth Charter, 2000**

“8. c. Ensure that information of vital importance to human health and environmental protection, including genetic information, remains available in the public domain”.

##### **New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002**

“5.2 Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality”.

##### **The Johannesburg Principles on the Role of Law and Sustainable Development, 2002**

“b) The improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information”.

### **Oslo Principles on Global Climate Change Obligations, 2015**

**Preamble:** “Additional crucial initiatives include: (...) guarantees of public access to information about the climate effects of policies, projects and practices, public participation in relevant decision-making, and the establishment of appropriate institutions to coordinate and implement efforts to reduce climate change”.

### **Draft IUCN Covenant (5th Edition), 2015**

**Article 15:** “3. Parties shall ensure that all persons, without being required to state an interest, have the right to require environmental information from public authorities, and to seek, receive, and disseminate information with regard to the environment, subject only to such restrictions as may be provided by law and are necessary for respect for the rights of others, for the protection of national security or for the protection of the environment (...).”

### **IUCN World Declaration on the Environmental Rule of Law, 2016**

#### **I. Foundations of the Environmental Rule of Law**

“The environmental rule of law is premised on key governance elements including, but not limited to: (...)

d. Effective rules on equal access to information, public participation in decision-making, and access to justice”.

### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 8:** “1. Everyone has the right to have and to express his or her opinion and to communicate ideas and information about the environment.

2. Environmental defenders must not be arbitrarily defamed, prosecuted, arrested, detained or exiled.

3. States shall take all necessary measures to protect the exercise of fundamental rights by any individual or group working to promote environmental protection”.

**Article 9:** “1. Everyone has the right, without having to prove an individual interest, to access to information on the environment, including information about hazardous materials and activities, and to obtain and disseminate it.

2. Such information must be disclosed in a way that is pertinent, comprehensible, and available at a reasonable cost”.

## 11. ARTICLE 10 - Public participation

*Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment.*

### ***I/ Rio Declaration***

#### **The Rio Declaration on Environment and Development, 1992**

**Principle 10:** “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

### ***II/ Other texts enacted in the framework of international organisations***

#### **World Charter for Nature, 1982**

“**23.** All persons (...) shall have the opportunity to participate (...) in the formulation of decisions of direct concern to their environment (...)”.

### ***III/ International Treaties***

#### **Paris Agreement, 2015**

**Article 12:** “Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement”.

### ***IV/ Regional Treaties***

#### **Convention On Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 1998**

**Articles 6:** “**2.** The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner (...).

**Article 7:** “Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. (...)”.

**Article 8:** “Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment (...)”.

**African Convention On the Conservation Of Nature And Natural Resources, 2003**

**Article XVI:** “The Parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate: (...)

c) participation of the public in decision-making with a potentially significant environmental impact”.

*V/ Texts drafted by civil society*

**Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997**

**Article 7:** “States and international organizations should also allow the scientific community, the industry and labour sectors and other non-State entities to participate, as appropriate, in the legal process of adopting environmental rules, and in their implementation and monitoring”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 15:** “4. Parties shall ensure that all persons have the right to participate effectively during decision-making processes at the local, national and international levels regarding activities, measures, plans, programmes and policies that may have a significant effect on the environment”.

**IUCN World Declaration on the Environmental Rule of Law, 2016**

**I. Foundations of the Environmental Rule of Law**

“The environmental rule of law is premised on key governance elements including, but not limited to: (...)

a. Development, enactment, and implementation of clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality”.

**Principle 10:** “The inclusion of minority and vulnerable groups and perspectives across generations, shall be actively addressed with regard to effective access to information, open and inclusive participation in decision-making, and equal access to justice”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 10:** “1. Everyone has the right to participate effectively in decision-making in environmental matters, from the beginning of the process.

2. The right to participation in particular must apply to the planning, usage, and management for the protection of the environment.

3. Results of public participation shall be taken into consideration”.

## 12. ARTICLE 11 - Access to environmental justice

*Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact.*

### *I/ Rio Declaration*

#### **Rio Declaration, 1992**

**Principle 10:** “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

### *II/ Other texts enacted in the framework of international organisations*

#### **Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, The International Law Commission, 2006**

**Principle 6:** “1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State”.

### *III/ Regional Treaties*

#### **Convention for the Protection of Human Rights and Fundamental Freedoms, 1950**

**Article 13:** “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

#### **Aarhus Convention, 1998**

**Article 9:** “1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”.

#### ***IV/ Texts drafted by civil society***

##### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 26:** “Access by States, international organizations and individuals to mechanisms facilitating compliance with environmental regimes, with particular reference to consultations, negotiations and other dispute prevention arrangements, should be provided for under such regimes. In the event of preventive mechanisms being unsuccessful, expeditious access to remedies, as well as submission of claims relating to environmental damage, should also be provided for”.

##### **Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997**

**Article 13:** “In order to ensure the enforcement within domestic legal systems of international environmental obligations, States shall make available to any interested person, judicial and nonjudicial procedures for the settlement of disputes arising from violations of such obligations”.

##### **The Johannesburg Principles on the Role of Law and Sustainable Development, 2002**

**Preamble:** “We affirm that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law, (...)”

We recognize that the rapid evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of the environment increasingly requires the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development, (...)”

We emphasize that the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised”.

**Oslo Principles on Global Climate Change Obligations, 2015**

“26. Each State must make available information that is necessary to enable persons within its jurisdiction to assess the risks to their lives and health that climate change poses”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 15:** “5. Parties shall ensure that all persons have the right of effective access to administrative and judicial procedures, including for redress and remedies, to challenge acts or omissions by private persons or public authorities, which contravene national or international environmental law”.

**World Declaration on the Environmental Rule of Law, 2016**

**Preamble:** “(...) Observing the essential role that judges and courts play in building the environmental rule of law through the effective application of laws at national, sub-national, regional and international levels, and through fair and independent decision-making that accord all parties equal consideration regardless of power or privilege (...)”.

**UNESCO First draft of a preliminary text of a declaration on ethical principles in relation to climate change, 2016**

**Article 5:** “5. In order to prevent adverse effects of climate change, and of climate change mitigation and adaptation policies and actions, each individual or group of individuals should be granted effective access to justice, including redress and remedy”.

### 13. ARTICLE 12 - Education and training

*The Parties shall ensure that environmental education, to the greatest possible extent, is taught to members of the younger generation as well as to adults, in order to inspire in everyone a responsible conduct in protecting and improving the environment.*

*The Parties shall ensure the protection of freedom of expression and information in environmental matters. They support the dissemination by mass media of information of an educational nature on ecosystems and on the need to protect and preserve the environment.*

#### ***I/ Stockholm and Rio Declarations***

##### **Stockholm Declaration, 1972**

**Principle 19:** “Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminates information of an educational nature on the need to project and improve the environment in order to enable man to develop in every respect”.

#### ***II/ Other texts enacted in the framework of international organisations***

##### **World Charter for Nature, 1982**

“15. Knowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education”.

#### ***III/ International Treaties***

##### **United Nations Framework Convention on Climate Change, 1992**

**Article 4:** “1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (...)

(i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations”.

**Article 6:** “In carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall:

(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:

(i) the development and implementation of educational and public awareness programmes on climate change and its effects; (...)

(iv) training of scientific, technical and managerial personnel; (...)

(b) existing bodies:

(i) the development and exchange of educational and public awareness material on climate change and its effects; and

(ii) the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.

### **Convention on Biological Diversity, 1992**

**Article 13:** “The Contracting Parties shall:

(a) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and

(b) Cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity”.

### **The Paris Agreement, 2015**

**Preamble:** “Affirming the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement,”

**Article 12:** “Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement”.

## ***IV/ Texts drafted by civil society***

### **Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997**

**Article 6:** “States and international organizations should provide to interested non-governmental organizations opportunities to contribute effectively to the development and implementation of international environmental law through, inter alia, appropriate participation in the law-making process, provision of technical advice to States and international organizations, raising of public awareness of environmental problems and public support for regulation, and monitoring of compliance by States and non-State actors with environmental obligations”.

### **Earth Charter, 2000**

“9. b. Empower every human being with the education and resources to secure a sustainable livelihood, and provide social security and safety nets for those who are unable to support themselves”.

“14. Integrate into formal education and life-long learning the knowledge, values, and skills needed for a sustainable way of life.

a. Provide all, especially children and youth, with educational opportunities that empower them to contribute actively to sustainable development.

b. Promote the contribution of the arts and humanities as well as the sciences in sustainability education.

c. Enhance the role of the mass media in raising awareness of ecological and social challenges.

d. Recognize the importance of moral and spiritual education for sustainable living”.

### **The Johannesburg Principles on the Role of Law and Sustainable Development, 2002**

**Preamble:** “We recognize the importance of ensuring that environmental law and law in the field of sustainable development feature prominently in academic curricula, legal studies and training at all levels, in particular among judges and others engaged in the judicial process (...) We express our conviction that the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law”.

“3) In the field of environmental law there is an urgent need for a concerted and sustained programme of work focused on education, training and dissemination of information, including regional and sub- regional judicial colloquia (...)”.

“d) The strengthening of environmental law education in schools and universities, including research and analysis as essential to realizing sustainable development”.

### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 7:** “1. Everyone has the right to education and to lifelong environmental education.

2. Environmental education emphasizes the acquisition of knowledge relating to balanced environmental uses and on different modes of management respectful of the natural environment”.

## 14. ARTICLE 13 - Research and innovation

*The Parties shall promote, to the best of their ability, the improvement of scientific knowledge of ecosystems and the impact of human activities. They shall cooperate through exchanges of scientific and technological knowledge and by enhancing the development, adaptation, dissemination and transfer of technologies respectful of the environment, including innovative technologies.*

### ***I/ Stockholm and Rio Declarations***

#### **Stockholm Declaration, 1972**

**Principle 12:** “Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose”.

**Principle 20:** “Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries”.

#### **The Rio Declaration on Environment and Development, 1992**

**Principle 9:** “States should co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies”.

### ***II/ Other texts enacted in the framework of international organisations***

#### **World Charter for Nature, 1982**

“15. Knowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education”.

“18. Constant efforts shall be made to increase knowledge of nature by scientific research and to disseminate such knowledge unimpeded by restrictions of any kind”.

#### **United Nations Global compact, 2000**

**Principle 9:** “Businesses should encourage the development and diffusion of environmentally friendly technologies”.

**Johannesburg Declaration on Sustainable Development, 2002**

“18. (...) At the same time, we will work together to help one another gain access to financial resources, benefit from the opening of markets, ensure capacity-building, use modern technology to bring about development and make sure that there is technology transfer, human resource development, education and training to banish underdevelopment forever”.

**III/ *International Treaties***

**Convention on Long-Range Transboundary Air Pollution, 1979**

**Article 3:** “The Contracting Parties, within the framework of the present Convention, shall by means of exchanges of information, consultation, research and monitoring, develop without undue delay policies and strategies which shall serve as a means of combating the discharge of air pollutants, taking into account efforts already made at national and international levels”.

**Article 4:** “The Contracting Parties shall exchange information on and review their policies, scientific activities and technical measures aimed at combating, as far as possible, the discharge of air pollutants, which may have adverse effects, thereby contributing to the reduction of air pollution including long-range transboundary air pollution”.

**United Nations Convention on the Law of the Sea, 1982**

**Article 200:** “States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies”.

**Article 268:** “States, directly or through competent international organizations, shall promote:

- (a) the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data;
- (b) the development of appropriate marine technology;
- (c) the development of the necessary technological infrastructure to facilitate the transfer of marine technology; (...)

**The Vienna Convention for the Protection of the Ozone Layer, 1985:**

**Article 4:** “The Parties shall co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of the developing countries, in promoting, directly or through competent international

bodies, the development and transfer of technology and knowledge. Such co-operation shall be carried out particularly through:

- a. Facilitation of the acquisition of alternative technologies by other Parties;
- b. Provision of information on alternative technologies and equipment, and supply of special manuals or guides to them;
- c. The supply of necessary equipment and facilities for research and systematic observations;
- d. Appropriate training of scientific and technical personnel”.

#### **The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987**

**Article 9:** “1. The Parties shall co-operate, consistent with their national laws, regulations and practices and taking into account in particular the needs of developing countries, in promoting, directly or through competent international bodies, research, development and exchange of information on:

- a. best technologies for improving the containment, recovery, recycling, or destruction of controlled substances or otherwise reducing their emissions;
- b. possible alternatives to controlled substances, to products containing such substances, and to products manufactured with them; (...).”

#### **United Nations Framework Convention On Climate Change, 1992**

**Preamble:** “(...) Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas (...).”

**Article 4:** “1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

- (d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems; (...)
- (g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies;
- (h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies”.

**Article 5:** “In carrying out their commitments under Article 4, paragraph 1 (g), the Parties shall:

(a) Support and further develop, as appropriate, international and intergovernmental programmes and networks or organizations aimed at defining, conducting, assessing and financing research, data collection and systematic observation, taking into account the need to minimize duplication of effort;

(b) Support international and intergovernmental efforts to strengthen systematic observation and national scientific and technical research capacities and capabilities, particularly in developing countries, and to promote access to, and the exchange of, data and analyses thereof obtained from areas beyond national jurisdiction (...).”

### **Convention on Biological Diversity, 1992**

**Preamble:** “Acknowledging further that special provision is required to meet the needs of developing countries, including the provision of new and additional financial resources and appropriate access to relevant technologies”

**Article 1:** “The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. (...).”

**Article 16:** “Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment. (...).”

**Article 18:** “1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions. (...).”

### **Agreement on Sanitary and Phytosanitary Measures, 1994**

**Article 2:** “2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5”.

### **The Stockholm Convention on Persistent Organic Pollutants, 2001**

**Article 11:** “1. The Parties shall, within their capabilities, at the national and international levels, encourage and/or undertake appropriate research, development, monitoring and cooperation pertaining to persistent organic pollutants and, where relevant, to their alternatives and to candidate persistent organic pollutants, (...).”

2. In undertaking action under paragraph 1, the Parties shall, within their capabilities:

- (a) Support and further develop, as appropriate, international programmes, networks and organizations aimed at defining, conducting, assessing and financing research, data collection and monitoring, taking into account the need to minimize duplication of effort;
- (b) Support national and international efforts to strengthen national scientific and technical research capabilities, particularly in developing countries and countries with economies in transition, and to promote access to, and the exchange of, data and analyses;
- (c) Take into account the concerns and needs, particularly in the field of financial and technical resources, of developing countries and countries with economies in transition and cooperate in improving their capability to participate in the efforts referred to in subparagraphs (a) and (b);
- (d) Undertake research work geared towards alleviating the effects of persistent organic pollutants on reproductive health;
- (e) Make the results of their research, development and monitoring activities referred to in this paragraph accessible to the public on a timely and regular basis; and
- (f) Encourage and/or undertake cooperation with regard to storage and maintenance of information generated from research, development and monitoring”.

#### **Paris Agreement, 2015**

**Article 10** “1. Parties share a long-term vision on the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions.

2. Parties, noting the importance of technology for the implementation of mitigation and adaptation actions under this Agreement and recognizing existing technology deployment and dissemination efforts, shall strengthen cooperative action on technology development and transfer. (...)

5. Accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development. Such effort shall be, as appropriate, supported, including by the Technology Mechanism and, through financial means, by the Financial Mechanism of the Convention, for collaborative approaches to research and development, and facilitating access to technology, in particular for early stages of the technology cycle, to developing country Parties”.

#### ***IV/ Regional Treaties***

##### **European Charter on Environment and Health, 1989**

###### **Principles for public policy**

“4. Action on problems of the environment and health should be based on the best available scientific information”.

*V/ Texts drafted by civil society*

**Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997**

**Article 4:** “Multilateral environmental treaties and other international instruments prescribing the adoption of measures for the protection of the environment shall, on the basis of the differences in the financial and technological capabilities of States and their different contribution to the environmental problem, provide for economic incentives, technical assistance, transfer of technologies and differentiated treatment where appropriate.”

**The ICC Business Charter for Sustainable Development, 1990**

**Principle 13:** “To contribute to the transfer of environmentally sound technology and management methods throughout the industrial and public sectors”.

**Earth Charter, 2000**

“**7. c.** Promote the development, adoption, and equitable transfer of environmentally sound technologies”.

“**8. a.** Support international scientific and technical cooperation on sustainability, with special attention to the needs of developing nations. (...)”

**c.** Ensure that information of vital importance to human health and environmental protection, including genetic information, remains available in the public domain”.

**Universal Declaration of Humankind Rights, 2016**

**XIV:** “The present generations have a duty to guide scientific and technical progress towards the preservation and health of humankind and of other species. To this end, they must, in particular, ensure that any access and use of biological and genetic resources altogether respects human dignity, traditional knowledge and the maintenance of biodiversity”.

## 15. ARTICLE 14 - Role of non-State actors and subnational entities

*The Parties shall take the necessary measures to encourage the implementation of this Pact by non- State actors and subnational entities, including civil society, economic actors, cities and regions taking into account their vital role in the protection of the environment.*

### I/ *International Treaties*

#### **Convention on Biological Diversity, 1992**

**Article 10:** “Each Contracting Party shall, as far as possible and as appropriate: (...) (e) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources”.

#### **Decision of the COP 21 related to the adoption of the Paris Agreement, 2015**

**Preamble:** “Agreeing to uphold and promote regional and international cooperation in order to mobilize stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples, (...)”

“**134.** Welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities.

**135.** Invites the non-Party stakeholders referred to in paragraph 134 above to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate Action platform referred to in paragraph 118 above.

**136.** Recognizes the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and establishes a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner; (...)”.

### II/ *Other texts enacted in the framework of international organisations*

#### **United Nations Conference on Environment & Development Rio de Janeiro, Application of the Rio Conference through Agenda 21**

**30.27:** “Multilateral and bilateral financial aid institutions should continue to encourage and support small- and medium-scale entrepreneurs engaged in sustainable development activities”.

**30.29:** “International organizations should increase support for research and development on improving the technological and managerial requirements for sustainable development, in particular for small and medium-sized enterprises in developing countries”.

**Johannesburg Declaration, 2002**

“27. We agree that in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities and societies”.

“29. We agree that there is a need for private sector corporations to enforce corporate accountability, which should take place within a transparent and stable regulatory environment”.

**ISO International Standard 26000, Guidance on social responsibility, 2010**

**4.6:** “(...) In the context of social responsibility, respect for the rule of law means that an organization complies with all applicable laws and regulations. This implies that it should take steps to be aware of applicable laws and regulations, to inform those within the organization of their obligation to observe and to implement those measures.

An organization should:

- comply with legal requirements in all jurisdictions in which the organization operates, even if those laws and regulations are not adequately enforced;
- ensure that its relationships and activities comply with the intended and applicable legal framework;
- keep itself informed of all legal obligations; and
- periodically review its compliance with applicable laws and regulations”.

**Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, 2011**

**Principle 11:** “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.

**Principle 13:** “The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.

**Principle 14:** “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational

context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts".

**Principle 15:** "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".

**Principle 17:** "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve".

**Principle 22:** "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes".

**Principle 23:** "In all contexts, business enterprises should:

- (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
- (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
- (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate".

## **OECD Guidelines for Multinational Companies, 2011**

### **II. General Policies: "A) Enterprises should: (...)**

**12.** Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

**13.** In addition to addressing adverse impacts in relation to matters covered by the *Guidelines*, encourage, where practicable, business partners, including

suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*".

**VI. Environment:** "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:

a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;

b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and

c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets. (...)

4. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage. (...)

7. Provide adequate education and training to workers in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies".

8. Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection".

**The United Nations Conference on Sustainable Development - or Rio+20, 2012**

**46:** "We acknowledge that the implementation of sustainable development will depend on the active engagement of both the public and the private sectors. We recognize that the active participation of the private sector can contribute to the achievement of sustainable development, including through the important tool of public-private partnerships. We support national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives, taking into account the importance of corporate social responsibility. We call on the private sector to engage in responsible business practices, such as those promoted by the United Nations Global Compact".

**47:** “We acknowledge the importance of corporate sustainability reporting and encourage companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle. We encourage industry, interested governments and relevant stakeholders with the support of the United Nations system, as appropriate, to develop models for best practice and facilitate action for the integration of sustainability reporting, taking into account experiences from already existing frameworks and paying particular attention to the needs of developing countries, including for capacity building”.

**48:** “We recognize the important contribution of the scientific and technological community to sustainable development. We are committed to working with and fostering collaboration among the academic, scientific and technological community, in particular in developing countries, to close the technological gap between developing and developed countries and strengthen the science-policy interface as well as to foster international research collaboration on sustainable development”.

**Resolution A/69/L.85 of UNGA (Objectives of Sustainable Development), 2015**

**28.** “(...) Governments, international organizations, the business sector and other non-State actors and individuals must contribute to changing unsustainable consumption and production patterns, including through the mobilization, from all sources, of financial and technical assistance to strengthen developing countries’ scientific, technological and innovative capacities to move towards more sustainable patterns of consumption and production (...)”.

**60.** “We reaffirm our strong commitment to the full implementation of this new Agenda. We recognize that we will not be able to achieve our ambitious Goals and targets without a revitalized and enhanced Global Partnership and comparably ambitious means of implementation. The revitalized Global Partnership will facilitate an intensive global engagement in support of implementation of all the Goals and targets, bringing together Governments, civil society, the private sector, the United Nations system and other actors and mobilizing all available resources”.

**Objective 8:** “Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”.

**8.3:** “Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services”.

**Objective 9:** “Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”.

**9.3:** “Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets”.

**Objective 17:** “Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development”.

17.17: “Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships”.

### **III/ *Texts drafted by civil society***

#### **Business Charter for Sustainable Development, 1990**

**Principle 13:** “To contribute to the transfer of environmentally sound technology and management methods throughout the industrial and public sectors”.

#### **Earth Charter, 2000**

“7. d. Internalize the full environmental and social costs of goods and services in the selling price, and enable consumers to identify products that meet the highest social and environmental standards”.

“8. c. Ensure that information of vital importance to human health and environmental protection, including genetic information, remains available in the public domain”.

“10. Ensure that economic activities and institutions at all levels promote human development in an equitable and sustainable manner. (...) c. Ensure that all trade supports sustainable resource use, environmental protection, and progressive labor standards”.

#### **United Nations Global Compact, 2000**

**Principle 7:** “Businesses should support a precautionary approach to environmental challenges”.

**Principle 8:** “Businesses should undertake initiatives to promote greater environmental responsibility”.

**Principle 9:** “encourage the development and diffusion of environmentally friendly technologies”.

#### **Oslo Principles on Global Climate Change Obligations, 2015**

“27. Enterprises must assess their facilities and property to evaluate their vulnerability to climate change; the financial effect that future climate change will have on the enterprises; and the enterprises’ efforts to increase their resilience to future climate change (...)”.

## 16. ARTICLE 15 – Effectiveness of environmental norms

*The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.*

### **I/ Rio Declaration**

#### **Rio Declaration, 1992**

**Principle 11:** “States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries”.

### **II/ Other texts enacted in the framework of international organisations**

#### **Draft articles on Prevention of transboundary harm from hazardous activities, The International Law Commission, 2001**

**Article 5:** “States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.”

#### **Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, The International Law Commission, 2006**

**Principle 8:** “1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles”.

### **III/ Texts drafted by civil society**

#### **Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997**

“Convinced that the development and effective implementation of international environmental law are essential to solve the serious problems arising out of the degradation of the environment”

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 17:** “2. Parties shall, at all stages and at all levels, integrate environmental conservation into the planning and implementation of their policies and activities, giving full and equal consideration to environmental, economic, social and cultural factors. To this end, the Parties shall:

a) conduct regular national reviews of environmental and developmental plans, programmes and policies;

- b) enact, periodically review, and enforce laws and regulations; and
- c) establish or strengthen institutional structures and procedures to integrate environmental and developmental issues in all spheres of decision-making”.

**Universal Declaration of Humankind Rights, 2016**

**XVI:** “All States have the duty to ensure the effectiveness of the principles, rights and duties proclaimed by this declaration, including through the organization or implementation of mechanisms making it possible to ensure its respect”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 23:** “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

## 17. ARTICLE 16 - Resilience

*The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.*

### **I/ Texts drafted by civil society**

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 9:** “The capacity of natural systems and human communities to withstand and recover from environmental disturbances and stresses is limited, and shall be sustained or restored as fully as possible. When such disturbances and stresses occur, efforts shall be taken to sustain or restore the systems and communities as fully as possible”.

#### **IUCN World Declaration on the Environmental Rule of Law, 2016**

**Principle 4:** “Legal and other measures shall be taken to protect and restore ecosystem integrity and to sustain and enhance the resilience of social-ecological systems. In the drafting of policies and legislation, and in decision-making, the maintenance of a healthy biosphere for nature and humanity should be a primary consideration”.

## 18. ARTICLE 17 - Non-regression

*The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law.*

### ***I/ Stockholm Declaration***

#### **Stockholm Declaration, 1972**

**Principle 1:** “Man has the 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 he bears a solemn responsibility to protect and improve the environment for present and future generations. (...)”.

### ***II/ International Treaties***

#### **United Nations Convention on the Law of the Sea, 1982**

**Article 311:** “6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof”.

#### **Convention on the Protection And Use of Transboundary Watercourses and International Lakes, Helsinki, 1992**

**Article 2:** “7. The application of this Convention shall not lead to the deterioration of environmental conditions nor lead to increased transboundary impact”.

#### **Paris Agreement, 2015**

**Article 4:** “3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.

### ***III/ Regional Treaties***

#### **North American Agreement on Environmental Cooperation, 1993**

**Article 3 :** “(...) each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations”.

#### **Treaty on the Functioning of the European Union, 2007**

**Preamble:** « (...) Affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples, (...) ».

**Article 191:** « 1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment (...) »

2. Union policy on the environment shall aim at a high level of protection ».

**Article 194:** 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (...) ».

#### ***IV/ Texts drafted by civil society***

##### **Draft IUCN Covenant (5th Edition), 2015**

**Article 10:** “Substantive and procedural rules for environmental conservation shall be maintained without regression, and interpreted and applied in favour of ecological integrity, unless compelling reasons of public interest require otherwise. The necessity of any measures of regression shall be revisited and re-examined on a periodic basis in order to restore or enhance pre-existing levels of environmental conservation”.

##### **IUCN World Declaration on the Environmental Rule of Law, 2016**

**Principle 12:** “States, sub-national entities, and regional integration organisations shall not allow or pursue actions that have the net effect of diminishing the legal protection of the environment or of access to environmental justice”.

**Principle 13:** “In order to achieve the progressive development and enforcement of the environmental rule of law, States, sub-national entities, and regional integration organisations shall regularly revise and enhance laws and policies in order to protect, conserve, restore, and ameliorate the environment, based on the most recent scientific knowledge and policy developments”.

##### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 2:** “1. Everyone has the right to a heightened level of protection of the environment and to non-retrogression in the levels already attained. (...)

5. These measures must contribute to enhanced protection for the environment and health. They must not lead to a reduction in the level of environmental protection already attained”.

## 19. ARTICLE 18 - Cooperation

*In order to conserve, protect and restore the integrity of the Earth's ecosystem and community of life, Parties shall cooperate in good faith and in a spirit of global partnership for the implementation of the provisions of the present Pact.*

### ON THE GENERAL PRINCIPLE OF COOPERATION

#### *I/ Stockholm and Rio Declarations*

##### **Stockholm Declaration, 1972**

**Principle 24:** "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States".

##### **Rio Declaration on Environment and Development, 1992**

**Article 7:** "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

**Principle 27:** "States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development".

#### *II/ Other texts enacted in the framework of international organisations*

##### **World Charter for Nature, 1982**

**Preamble:** "Firmly convinced of the need for appropriate measures, at the national and international, individual and collective, and private and public levels, to protect nature and promote international co-operation in this field".

"21. States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall: (...)

(a) Co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations".

“22. Taking fully into account the sovereignty of States over their natural resources, each State shall give effect to the provisions of the present Charter through its competent organs and in co-operation with other States”.

#### **Agenda 21, 1992**

#### **Chapter 2 - International Cooperation To Accelerate Sustainable Development In Developing Countries And Related Domestic Policies**

“2.1. In order to meet the challenges of environment and development, States have decided to establish a new global partnership. This partnership commits all States to engage in a continuous and constructive dialogue, inspired by the need to achieve a more efficient and equitable world economy, keeping in view the increasing interdependence of the community of nations and that sustainable development should become a priority item on the agenda of the international community. It is recognized that, for the success of this new partnership, it is important to overcome confrontation and to foster a climate of genuine cooperation and solidarity. It is equally important to strengthen national and international policies and multinational cooperation to adapt to the new realities”.

#### **Chapter 34 - Transfer of Environmentally Sound Technology, Cooperation & Capacity-Building**

“34.4. There is a need for favorable access to and transfer of environmentally sound technologies, in particular to developing countries, through supportive measures that promote technology cooperation and that should enable transfer of necessary technological know-how as well as building up of economic, technical, and managerial capabilities for the efficient use and further development of transferred technology. Technology cooperation involves joint efforts by enterprises and Governments, both suppliers of technology and its recipients. Therefore, such cooperation entails an iterative process involving government, the private sector, and research and development facilities to ensure the best possible results from transfer of technology. Successful long-term partnerships in technology cooperation necessarily require continuing systematic training and capacity-building at all levels over an extended period of time”.

### **III/ *International Treaties***

#### **United Nations Convention on the Law of the Sea, 1982**

**Article 197:** “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features”.

#### **Vienna Convention for the Protection of the Ozone Layer, 1985:**

**Article 2:** “2. To this end the Parties shall, in accordance with the means at their disposal and their capabilities:

(a). Co-operate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer (...).”

#### **United Nations Framework Convention on Climate Change, 1992**

**Preamble:** “(...) Reaffirming the principle of sovereignty of States in international cooperation to address climate change (...).”

**Article 3:** “5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.

#### **Convention on Biological Diversity, 1992**

**Preamble:** “Stressing the importance of, and the need to promote, international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity and the sustainable use of its components.

**Article 5:** “Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity”.

#### **United Nations Convention to Combat Desertification, 1994**

**Preamble:** “Recognizing also the importance and necessity of international cooperation and partnership in combating desertification and mitigating the effects of drought (...) Recognizing the urgent need to improve the effectiveness and coordination of international cooperation to facilitate the implementation of national plans and priorities”.

**Article 3:** “(b) the Parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at subregional, regional and international levels, and better focus financial, human, organizational and technical resources where they are needed”.

**Article 3:** “(c) the Parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use”.

#### **Paris Agreement, 2015**

**Preamble:** “Affirming the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the matters addressed in this Agreement”.

**Article 7:** “6. Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.

7. Parties should strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation Framework, including with regard to:  
(a) Sharing information, good practices, experiences and lessons learned, including, as appropriate, as these relate to science, planning, policies and implementation in relation to adaptation actions (...).”

**Article 8:** “4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:

- (a) Early warning systems;
- (b) Emergency preparedness;
- (c) Slow onset events;
- (d) Events that may involve irreversible and permanent loss and damage;
- (e) Comprehensive risk assessment and management;
- (f) Risk insurance facilities, climate risk pooling and other insurance solutions (...).”

#### ***IV/ Texts drafted by civil society***

##### **Oslo Obligations on Global Climate Change Obligations, 2015**

**Preamble:** “International law entails obligations to act cooperatively to protect and advance fundamental human rights, including in the context of climate change and its effects on people’s ability to exercise such rights”.

##### **Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 20:** “All States, international organizations, and all peoples shall cooperate in a spirit of global partnership to oversee, assess, conserve, protect and restore the health and integrity of the Earth's land and marine ecosystems, taking into account especially the needs of the most vulnerable populations, in particular in the least developed countries and small island developing States”.

#### **ON SPECIFIC CASES OF TRANSBOUNDARY COOPERATION**

##### ***I/ Rio Declaration***

##### **Rio Declaration on Environment and Development, 1992**

**Principle 14:** “States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health”.

**Principle 18:** “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted”.

## ***II/ Other texts enacted in the framework of international organisations***

### **Draft articles on Prevention of transboundary harm from hazardous activities, The International Law Commission, 2001**

**Article 4:** “States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.”

## ***III/ International Treaties***

### **United States Convention on the Law of the Sea, 1982**

**Article 123:** “States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article”.

**Article 198:** “When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations”.

### **London Convention on International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990**

**Article 7:** “(1) Parties agree that, subject to their capabilities and the availability of relevant resources, they will co-operate and provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected. The financing of the costs for such assistance shall be based on the provisions set out in the Annex to this Convention”.

### **Helsinki Convention on Transboundary Effects of Industrial Accidents, 1992**

**Preamble:** “Affirming the need to promote active international cooperation among the States concerned before, during, and after an accident, to enhance appropriate policies and to reinforce and coordinate action at all appropriate levels for promoting the prevention of, preparedness for and response to the transboundary effects of industrial accidents”.

**Convention on Biological Diversity, 1992**

**Article 14:** “1. Each Contracting Party, as far as possible and as appropriate, shall: (...)

(d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage”.

**IV/ *Texts drafted by civil society***

**Resolution “Environment” The Institute of International Law, 1997**

**Article 7:** “Whenever a State has at its disposal a monitoring system which may give it advance warning of any risk of impact on the environment resulting from activities conducted outside its boundaries, it shall make any information obtained from such system immediately available to the country where the threat to the environment may originate and, where necessary, to the international community. In this field, international co-operation through appropriate institutions is highly recommended”.

**Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 29:** “Dispute prevention might also be facilitated by the participation of qualified States and entities in the planning process of major projects of another State in the context of mechanisms of international cooperation. Domestic and regional environmental impact assessment should also be required for activities likely to have transboundary effects or affect areas beyond the limits of national jurisdiction”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 19:** “1. Parties shall, without delay and by the most expeditious means available, notify potentially affected States and competent international organizations of any industrial or other technological emergency or natural disaster originating within their jurisdiction or control, or of which they have knowledge, that may cause harm to the environment.

2. A Party within whose jurisdiction or control an emergency or disaster originates shall immediately take all practicable measures necessitated by the circumstances, in cooperation with affected and potentially affected States, and where appropriate, competent international organizations, to prevent, mitigate and eliminate harmful effects of the emergency or disaster.

3. Parties shall take all necessary measures to provide immediate relief for those displaced by emergencies or disasters in the state in which the displaced persons are at present living, regardless of the state of origin of the displaced persons.

4. States shall provide scientific, technical, logistical and other cooperation to Parties experiencing an emergency or disaster. Cooperation may include coordination of international actions and communications, making available response personnel, response equipment and supplies, scientific and technical expertise and humanitarian assistance”.

## 20. ARTICLE 19 - Armed Conflicts

*States shall take pursuant to their obligations under international law all feasible measures to protect the environment in relation to armed conflicts.*

### *I/ Stockholm and Rio Declarations*

#### **Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972**

**Principle 26:** “Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction”.

#### **Rio Declaration, 1992**

**Principle 24:** “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary”.

### *II/ Other texts enacted in the framework of International Organisations*

#### **World Charter for Nature, 1982**

“5. Nature shall be secured against degradation caused by warfare or other hostile activities”.

### *III/ Texts drafted by civil society*

#### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 22:** “Without prejudice to the rules of international law governing armed conflicts, such an event as well as terrorism and a natural disaster of an irresistible character and other similar situations normally provided for under civil liability conventions may be considered as acceptable exemptions in environmental regimes, subject to the principle that no one can benefit from his or her own wrongful act”.

#### **Draft IUCN Covenant (5th Edition), 2015**

**Article 40:** “1. Parties shall protect the environment during periods of armed conflicts (...)”.

#### **Universal Declaration of Humankind Rights, 2016**

**IX:** “Humanity has the right to peace, in particular the peaceful settlement of disputes, and the right to human security at the environmental, alimentary, sanitary, economic and political levels. This right is aimed in particular at preserving succeeding generations from the scourge of war”.

## 21. ARTICLE 20 – Diversity of national situations

*The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special attention.*

*Account shall be taken, where appropriate, of the Parties' common but differentiated responsibilities and respective capabilities, in light of different national circumstances.*

### I/ *Stockholm and Rio Declarations*

#### **Stockholm Declaration, 1972**

**Principle 9:** “Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required”.

**Principle 10:** “For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management, since economic factors as well as ecological processes must be taken into account”.

**Principle 12:** “Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose”.

**Principle 23:** “Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries”.

#### **The Rio Declaration On Environment and Development, 1992**

**Principle 6:** “The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries”.

**Principle 7:** “States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development

in view of the pressures their societies place on the global environment and of the technologies and financial resources they command”.

**Principle 11:** “States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries”.

**Principle 15:** “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. (...)”

## ***II/ Other texts enacted in the framework of International Organisations***

### **The United Nations Conference on Sustainable Development, Rio+20, 2012**

**58:** “We affirm that green economy policies in the context of sustainable development and poverty eradication should:

- (a) Be consistent with international law;
- (b) Respect each country's national sovereignty over their natural resources taking into account its national circumstances, objectives, responsibilities, priorities and policy space with regard to the three dimensions of sustainable development;”

**191:** “We underscore that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions. We recall that the United Nations Framework Convention on Climate Change provides that parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. (...)”.

## ***III/ International Treaties***

### **Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972**

**Article 2:** “Contracting Parties shall individually and collectively protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter. Where appropriate, they shall harmonize their policies in this regard”.

### **United Nations Convention on the Law of the Sea, 1982**

**Preamble:** “Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into

account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked”.

**The Vienna Convention for the Protection of the Ozone Layer, 1985**

Preamble: “Taking into account the circumstances and particular requirements of developing countries”.

**The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987**

**Article 5:** “1. Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures set out in Articles 2A to 2E, provided that any further amendments to the adjustments or Amendment adopted at the Second Meeting of the Parties in London, 29 June 1990, shall apply to the Parties operating under this paragraph after the review provided for in paragraph 8 of this Article has taken place and shall be based on the conclusions of that review. (...)”.

**Article 10:** “1. The Parties shall establish a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to Parties operating under paragraph 1 of Article 5 of this Protocol to enable their compliance with the control measures set out in Articles 2A to 2E, Article 2I and Article 2J, and any control measures in Articles 2F to 2H that are decided pursuant to paragraph 1 **bis** of Article 5 of the Protocol. The mechanism, contributions to which shall be additional to other financial transfers to Parties operating under that paragraph, shall meet all agreed incremental costs of such Parties in order to enable their compliance with the control measures of the Protocol. (...)”.

**United Nations Framework Convention On Climate Change, 1992**

**Preamble:** “Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs, (...) Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions (...)”.

**Article 3:** “(...) 1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate

change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration (...)."

#### **The Convention on Biological Diversity, 1992**

**Preamble:** "Acknowledging further that special provision is required to meet the needs of developing countries, including the provision of new and additional financial resources and appropriate access to relevant technologies, Noting in this regard the special conditions of the least developed countries and small island States".

**Article 20:** "2. The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions and which costs are agreed between a developing country Party and the institutional structure referred to in Article 21, in accordance with policy, strategy, programme priorities and eligibility criteria and an indicative list of incremental costs established by the Conference of the Parties. Other Parties, including countries undergoing the process of transition to a market economy, may voluntarily assume the obligations of the developed country Parties. For the purpose of this Article, the Conference of the Parties, shall at its first meeting establish a list of developed country Parties and other Parties, which voluntarily assume the obligations of the developed country Parties. (...)

4. The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.

5. The Parties shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology.

6. The Contracting Parties shall also take into consideration the special conditions resulting from the dependence on, distribution and location of, biological diversity within developing country Parties, in particular small island States.

7. Consideration shall also be given to the special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi- arid zones, coastal and mountainous areas".

#### **United Nations Convention to Combat Desertification, 1994**

**Article 3:** "In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following: (...)

(d) The Parties should take into full consideration the special needs and circumstances of affected developing country Parties, particularly the least developed among them".

#### **Kyoto Protocol, 1997**

**Article 10:** “All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances (...)”

**Article 13:** “4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall:

(c) Promote and facilitate the exchange of information on measures adopted by the Parties to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol;

(d) Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol; (...).”

#### **The Stockholm Convention on Persistent Organic Pollutants, 2001**

**Preamble:** “Noting the respective capabilities of developed and developing countries, as well as the common but differentiated responsibilities of States as set forth in Principle 7 of the Rio Declaration on Environment and Development”.

**Article 13:** “2. The developed country Parties shall provide new and additional financial resources to enable developing country Parties and Parties with economies in transition to meet the agreed full incremental costs of implementing measures which fulfill their obligations under this Convention as agreed between a recipient Party and an entity participating in the mechanism described in paragraph 6. (...).

4. The extent to which the developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention relating to financial resources, technical assistance and technology transfer. The fact that sustainable economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties will be taken fully into account, giving due consideration to the need for the protection of human health and the environment.

5. The Parties shall take full account of the specific needs and special situation of the least developed countries and the small island developing states in their actions with regard to funding (...).”

#### **Paris Agreement, 2015**

**Preamble:** “In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.

**Article 2:** “2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.

**Article 4:** “3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

5. Support shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.

6. The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances. (...)

19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.

**Article 9** “1. Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention. (...)

3. As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts”.

#### ***IV/ Texts drafted by civil society***

#### **Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997**

**Article 13:** “Environmental regimes should consider the appropriate connections between the preventive function of responsibility and liability and other preventive mechanisms [...]. The implications of the precautionary principle, the “polluter pays” principle and the principle of common but differentiated responsibility in the context of responsibility and liability should also be considered under such regimes”.

#### **The Johannesburg Principles on the Role of Law and Sustainable Development,**

**2002**

**Preamble:** “(...) We are also of the view that the inequality between powerful and weak nations in terms of their relative capacity and opportunity to protect the sustainable development of the shared global environment places a greater responsibility on the former to protect the global environment (...)”.

**New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002**

**3.1** States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.

**3.2** Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State, in accordance with paragraph 3.3.

**3.3** The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

**3.4** Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, *inter alia* by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development”.

**Oslo Principles On Global Climate Change Obligations, 2015**

**14.** The obligations of States are common but differentiated”.

**Draft IUCN Covenant (5th Edition), 2015**

**Article 13:** “States shall meet their duties in accordance with their common but differentiated responsibilities and respective capabilities”.

**Universal Declaration of Humankind Rights, 2016**

**I:** “The principle of intragenerational and intergenerational responsibility, equity and solidarity demands that the human family and in particular its States shall endeavor, in a common and differentiated manner, to safeguard and preserve humanity and Earth”.

**IV:** “The principle of non-discrimination between generations shall preserve humanity, particularly future generations, and requires that no activities or measures undertaken by the present generations shall have the effect of causing depletion or

perpetuating excessive reduction of resources nor restriction of choices for future generations”.

**Draft of the International Covenant on the Human Right to the Environment, 2017**

**Article 17:** 2. States Parties “fulfill their obligations by taking into account their common but differentiated responsibilities”.

**V/ *Case-Law***

**DSB of WTO, United States — Import Prohibition of Certain Shrimp and Shrimp Products, Case WT/DS58/AB/R, 15 June 2001**

**Concluding Remarks**

**7.2:** “The Panel urges Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment”.

## **22. ARTICLE 21 – Monitoring the implementation of the Pact**

*A compliance mechanism to facilitate implementation of, and to promote compliance with, the provisions of the present Pact is hereby established.*

*This mechanism consists of a Committee of independent experts and focuses on facilitation. It operates in a transparent, non-adversarial and non-punitive manner. The committee shall pay particular attention to the respective national circumstances and capabilities of the Parties.*

*One year after the entry into force of the present Pact, the Depositary shall convene a meeting of the Parties, which will establish the modalities and procedures by which the Committee shall exercise its functions.*

*Two years after the Committee takes office, and at a frequency to be determined by the meeting of the Parties, not exceeding four years, each Party shall report to the Committee on its progress in implementing the provisions of the Pact.*

### **I/ International Treaties**

#### **The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987**

**Article 10:** “5. The Parties shall establish an Executive Committee to develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources, for the purpose of achieving the objectives of the Multilateral Fund. The Executive Committee shall discharge its tasks and responsibilities, specified in its terms of reference as agreed by the Parties, with the co-operation and assistance of the International Bank for Reconstruction and Development (World Bank), the United Nations Environment Programme, the United Nations Development Programme or other appropriate agencies depending on their respective areas of expertise. The members of the Executive Committee, which shall be selected on the basis of a balanced representation of the Parties operating under paragraph 1 of Article 5 and of the Parties not so operating, shall be endorsed by the Parties”.

#### **Kyoto Protocol, 1997**

**Article 17** “The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article”.

**Article 18:** “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-

compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol”.

**Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000**

**Article 29:** “4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall:

- (a) Make recommendations on any matters necessary for the implementation of this Protocol;
- (b) Establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol;
- (c) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies;
- (d) Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 33 of this Protocol and consider such information as well as reports submitted by any subsidiary body;
- (e) Consider and adopt, as required, amendments to this Protocol and its annexes, as well as any additional annexes to this Protocol, that are deemed necessary for the implementation of this Protocol; and
- (f) Exercise such other functions as may be required for the implementation of this Protocol”.

**Paris Agreement, 2015**

**Article 15:** “1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.

2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties.

3. The committee shall operate under the modalities and procedures adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session and report annually to the Conference of the Parties serving as the meeting of the Parties to this Agreement”.

**II/ *Regional Treaties***

**Convention On Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 1998**

**Article 15:** “The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention”.

## ANNEX – GENERAL LIST OF TEXTS

### 1. Binding Instruments

#### 1.1. *International Treaties*

Vienna Convention on Civil Liability for Nuclear Damage, 1963

Convention on civil liability for damage caused by oil pollution, 1969

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972

International Convention for the Prevention of Pollution from Ships (MARPOL), 1973

Convention on Long-Range Transboundary Air Pollution, 1979

United Nations Convention on the Law of the Sea, Montego Bay, 1982

Vienna Convention for the Protection of the Ozone Layer, 1985

The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987

London Convention on International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990

Convention on Environmental Impact Assessment in a Transboundary Context, “Espoo Convention”, 1991

Convention on Biological Diversity, 1992

United Nations Framework Convention on Climate Change, 1992

Helsinki Convention on Transboundary Effects of Industrial Accidents, 1992

Convention on the Protection And Use of Transboundary Watercourses and International Lakes, Helsinki, 1992

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993

Convention to Combat Desertification, 1994

Oslo Protocol to the Convention on Long-Range Transboundary Air Pollution, 1994

WTO, Marrakesh Agreement, 1994

Agreement on Sanitary and Phytosanitary Measures, 1994

Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1996

Kyoto Protocol, 1997

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, 1999

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000

Stockholm Convention on Persistent Organic Pollutants, 2001

The Protocol on Environmental Protection to the Antarctic Treaty, Annex VI on Liability Arising from Environmental Emergencies, 2005

International Tropical Timber Agreement, 2006

Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010

Paris Agreement, 2015

### 1.2. *Regional Treaties*

African Convention on the Conservation of Nature and Natural Resources, 1968

Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 1978

African Charter on Human and Peoples Rights, 1981

Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 1981

Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1983

ASEAN - Agreement on the Conservation of Nature and Natural Resources, 1985

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", 1988

Maghreb Charter on Environmental Protection and Sustainable Development, 1992

Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 1992

North American Agreement on Environmental Cooperation, 1993

Convention On Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 1998

Charter of Fundamental Rights of the European Union, 2000

African Convention On the Conservation Of Nature And Natural Resources, 2003

Arab Charter of Human Rights, 2004

Treaty on European Union, 2007

Treaty on the Functioning of the European Union, 2007

## **2. Non-binding Instruments**

### *1.1. Texts enacted in the framework of International Institutions*

Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972

Conference on Security and Cooperation in Europe Final act, Helsinki, 1975

World Charter for Nature, 1982

European Charter on Environment and Health, 1989

Rio Declaration on Environment and Development, 1992

Agenda 21, 1992

United Nations Global compact, 2000

Johannesburg Declaration, 2002

United Nations Declaration on the Rights of Indigenous Peoples, 2007

Copenhagen Accord, 2009

ISO International Standard 26000, Guidance on social responsibility, 2010

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, 2011

OECD Guidelines for Multinational Companies, 2011

Outcome document of the United Nations Conference Sustainable Development Rio+20, “The future we want”, 2012

Resolution A/69/L.85 Of the United Nations General Assembly, draft outcome document of the United Nations Summit for the adoption of the post-2015 development agenda (Objectives of Sustainable Development), 2015

ILO, Guidelines for a just transition towards environmentally sustainable economies and societies for all, 2015

UNESCO First draft of a preliminary text of a declaration on ethical principles in relation to climate change, 2016

### *1.2. Texts drafted by Civil Society*

The ICC Business Charter for Sustainable Development, 1990

Resolution “Environment”, The Institute of International Law, 1997

Resolution “Responsibility and Liability under International Law for Environmental Damage”, The Institute of International Law, 1997

Resolution “Procedures for the Adoption and Implementation of Rules in the Field of Environment”, The Institute of International Law, 1997

Earth Charter, 2000

New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002

The Johannesburg Principles on the Role of Law and Sustainable Development, 2002

Draft IUCN Covenant (5th Edition), 2015

Oslo Principles on Global Climate Change Obligations, 2015

Universal Declaration of Humankind Rights, 2016

IUCN World Declaration on the Environmental Rule of Law, 2016

Draft of the International Covenant on the Human Right to the Environment, 2017

### **3. Case-Law**

Trail Smelter arbitral sentence, 11 March 1941

ICJ, Corfu Channel Case (United Kingdom v. Albania), 9 April 1949

Lake Lanoux Arbitration (France v. Spain), 16 November 1957

ICJ, Advisory opinion on the legality of the threat or use of nuclear weapons, 8 July 1996

ICJ, Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia), 25 September 1997

ITLOS, Southern Bluefin case (New Zealand v. Japan and Australia v. Japan), 27 August 1999

DSB of WTO, United States — Import Prohibition of Certain Shrimp and Shrimp Products, Case WT/DS58/AB/R, 15 June 2001

ITLOS, The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Ord., 3 December 2001

ECJ, Commission v. Irlande, Case C-459/03, 30 May 2006

ICJ, Pulp Mills on the River Uruguay case (Argentina v. Uruguay), 20 April 2010