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# The Environment Through the Lens of International Courts and Tribunals

Edgardo Sobenes

Sarah Mead

Benjamin Samson *Editors*

*Foreword by* H. E. Mr. Philippe Gautier



Springer

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Editors

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# Foreword

‘[T]he environment is under daily threat’. This statement was made by the International Court of Justice (ICJ) in its advisory opinion rendered in 1996 in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*.<sup>1</sup>

Such an assessment is still valid today. In light of current environmental challenges—*inter alia*, climate changes and global warming, illegal, unreported and unregulated fishing activities and overexploitation of fishery resources, deforestation, plastic debris, air, water and land pollution—the status of the environment is even more alarming in 2021 than it was 25 years ago. This is so, in spite of the proliferation of international treaties, recommendations and guidelines that aim to preserve and protect the environment.

The dire situation of the fauna and flora of our planet may be a matter of surprise given the abundance of existing international environmental norms. But the adoption of treaties and other rules of international law does not in itself guarantee that the environment is properly protected in practice. An effective regime of protection requires that, in addition to the existence of legal norms, tools and mechanisms be put into place to ensure compliance therewith, to monitor their implementation and to provide legal recourses should they be breached.

It is against this background that the contribution of international courts and tribunals in promoting compliance with environmental rules needs to be assessed. International courts and tribunals may play a useful role when cases involving alleged violations of obligations under environmental law are brought before them. They may settle environmental disputes and avoid their aggravation, clarify the interpretation and scope of the rules concerned, and order reparation.

For the past 30 years, international courts and tribunals have not remained inactive in the environmental field. On the contrary, they have been seized of a growing number of environmental cases, and their decisions (judgments or advisory opinions) have contributed to the development of a broad corpus of environmental rules and

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<sup>1</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 241, para 29.

principles. Mention may be made, for example, of the ‘concept of sustainable development’, to which the ICJ referred to as early as 1997 in its Judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>2</sup> or the obligation 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’,<sup>3</sup> whose binding character under international customary law was affirmed in 2010 by the ICJ in its *Pulp Mills* judgment, and also by the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion of 2011.<sup>4</sup>

In this context, it is worth noting that the book *The Environment through the Lens of International Courts and Tribunals*, co-edited by Edgardo Sobenes, Sarah Mead and Benjamin Samson comes at the right time. Of course, the fact that this is a timely publication is not the only reason for which the co-editors and the different contributors are to be commended. The added value of the book is to offer in one volume a comprehensive and systematic overview of the different legal issues relating to the handling of environmental cases by international courts and tribunals.

In Part I, readers are given a detailed presentation of the various international courts and tribunals which may have jurisdiction on environmental issues. Besides the ICJ, ITLOS, WTO dispute settlement mechanism and the International Criminal Court, the book also covers more recent developments before regional courts—mainly in the context of human rights—and commercial and investment arbitration tribunals.

A legal battle may be lost or won on procedural grounds. Therefore, it is useful for litigants to be fully aware of procedural and jurisdictional challenges which may be faced during international proceedings. Part II responds to such a need by reviewing in a systematic manner a number of key notions such as jurisdiction, access to courts and tribunals and evidence. Access to international justice is probably the most crucial element to keep in mind in an international legal order without a court possessing general compulsory jurisdiction. This explains why existing compulsory regimes for the settlement of environmental disputes, such as Part XV of the United Nations Convention on the Law of the Sea, are particularly attractive for States willing to engage in international litigation. Part II also includes a chapter on provisional measures before international courts and tribunal. The emphasis put on provisional measures is fully justified. Provisional proceedings may constitute an efficient tool whenever it is necessary to prevent serious harm to the environment pending a decision on the merits.

The co-editors have rightly allocated part of the publication (Part III) to the consideration of issues relating to the future of environmental litigation. The part addresses new trends and ideas, such as the role of international litigation in a context marked

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<sup>2</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 78, para 140.

<sup>3</sup> ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, p. 83, para 205.

<sup>4</sup> ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 50, para 145.

by an increased recourse to municipal courts in environmental litigation, and the potential role of the United Nations Security Council in dealing with environmental emergencies.

At a time when confidence in the multilateral legal order and the peaceful settlement of international disputes remains fragile, it is a source of comfort to see that more than twenty international practitioners and academics (with a composition which reflects gender balance and includes representatives of the new generation) have united their efforts to provide to the public what may be characterized as a guide to international environmental litigation. Legal norms to protect the environment do exist. It remains to be hoped that this new publication will contribute to a greater use of international courts and tribunals in order to protect our common environment.

Louvain-la-Neuve, France  
September 2021

H. E. Mr. Philippe Gautier  
Registrar, International Court of Justice

# Preface

As litigators and scholars specialised in international law with a deep concern for the environmental crises upon us, this book aims to put the spotlight on how international courts and tribunals are addressing issues relating to the environment. It is our view that, only with a clear sense of the state of play, can we determine whether the system of international dispute resolution is up to the task of protecting our most precious asset: the natural world.

The book covers the full range of international, regional and transnational courts and tribunals, with a focus on their treatment of the environment. Presented in three parts, the book addresses how individual courts and tribunals engage with environmental matters (Part I); compares the manners in which these courts and tribunals are resolving key issues common to environmental litigation (Part II); and delves into future opportunities and developments in the field (Part III). The book therefore serves as both an essential aid to scholars and students engaged in research in this ever-developing field, and practitioners involved in environmental litigation.

The breadth of international courts and tribunals covered in this book can only be achieved through an edited volume: each contributor has brought their specialist knowledge and experience to the task of preparing their respective chapters. We, the editors, are deeply grateful for their commitment to the project—despite the delays and difficulties caused by the COVID-19 pandemic. We also extend our sincere gratitude to our assistant editor, Joseph Reeves, who has been instrumental in bringing the final manuscript together.

For better or worse, the sovereign state remains at the heart of the international legal system. Yet it is evident that the system has failed to pay adequate attention to the interconnected nature of the natural world. Our flourishing as a global community therefore depends on the ability for our systems to change—and the system of international dispute resolution is no different. It is our hope that, by showing how



international courts and tribunals have fared to date, this book lays the foundation for further research aimed at identifying ways to strengthen the system of international disputes resolution towards the better protection of our global environment for future generations.

The Hague, The Netherlands  
Amsterdam, The Netherlands  
Angers, France

Edgardo Sobenes  
Sarah Mead  
Benjamin Samson

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**Benjamin Samson** holds a Ph.D. in law from Université Paris Nanterre. He specialises in public international law, international investment law and law of the sea. He has extensive experience acting as counsel for governments in proceedings before the International Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration. He was a Visiting Scholar at the George Washington University School of Law (Washington D.C.) (2017), and has taught international law and international dispute settlement at various universities

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# Chapter 1

## Emergence of International Environmental Law: A Brief History from the Stockholm Conference to Agenda 2030



Sumudu Atapattu

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**Abstract** This chapter provides an overview of the emergence of international environmental law from the Stockholm Conference in 1972 to the adoption of the Sustainable Development Goals in 2015. It discusses the major milestones as well as principles that have emerged and their impact on international environmental law

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(IEL), especially the report of the World Commission on Environment and Development (1987) and sustainable development. The chapter surveys the evolution of IEL under three subheadings: (a) during the pre-sustainable development era—from the Stockholm Conference in 1972 to the World Commission on Environment and Development in 1987; (b) the post-sustainable development advancements from the Rio Declaration of 1992 to Rio+20 in 2012 with particular emphasis on the impact of sustainable development on IEL; and (c) globalization, the Anthropocene and the Sustainable Development Goals. The chapter also discusses some of its unique features such as the extensive use of soft law instruments, the framework/protocol approach, linkages with other disciplines and the North-South divide. It briefly surveys the regulation of the global commons as well as the activities of non-state actors. It concludes by summarizing the achievements, challenges and the future trajectory of IEL. It argues that IEL needs to devise novel legal tools and principles to confront the challenges posed by global environmental challenges, especially climate change, and urgently rethink the capitalist model of development that has given rise to extensive environmental destruction.

**Keywords** International Environmental Law · Climate change · Sustainable development · World Commission on Environment and Development · Sustainable Development Goals · Soft law · Anthropocene · Stockholm Declaration on the Human Environment · Rio Declaration on Environment and Development

## 1.1 Introduction

Modern international environment law dates back to the UN Conference on the Human Environment held in 1972,<sup>1</sup> even though several conservation treaties were in existence at the turn of the 20th century.<sup>2</sup> No textbook on international law carried a chapter on the topic and there were certainly no textbooks on it. Despite this late start, international environmental law (IEL) has flourished with many of its topics,<sup>3</sup> and even sub-topics,<sup>4</sup> attracting textbooks. Its evolution within a span of five decades is remarkable.

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<sup>1</sup> UN Conference on the Human Environment held in Stockholm. United Nations 1972; Handl 2012.

<sup>2</sup> Examples include: Convention for the Protection of Birds Useful to Agriculture (1902); Treaty for the Preservation and Protection of Fur Seals (1911); General Convention Relating to the Development of Hydraulic Power Affecting More than One State (1923); Convention on Certain Questions Relating to the Law on Watercourses (1929). See Hunter et al. 2015, p. 137; and the table of treaties in Sands et al. 2018.

<sup>3</sup> For example, climate change, sustainable development and the link between human rights and environment have attracted a large number of publications. Other topics include biodiversity, ozone depletion, water pollution, air pollution, hazardous waste, and trade and environment.

<sup>4</sup> Sub-topics include trade and environment, carbon trading, REDD, climate refugees, climate litigation, the Paris Agreement, indigenous peoples and traditional knowledge, and gender and environmental protection.



IEL did not evolve in a systematic manner. It simply responded to various environmental challenges as they arose. Its evolution has revolved around four major international conferences and its principles are scattered across a plethora of multi-lateral, regional and bilateral treaties, thousands of soft law instruments and a handful of judicial decisions. No Universal Declaration of Environmental Principles similar to the Universal Declaration of Human Rights exists.<sup>5</sup> Yet, despite its rather ad hoc development, it is possible to find an overarching framework, a coherent body of legal principles, and compliance mechanisms.

This chapter provides an overview of the emergence of IEL from the Stockholm Conference in 1972 to the adoption of the Sustainable Development Goals in 2015.<sup>6</sup> It will discuss the major milestones as well as principles that have emerged and their impact on IEL, especially the report of the World Commission on Environment and Development (WCED) and sustainable development. It proceeds in seven sections. Section 1.2 provides an overview of the evolution of IEL from the pre-sustainable development era to the Anthropocene. Section 1.3 is devoted to a discussion of selected principles of IEL—the principle of harm prevention and the obligation not to cause damage to the environment of other states and to the global commons; the common but differentiated responsibility principle; inter and intra-generational equity principle; the precautionary principle; and environmental impact assessment and public participation. Section 1.4 highlights some of the unique features of IEL—the extensive use of soft law; the framework/protocol approach in designing legal obligations; and linkages with other areas such as economic activities; trade and investment; human rights, justice and good governance; and the North-South divide in shaping IEL. Section 1.5 surveys the regulation of the global commons including the common heritage of mankind principle, while Sect. 1.6 briefly discusses the attempts made to and the norms that have emerged to regulate activities of non-state actors. Section 1.7 concludes with some final thoughts on achievements, challenges and the future trajectory. It argues that IEL needs to devise novel legal tools and principles to confront the challenges posed by global environmental challenges, especially climate change, and urgently rethink the capitalist model of development that has given rise to much environmental destruction.

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<sup>5</sup> See Hunter et al. 2015, p. 433. This, by itself, is not a problem and the Stockholm Declaration has, to some extent, played this role. The Universal Declaration of Human Rights was adopted in 1948 and forms the foundation of modern human rights law. See De Schutter 2010.

<sup>6</sup> United Nations General Assembly 2015, Transforming Our World: Agenda 2030 for Sustainable Development (Agenda 2030), UN Doc. A/RES/70/1.

## 1.2 Evolution of International Environmental Law<sup>7</sup>

The evolution of IEL will be discussed under three subheadings: the pre-sustainable development era—from the Stockholm Conference in 1972 to the WCED in 1987; the post-sustainable development era advancements from Rio Declaration of 1992 to Rio+20 in 2012 with particular emphasis on the impact of sustainable development on IEL; and globalization, the Anthropocene and the Sustainable Development Goals.

### 1.2.1 *Pre-sustainable Development Era*

By the late 1960s several European states were beginning to feel the negative consequences of ‘acid rain’,<sup>8</sup> a by-product of industrial activities. Because the consequences were felt far away from the source and these sources were outside their territories, an international response was required. Sweden suggested an international conference in 1968 to address these emerging environmental challenges and offered to host it in 1972.

North–South divisions plagued the conference from the start. Developing countries, many of whom were newly independent and not feeling the negative impacts of industrialization, wanted to ensure that their sovereign right to develop was preserved. Having finally achieved the majority in the UN General Assembly, G-77 and China sponsored a series of resolutions ‘affirming their right to development, their sovereignty over natural resources and the need to handle environmental policies at the national level’.<sup>9</sup> A resolution on development and environment was adopted shortly before the Stockholm Conference,<sup>10</sup> recognizing that ‘no environmental policy should adversely affect the present and future development possibilities of developing countries’<sup>11</sup> and affirming the sovereign right of each country to plan its own economy, define its own priorities, and determine its own environmental standards and criteria. The resolution also expressed the view that most environmental problems in developing countries are caused by a lack of economic resources and

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<sup>7</sup> See Yang and Percival 2009, p. 616, who define ‘global environmental law’ as ‘the set of legal principles developed by national, international, and transnational environmental regulatory systems to protect the environment and manage natural resources.’ This must be distinguished from ‘international environmental law’ which is the body of law governing the global environment. While there are national legal principles that have become part of IEL (see discussion below), there is a distinct body of laws governing environmental issues that affect two or more states or the global environment. According to Sands et al. 2018, p. 14, ‘international environmental law comprises those substantive, procedural and institutional rules of international law that have as their primary objective the protection of the environment.’

<sup>8</sup> See Hunter et al. 2015, Chapter 10.

<sup>9</sup> *Ibid.*, p. 138.

<sup>10</sup> United Nations General Assembly 1972, Resolution on Development and Environment, UN Doc. A/RES/2849 (XXVI) (Stockholm Declaration).

<sup>11</sup> *Ibid.*, para 3.

that the quality of human life depends on resolving environmental problems which have their origins in underdevelopment itself. The United States of America and the United Kingdom voted against the resolution while almost all the other industrialized countries abstained.<sup>12</sup> This was the mindset of countries going into the Stockholm conference.

Considered as one of the most successful conferences held up to that point, 113 countries participated in the conference although only two heads of state—from Sweden and India—attended. Despite being a soft law instrument,<sup>13</sup> the Stockholm Declaration on the Human Environment adopted at the Conference laid the foundation for modern international environmental law.<sup>14</sup> It also laid the foundation for the subsequent acceptance of sustainable development, although the term itself did not appear in the Declaration. It emphasized the importance of integrating environment with development and ‘internationalized’ environmental protection despite the insistence by developing countries that environmental protection should be subject to national law and policies. Its near-endorsement of a human right to a healthy environment is noteworthy:

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 [...].<sup>15</sup>

Later documents unfortunately failed to develop and adopt a distinct right to a healthy environment which remains a gap in contemporary international human rights law.<sup>16</sup> Regional human rights treaties, on the other hand, have been much more forthcoming,<sup>17</sup> as have regional human rights institutions and national judiciaries.<sup>18</sup>

Another influential provision in the Declaration that is now considered as having crystallized into a customary law principle governing the environment is 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

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<sup>12</sup> This resolution emphasized developing countries’ strong belief that environmental protection should not interfere with their development agenda and that environmental protection should be left to individual countries. See Hunter et al. 2015, p. 140.

<sup>13</sup> See discussion in Sect. 1.4.1.

<sup>14</sup> Stockholm Declaration, above n 10.

<sup>15</sup> Ibid. Principle 1.

<sup>16</sup> See Atapattu and Schapper 2019, p. 3.

<sup>17</sup> These are: American Declaration of Rights and Duties of Man, adopted at the Ninth International Conference of American States, Bogota, Colombia, 2 May 1948; African Charter on Human and Peoples’ Rights, opened for signature 27 June 1981, 1520 UNTS 217, entered into force 21 October 1986; Convention on Access to Information, Public Participation in Decision Making and Access to justice in Environmental Matters (Aarhus Convention), opened for signature 25 June 1998, 2161 UNTS 447, entered into force 30 October 2001.

<sup>18</sup> See Pedersen 2018, p. 86; Atapattu and Schapper 2019, chapters 4 and 8.

or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>19</sup>

The Stockholm Conference legitimized international action in relation to the environment, spurred action at the national level and recognized the link between economic development and environmental protection. Subsequent to the Conference, the United Nations Environment Program (UNEP) was established which, to date, continues as the international organization and focal point relating to the global environment. Around this time, many national laws and institutions were also adopted along with a proliferation of environmental treaties.<sup>20</sup>

Despite these noteworthy developments, the North-South tensions influenced the Stockholm Conference and ‘have continued to play a central role at the major international gatherings on environmental protection held since.’<sup>21</sup> These tensions prompted the UN General Assembly to appoint a commission in 1983 to look into ways to reconcile economic development with environmental protection. Thus, the World Commission on Environment and Development headed by the then Prime Minister of Norway, Gro Harlem Brundtland, was born.

### ***1.2.2 Post-sustainable Development Era***

The mandate given to the WCED was to formulate ‘a global agenda for change’ and to, inter alia, propose long-term environmental strategies for achieving sustainable development by 2000 and beyond.<sup>22</sup> The central message of the report—sustainable development—had a huge impact on the development of international environmental law. Defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’,<sup>23</sup> sustainable development has become one of the most influential concepts of international law. The WCED sent an urgent message to states to change their destructive practices: ‘we are unanimous in our conviction that the security, well-being and very survival of the planet depend on such changes, now.’<sup>24</sup> The WCED report had a direct bearing

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<sup>19</sup> United Nations General Assembly 1972, Principle 21. See also Hunter et al. 2015, p. 142; Sands et al. 2018, p. 202.

<sup>20</sup> An often forgotten, yet important instrument is the World Charter for Nature adopted by the UN General Assembly to celebrate the 10<sup>th</sup> anniversary of the Stockholm conference. It was the first instrument to adopt a set of principles to protect nature. It recognized that nature should be protected irrespective of its worth to human beings and laid the first seeds of the precautionary principle, EIA and sustainable development. UN General Assembly, World Charter for Nature 1982, UN Doc. A/RES/37/7.

<sup>21</sup> See Michelson 2015, p. 109. See also Ntambirweki 1991.

<sup>22</sup> See WCED 1987, p. ix.

<sup>23</sup> Ibid., p. 43.

<sup>24</sup> Ibid., p. 23.

on the UN Conference on Environment and Development (Rio Conference) held in 1992.<sup>25</sup>

Instead of trying to improve the definition of sustainable development, the Rio Declaration sought to give it content. Thus, the Rio Declaration embodies substantive components, procedural components, linkages and tools to achieve sustainable development. In this sense, the Rio Declaration can be considered one of the most influential instruments on sustainable development to have been adopted by the international community.

The substantive components include the principle of equity (both inter- and intra-generational); sustainable utilization of natural resources; the principle of integration; and the right to development.<sup>26</sup> The procedural components include, as embodied in Principle 10, access to information, participation in decision-making and access to remedies which form part of international human rights law.<sup>27</sup> Many of these components have normative effect and states must fulfil these requirements in relation to development activities within their territories.

The most significant contribution of the Rio Declaration was the recognition of sustainable development as the overarching framework for environmental governance and the adoption of principles and tools to achieve it: environmental impact assessment (Principle 17), the polluter pays principle (Principle 16), the precautionary principle (Principle 15), and the common but differentiated responsibility principle (Principle 7). It identified women, youth, and indigenous peoples as groups requiring special protection (Principles 20, 21 and 22 respectively) and linkages with areas such as warfare (Principle 24) and peace (Principle 25).

The journey of sustainable development, which began with the adoption of the WCED report, got a considerable boost with the adoption of the Rio Declaration which essentially ‘put meat on the bones’. Its binary nature consisting of two pillars changed to encompass a third pillar with the adoption of the Copenhagen Declaration on Social Development,<sup>28</sup> which was later affirmed in the Johannesburg Declaration on Sustainable Development.<sup>29</sup>

Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels.<sup>30</sup>

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<sup>25</sup> See Report of the UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol I). See in particular the Rio Declaration on Environment and Development, Annex 1, p. 3 (Rio Declaration). See also Sand 1992, p. 209.

<sup>26</sup> See Birnie et al. 2009. See also Sands et al. 2018, p. 219.

<sup>27</sup> See Rio Declaration, above n 25.

<sup>28</sup> United Nations (1995) Report of the World Summit for Social Development, Copenhagen, 6–12 March, UN Doc. A/CONF.166/9 (Copenhagen Declaration).

<sup>29</sup> United Nations, Johannesburg Declaration on Sustainable Development 2002, UN Doc. A/CONF.199/20.

<sup>30</sup> *Ibid.*, para 5. See Jacob 1999, who argues that sustainable development is a ‘contestable concept’ which has two levels of meaning—the first level is unitary but vague and the concept is defined by reference to core ideas (similar to democracy and liberty). The second level of meaning is how the

In many respects, the Rio+20 conference held to celebrate the 20<sup>th</sup> anniversary of the Rio Conference, was a disappointment. Its unambitious agenda consisted of just two broad themes—promoting a green economy as the vehicle to achieve sustainable development and strengthening the institutional framework to achieve that.<sup>31</sup> While the final document titled *The Future We Want* endorsed the international community's commitment to sustainable development, the Rio+20 conference failed to capture the excitement and promise of its predecessor, the Earth Summit.

However, sustainable development has survived the ebbs and flows in enthusiasm. It provides the overarching framework for the myriad of environmental principles that developed in a rather ad hoc manner and lacked an organizing principle.<sup>32</sup> If only from this perspective, sustainable development plays an important role. Sustainable development also internationalized the development process, thereby bringing the economic development process of states subject to international scrutiny: 'The most potentially far-reaching aspect of sustainable development is that for the first time it makes a state's management of its own domestic environment a matter of international concern in a systematic way.'<sup>33</sup> Thus, sustainable development is now entrenched in IEL and some scholars believe that a separate branch of international law called international sustainable development law has now emerged.<sup>34</sup>

### ***1.2.3 Globalization, Anthropocene and Sustainable Development Goals (SDGs)***

The promising start to sustainable development made with the adoption of the Rio Declaration met its match with the rise of globalization, another 'whirlwind force'<sup>35</sup> to sweep the world:

The emergence of globalization as the predominant economic trend in the 1990s set up an inevitable potential conflict with the goals of sustainable development proclaimed at Rio. Many of the same policy makers that embraced sustainable development also embraced globalization, as the engine that would deliver the promises of Rio.<sup>36</sup>

Many believed that the policies of globalization with its emphasis on market forces, technological changes and undermining environmental and social safeguards

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concept should be interpreted in practice. He identifies six core ideas of sustainable development: environment-economy integration; futurity; environmental protection; equity; quality of life; and participation. See also Boyle and Freestone 1999. For a critique, see Dawe and Ryan 2003.

<sup>31</sup> See Hunter et al. 2015, p. 182.

<sup>32</sup> See Hunter et al. 2015, p. 169; Atapattu 2019.

<sup>33</sup> See Birnie et al. 2009, p. 124.

<sup>34</sup> See Cordonier Segger and Khalfan 2004, and Principle 27 of the Rio Declaration, above n 25, which calls upon states to cooperate in good faith to develop 'international law in the field of sustainable development.'

<sup>35</sup> See Hunter et al. 2015, p. 175.

<sup>36</sup> Ibid.

was antithetical to the objectives of sustainable development.<sup>37</sup> It is no secret that the trade agenda was promoted at the expense of the environmental agenda with the World Trade Organization and the World Bank playing a major role. Structural adjustment policies and deregulation of multinational corporations that benefited the Global North were promoted while pro-poor, environmentally friendly policies were rejected which negatively impacted small scale farmers and other vulnerable communities in the Global South.<sup>38</sup> These negative impacts led Nobel laureate Joseph Stiglitz to note that globalization is not working for the environment or for the world's poor.<sup>39</sup> The negative impact of globalization was recognized in the Johannesburg Declaration on Sustainable Development which noted:

Globalization has added a new dimension to these challenges. The rapid integration of markets, mobility of capital and significant increases in investment flows around the world have opened new challenges and opportunities for the pursuit of sustainable development. But the benefits and costs of globalization are unevenly distributed, with developing countries facing special difficulties in meeting this challenge.<sup>40</sup>

Forces of globalization continue to date and has diverted attention from sustainable development. As noted, the agenda of the Rio+20 conference held in Brazil in 2012 was 'strikingly unambitious'.<sup>41</sup> This lackluster situation was reinvigorated somewhat with the adoption of the Sustainable Development Goals (SDGs) in 2015.<sup>42</sup> For the first time, the global community adopted a common global agenda on *all* three dimensions of sustainable development, articulating that SDGs are integrated and indivisible and are based on human rights.<sup>43</sup> Comprising 17 goals and 169 targets, SDGs are an ambitious global agenda that seek to address, inter alia, poverty as well as climate change. However, SDGs continue to promote economic growth as the vehicle for poverty alleviation when the negative consequences of limitless growth are apparent in the form of the externalities that it has created:

Goal 8, for example, seeks to increase GDP growth in the least developed countries along with higher levels of economic productivity in all countries. By failing to acknowledge the need to reduce economic growth in affluent countries in order to improve living standards in poor countries without exceeding ecological limits, the SDGs 'fail to reconcile the contradiction between growth and sustainability at the core of sustainable development'.<sup>44</sup>

The latest 'catch phrase' to enter the global scene is the Anthropocene. Scientists believe that we have entered a new geologic epoch called the 'Anthropocene' in which

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<sup>37</sup> See Yang and Percival 2009, pp. 641–42 who point out that while globalization in the form of trade liberalization and the growth of MNCs has facilitated externalization of pollution and environmental degradation, it has also led to more positive outcomes via environmental self-regulation.

<sup>38</sup> See Gonzalez 2017, p. 218.

<sup>39</sup> See Stiglitz 2001, referred to in Hunter et al. 2015, p. 177.

<sup>40</sup> Johannesburg Declaration on Sustainable Development, above n 29, para 14.

<sup>41</sup> See Hunter et al. 2015, p. 181.

<sup>42</sup> See UN General Assembly 2015.

<sup>43</sup> *Ibid.*, para 18. Agenda 2030, above n 6, affirms the importance of the UDHR and human rights treaties and the responsibility of states to respect human rights and fundamental freedoms for all, without distinction of any kind (para 19) and gender equality (para 20). Cf. Knox 2015.

<sup>44</sup> See Atapattu et al. 2020, quoting Adelman 2018, p. 34.

human beings are the primary driver of environmental destruction.<sup>45</sup> This epoch ‘is characterized by human domination and disruption of Earth system processes essential to the planet’s self-regulating capacity’.<sup>46</sup> This generalized statement blurs the fact that more affluent segments of society are responsible for this destruction and that environmental crises are intrinsically connected to global economic policies that have colonial and post-colonial origins.<sup>47</sup> International law has enabled the entrenchment of these policies and practices.<sup>48</sup> Climate change, massive loss of biological diversity, and generation of toxic chemicals are just the tip of the iceberg. Many impoverished and minority communities continue to suffer the negative impacts of these environmental crises disproportionately, leading to justice concerns.<sup>49</sup>

### 1.3 Selected Principles of International Environmental Law

In addition to sustainable development, other principles of IEL have now emerged.<sup>50</sup> These principles play an important role, from providing guidance to states to design obligations in a particular area, to courts and tribunals to resolve disputes when they arise. They also provide guidance to states when negotiating treaties and other instruments.<sup>51</sup> While some principles have been borrowed from general international law,<sup>52</sup> others are unique to IEL.<sup>53</sup> These principles are substantive or procedural in nature although a clear distinction is hard to draw.<sup>54</sup> We now turn to a brief survey of some of these principles here.

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<sup>45</sup> See Crutzen 2002, referred to in Gonzalez 2017.

<sup>46</sup> See Gonzalez 2017, p. 219.

<sup>47</sup> Ibid., p. 220.

<sup>48</sup> Ibid., p. 222.

<sup>49</sup> There is considerable literature on environmental justice. See, generally, Agyeman et al. 2003; Foster 1998; Bullard 2005; Boyd 2019. See also Principle 14 of the Framework Principles on Human Rights and the Environment 2018, UN Doc. A/HRC/37/59 proposed by John Knox, former UN Special Rapporteur on Human Rights and Environment.

<sup>50</sup> See, generally, Sands et al. 2018; Birnie et al. 2009; Hunter et al. 2015; Dupuy and Vinuales 2015; Atapattu 2006; Rosencranz 2003, p. 309; Brown Weiss 2011, p. 37; and Bodansky 2009.

<sup>51</sup> See Hunter et al. 2015, pp. 438–439.

<sup>52</sup> Principles of sovereignty and state responsibility are examples.

<sup>53</sup> The common but differentiated responsibility principle is a good example.

<sup>54</sup> See Brunnée 2018.



### 1.3.1 *Obligation not to Cause Environmental Harm and the Principle of Prevention*

The corollary of the cardinal principle of state sovereignty is the duty not to cause environmental harm beyond states' borders. Enshrined in Principle 21 of the Stockholm Declaration, and reaffirmed in the Rio Declaration<sup>55</sup> and treaties,<sup>56</sup> the obligation of harm prevention has now become a customary international law principle governing the environment.<sup>57</sup> This principle has its roots in the common law principle of *sic utere tuo ut alienum non laedus* ('do not use your property to harm another') and has been affirmed in several cases. In the *Corfu Channel Case*, the ICJ referred to 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'<sup>58</sup> This principle was affirmed in the environmental context in the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.<sup>59</sup>

While the Principle 21 formulation is considered a well-established customary international law principle, several questions remain: (a) what is the level of harm that would trigger this obligation; (b) what is the standard of care that states are required to abide by;<sup>60</sup> (c) what activities are under the jurisdiction or control of states; and (d) what remedies should be available to states that suffer damage? The answers depend on the context of each case and whether there are other obligations

<sup>55</sup> Rio Declaration, above n 25.

<sup>56</sup> See for example Convention on Long-range Transboundary Air Pollution, opened for signature 13 November 1979, 1302 UNTS 217, entered into force 16 March 1983; Vienna Convention for the Protection of the Ozone Layer, opened for signature 22 March 1985, 1513 UNTS 293, entered into force 22 September 1988; Stockholm Convention on Persistent Organic Pollutants, opened for signature 22 May 2001, 2256 UNTS 119, 17 May 2004; United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107, entered into force 21 March 1994 (embodies Principle 21 verbatim in the Preamble without mentioning Principle 21); and Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79, entered into force 29 December 1993 (embodies Principle 21 verbatim in Article 3 titled 'principle' without mentioning Principle 21).

<sup>57</sup> See Hunter et al. 2015, p. 473; Sands et al. 2018.

<sup>58</sup> ICJ, *Corfu Channel (UK v Albania)*, Judgement, 9 April 1949, ICJ Reports 1949, p. 22.

<sup>59</sup> ICJ, *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para 29–30. This was affirmed in ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, p. 14; and ICJ, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 7.

<sup>60</sup> In the *Pulp Mills* case, the ICJ referred to the obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. Elaborating on what this obligation entails, the ICJ stated: 'it is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party', para 197.

in place that establish more precise standards. Although this principle is useful in the context of transboundary environmental issues, it is less useful to seek damages in relation to global issues such as climate change because, due to the multitude of sources, actors and victims, and the time lags involved, it is difficult to establish the causal link between the activity and damage.<sup>61</sup> However, the basic obligation of harm prevention is applicable to all activities of states.

A manifestation of the principle of sovereignty is the permanent sovereignty over natural resources principle. Its adoption was championed by developing countries who wanted to assert their sovereignty over their natural resources, after having gained independence after years of colonialism. General Assembly Resolution 2158 affirmed ‘the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development, in conformity with the spirit and principles of the Charter of the United Nations...’.<sup>62</sup> It also called on states to achieve the maximum possible development of natural resources of developing countries in accordance with national laws and regulations. However, with the advent of sustainable development and the principle of prevention, the efficacy of this principle has diluted somewhat as states are required to balance development activities with their environmental and social impact regardless of their impact beyond national borders.

With the advent of sustainable development as a principle, states are now required to prevent environmental harm even *within* their territory—giving rise to the principle of harm prevention. This principle is useful vis-à-vis global problems as states are required to prevent environmental harm irrespective of a transboundary element.<sup>63</sup> Environmental impact assessment, discussed below, is a useful tool to give effect to the principle of prevention as it ‘emphasizes the need to anticipate environmental damage and to act proactively and cooperatively to avoid or minimize the risk’.<sup>64</sup> The principle of prevention emphasizes that preventing environmental harm is better and less costly than relying on remedial measures and/or providing compensation for damage. Moreover, some environmental damage may be irremediable.

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<sup>61</sup> These legal issues were brought to the forefront in the Inuit petition filed before the Inter-American Commission on Human Rights in 2005 against the United States. The petition is available here: <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/>. Accessed 23 March 2022. See also Farber 2007, p. 1615.

<sup>62</sup> See Hunter et al. 2015, p. 443; and Schrijver 1997.

<sup>63</sup> See Duvic-Paoli 2018.

<sup>64</sup> See Hunter et al. 2015, p. 477. See discussion below in Sect. 1.3.5.

### 1.3.2 *Common but Differentiated Responsibility Principle*<sup>65</sup>

The principle of common but differentiated responsibility (CBDR) serves as an exception to the sovereign equality principle. It gave rise to intense North-South debate at the time of its adoption,<sup>66</sup> and continues to be a hotly debated principle. It underlies the legal regimes governing ozone depletion<sup>67</sup> and climate change.<sup>68</sup> Reflecting core elements of equity, the CBDR principle acknowledges that the contribution to certain global environmental problems, their impact as well as the ability to address them, differ widely across states. It ‘presents a conceptual framework for compromise and cooperation in meeting future environmental challenges, because it allows countries that are in different positions with respect to specific environmental issues to be treated differently’.<sup>69</sup> The Rio Declaration incorporates this principle:

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.<sup>70</sup>

The UN Framework Convention on Climate Change (UNFCCC) includes CBDR as one of its guiding principles.<sup>71</sup> Including a specific provision on principles is rather unusual in environmental treaties and the adoption of this provision was contentious.<sup>72</sup> CBDR does not play a major role in relation to mitigation commitments under the Paris Agreement as the parties opted for bottom-up, voluntary commitments ostensibly to get around the CBDR principle. However, the principle continues to play an important role in relation to adaptation, climate finance, and the loss and damage mechanism.<sup>73</sup> The Paris Agreement is to be ‘implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.’<sup>74</sup> The CBDR principle

<sup>65</sup> See, generally, Cullet 2003; Rajamani 2006; French 2000; Stone 2004; Halvorsen 1999.

<sup>66</sup> See Atapattu 2015, p. 93.

<sup>67</sup> See Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987, 1522 UNTS 3, entered into force 1 January 1989.

<sup>68</sup> See UNFCCC, above n 56; and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 2303 UNTS 162, entered into force 16 February 2005.

<sup>69</sup> See Hunter et al. 2015, pp. 463–64. See also Rajamani 2016, pp. 493–514.

<sup>70</sup> Principle 7, Rio Declaration, above n 25.

<sup>71</sup> See UNFCCC, above n 56.

<sup>72</sup> See Atapattu 2015, p. 93, and Yamin and Depledge 2004, p. 70 who point out that Article 3 ‘does not refer to historic contribution to climate change as originally proposed by some developed countries but presents a more balanced approach emphasizing Parties’ responsibilities as well as their present-day capabilities.’

<sup>73</sup> See Bodansky et al. 2017, p. 219.

<sup>74</sup> Preamble, Paris Agreement, opened for signature 12 December 2015 (2015), UN Doc. FCCC/CP/2015/L.9, Annex, entered into force 4 November 2016.

breaks new ground in international law<sup>75</sup> and its adoption even in its diluted form<sup>76</sup> was a major victory for developing countries.

### 1.3.3 *Inter- and Intra-generational Equity Principle*

Also grounded in the principle of equity are the principles of inter and the intra-generational equity—which form part of the substantive components of sustainable development. The inter-generational equity principle acknowledges that many of our decisions have an impact on future generations and hence, they should be ‘given a seat at the table’ when making decisions.<sup>77</sup> The climate crisis has brought the importance of this principle to the forefront. The UNFCCC calls upon parties to protect the climate system for the benefit of present and future generations of humankind.<sup>78</sup>

According to the theory of inter-generational justice which seeks to sustain the welfare and well-being of all generations, ‘each generation has an obligation to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation.’<sup>79</sup> This requires each generation to conserve options, quality and access to resources.

The most celebrated decision that discusses the inter-generational equity principle is the *Minors Oposa case* from the Philippines:

Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generations and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned..... Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>80</sup>

This decision shows how developments at the international level can influence judicial decisions at the national level. The ICJ referred to the inter-generational

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<sup>75</sup> See Atapattu 2015, p. 98.

<sup>76</sup> Ibid. p. 96. The original formulation of the CBDR principle referred specifically to the historic responsibility of Northern states but was dropped due to opposition by Northern countries especially, the US which appended an ‘interpretative clause’ to Principle 7 when signing the Rio Declaration, above n 25.

<sup>77</sup> See Hunter et al. 2015, p. 460. For the seminal work on the Inter-generational equity principle, see Brown Weiss 1996.

<sup>78</sup> UNFCCC, above n 56, Preamble and Article 3.

<sup>79</sup> See Brown Weiss 2011, p. 37.

<sup>80</sup> Supreme Court of the Philippines, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, Judgement, 30 July 1993, 33 ILM 173.

equity principle in its advisory opinion on *The Legality of the Threat of Use of Nuclear Weapons*.<sup>81</sup> The ICJ noted 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.’<sup>82</sup>

On the other hand, southern countries argue that the emphasis on future generations should not obscure the inequity in the current generation which should be addressed *before* equity among generations is addressed.<sup>83</sup> In other words, the intra-generational equity principle requires that economic, social and environmental injustices that plague the current generation should be addressed, especially, the disproportionate burden of environmental costs placed on certain communities. The environmental justice movement seeks to address the unequal burden of polluting activities on low-income and minority communities.<sup>84</sup>

The Rio Declaration embodies both principles. Principle 3 provides that: ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations,’<sup>85</sup> while Principle 5 emphasizes the need to eradicate poverty ‘in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world’.<sup>86</sup> Agenda 2030 with its 17 Sustainable Development Goals (SDGs) that range from poverty alleviation<sup>87</sup> to addressing climate change,<sup>88</sup> embodies both inter and intra-generational equity aspects. Many environmental treaties also embody these two principles.<sup>89</sup>

### 1.3.4 Precautionary Principle

Another controversial yet important principle that has given rise to intense debate is the precautionary principle. It recognizes that scientific certainty often comes too late and therefore, scientific uncertainty should not be used as an excuse to postpone cost effective preventive measures. Like the principle of prevention, the precautionary principle entails taking anticipatory action to avoid irreparable environmental harm

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<sup>81</sup> See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, above n 59, p. 95.

<sup>82</sup> *Ibid.* para 29.

<sup>83</sup> See Atapattu 2015, p. 92.

<sup>84</sup> See Kuehn 2000, p. 10681; Gonzalez 2012, pp. 77–98; and Foster 1998, p. 52.

<sup>85</sup> See Rio Declaration, above n 25, Principle 3.

<sup>86</sup> *Ibid.*, Principle 5. Principle 6 of the Rio Declaration is another manifestation of the intra-generational equity principle. It requires the special situation and needs of developing countries, particularly the least developed countries to be given special priority.

<sup>87</sup> See Agenda 2030, above n 6, SDG 1.

<sup>88</sup> *Ibid.*, SDG 13.

<sup>89</sup> See for example UNFCCC, above n 56; Paris Agreement, above n 74; and Convention on Biological Diversity, above n 56.

before it occurs: ‘Indeed, the precautionary principle can be viewed as the application of the principle of prevention where the scientific understanding of a specific environmental threat is not complete.’<sup>90</sup>

This principle reflects the important relationship that environmental issues have with science.<sup>91</sup> Many of the environmental laws cannot be designed without a sound scientific basis. When there is scientific uncertainty or science is conflicting, designing an effective legal regime becomes problematic. Moreover, states have used scientific uncertainty as an excuse not to take preventive measures.<sup>92</sup> The precautionary principle was born in an effort to address this situation. The IPCC reports which play an important role in relation to climate change is a good example of this relationship.<sup>93</sup>

Principle 15 of the Rio Declaration embodies the precautionary principle. It provides that:

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.<sup>94</sup>

The precautionary principle has been included in many treaties, including the Montreal Protocol,<sup>95</sup> the UNFCCC,<sup>96</sup> and the Biosafety Protocol.<sup>97</sup> The UNFCCC includes it as a principle under Article 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 [...] <sup>98</sup>

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<sup>90</sup> See Hunter et al. 2015, p. 478.

<sup>91</sup> See Sands et al. 2018, p. 6.

<sup>92</sup> The United States referred to scientific uncertainty as one of the reasons for withdrawing from the Kyoto Protocol in 2001. See Phillipson 2001, pp. 288–304.

<sup>93</sup> The Intergovernmental Panel on Climate Change (IPCC) was established by the UN to synthesize science relating to climate change. Its reports have influenced climate negotiations and are widely regarded as reflecting the status of climate science. See [www.ipcc.ch/](http://www.ipcc.ch/).

<sup>94</sup> Principle 15, Rio Declaration, above n 25.

<sup>95</sup> The Preamble refers to the need to take precautionary measures to control the substances that deplete the ozone layer, with the ultimate objective of eliminating them on the basis of scientific knowledge, taking into consideration technical and economic considerations.

<sup>96</sup> Principle 3, UNFCCC, above n 56.

<sup>97</sup> Article 1 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, opened for signature 29 January 2000, 2226 UNTS 208, entered into force 11 September 2003, refers specifically to Principle 15 of the Rio Declaration, above n 25.

<sup>98</sup> Article 3(3), UNFCCC, above n 56. Draft Article 3 gave rise to intense debate during negotiations. See Bodansky 1993; Atapattu 2017, p. 247.