

# INTERNATIONAL LAW ASSOCIATION

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### ROLE OF INTERNATIONAL LAW IN SUSTAINABLE NATURAL RESOURCE MANAGEMENT FOR DEVELOPMENT

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## I. Introduction

The ILA Committee on the **Role of International Law in Sustainable Natural Resource Management for Development** (hereinafter ‘the Committee’) was established by the ILA Executive Council in November 2012 in response to a proposal by the Netherlands Branch in September 2012. This Committee builds upon a distinguished history of ILA inquiry into international law related to sustainable development. In 1978, the ILA established the Committee on Legal Aspects of a New International Economic Order, whose work culminated in the substantive Seoul Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order (1986) and a series of book publications in the 1980s and early 1990s. At the 1992 Cairo Conference of the ILA, the Committee on Legal Aspects of Sustainable Development was established, and its work resulted in the 2002 New Delhi Declaration on Principles of International Law in the Field of Sustainable Development (New Delhi Declaration). The New Delhi Declaration was also published as an UN document and served as an input at the World Summit on Sustainable Development (WSSD) in Johannesburg, 2002. A follow-up Committee on International Law on Sustainable Development was equally productive, with a number of book publications and the adoption of the 2012 Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development (Sofia Guiding Statements). In Sofia, pressing questions on sustainable natural resource management for development were emphasized, and it was agreed that a new Committee would examine these issues.

This new Committee analyses the principle of sustainable use of natural resources as a crucial element of the evolving international law of sustainable development, in view of its firm status in treaty law and its frequent application in decisions of international courts and tribunals. It considers how international law can support a sustainable use and stewardship of natural resources, while also contributing to an adequate living standard and the realization of human rights for all. For sustainable development, effective governance of resources is crucial, including water, forests, biodiversity, landscapes, minerals, and energy (particularly from renewable sources), as is the relationship between armed conflict and natural resource management. In this regard, there is recognition of the need to analyse and build better global understanding of the role and legal status of principles and rules of international law for the sustainable use of natural resources, as well as their implementation in the practice of States and international organizations, and their reflection in the decisions of international courts and tribunals.

The Committee’s mandate is informed by an understanding that the field of international law on sustainable development is rapidly evolving,<sup>1</sup> and that global concern and attention towards sustainable resources management concerns is increasing significantly. Global policy agendas are moving to reflect the interest, with the outcomes of the 2012 UN Conference on Sustainable Development (Rio+20) resulting in the world’s agreement, in New York in September 2015, on Agenda 2030 and the global Sustainable Development Goals (SDGs), which cover high profile resources such as water, energy, landscapes and biodiversity towards 2030. New treaty negotiations

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<sup>1</sup> See generally N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Hague Academy of International Law, 2008); D Freestone & V Lowe, *Sustainable Development in International Law* (Oxford University Press, 1999); MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004); N Schrijver & F Weiss, eds, *International Law and Sustainable Development* (Martinus Nijhoff, 2004); MC Cordonier Segger & CG Weeramantry, eds, *Sustainable Justice* (Martinus Nijhoff, 2004); D French, *International Law and Policy of Sustainable Development* (Manchester University Press, 2005); D French, ed, *Global Justice and Sustainable Development* (Brill, 2010); M Gehring & MC Cordonier Segger, eds, *Sustainable Development in World Trade Law* (Kluwer Law International, 2005); MC Cordonier Segger, M Gehring & A Newcombe, eds, *Sustainable Development in World Investment Law* (Kluwer Law International, 2010); S Jodoin & MC Cordonier Segger, eds, *Sustainable Development, International Criminal Justice & Treaty Implementation* (Cambridge University Press, 2015); and MC Cordonier Segger & HE Judge CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992-2012* (Routledge, 2017).

continue to touch upon sustainable management of different natural resources. Of note, as explained in the last report, was the adoption at Paris in December 2015 of the new *Paris Agreement under the United Nations Framework Convention on Climate Change*<sup>2</sup> (Paris Agreement) at the 21<sup>st</sup> Conference of the Parties (COP). International tribunals are increasingly being seized of natural resources concerns. Notable recent decisions underlined in the Committee's First Report included the *Japan – Whaling case*, *Nicaragua – San Juan River case*, and the *Peru – Maritime Boundary case* in the International Court of Justice (ICJ), the *Coastal State Opinion* and the *Seabed Chamber Opinion* in the International Tribunal on the Law of the Sea (ITLOS), the *South China Sea Arbitration* in the Permanent Court of Arbitration, and *China – Rare Earth* and *US – Tuna/Dolphin III* in the World Trade Organisation's dispute settlement mechanism (DSM). Further important decisions, in the period since the Committee's last report, include *Opinion Consultiva OC 23-17, Medio Ambiente y Derechos Humanos*, by the Inter-American Court of Human Rights (IACtHR), *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean /Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, by the ICJ, *Jugheli and Others v Georgia*, by the European Court of Human Rights (ECHR), *Commission v Poland (2018)*, by the European Court of Justice (ECJ), *African Commission on Human and Peoples' Rights v Republic of Kenya*, by the African Court of Human and Peoples Rights, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana v Cote D'Ivoire)*, by ITLOS, and *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* and *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, both by the World Trade Organization's DSM.

The focus of the Committee's work is responsive to the evolving needs of the global sustainable development agenda, supported by a consideration of how key principles on sustainable development have been reflected in the growing body of global, regional and bilateral treaties which touch upon the sustainable management of key natural resources, and also the increasing instances of countries seeking international dispute resolution through different tribunals, courts and arbitral procedures. In particular, the Mandate of this Committee has three principal axes that form the Work Programme:

- (i) The study and analysis of the contents, legal status and application of the principles and rules of international law related to the sustainable management of natural resources at the national and international levels, as well as an assessment of the practice of States, and international organizations in this field;
- (ii) An examination of the relationship between the evolving international law in the field of sustainable development (see the New Delhi Declaration and the Sofia Guiding Statements) and the principle of the sustainable use of natural resources, including analysis of:
  - a. the status of the obligation of States to use natural resources in a manner that is sustainable, including issues such as the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest and taking into account the interests and needs of future generations;
  - b. innovative economic instruments to support sustainable use of natural resources and their status and implementation in international and national law, including measures within Regional Trade Agreements and multilateral economic treaties;
  - c. the relationship between natural resource management and the enjoyment of human and peoples' rights;
  - d. decisions of international courts and tribunals on matters related to natural resource management.
- (iii) The study of national and international approaches to the regulation of natural resources in developing countries and the impact of such approaches on the sustainable use of natural resources and on the evolution of international law in this field.

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<sup>2</sup> *Paris Agreement under the United Nations Framework Convention on Climate Change*, 12 December 2015 (in force 4 November 2016), UN Doc FCCC/CP/2015/10/Add.1, Decision 1/CP.21, Annex. ("Paris Agreement")

## **II. The Rules and Practices of International Law and their Contributions to the Global Sustainable Development Goals in Relation to Natural Resources**

During the period 2016-18, the Committee has made significant progress in its study of the evolution of the rules and practices of international law, and their contributions to sustainable resources management, including the realisation of global Sustainable Development Goals (SDGs).

Through surveys and studies, and through international symposia, seminars and legal experts panels, the Committee has worked to fulfil its original mandate (as described in the Introduction), while also accommodating refinements and additional tasks as agreed. After approval of its constitution by the ILA and appointment of an initial circle of Members between 2014-16, the Committee has undertaken its work in a consultative and participatory manner, combining online teamwork, collegial exchanges and collaborative publications with face-to-face meetings and joint events. The Committee has counted on its Chair and its Rapporteur, and also a small ‘core team’ who facilitate communications and event organising for the Committee, and the substantive working groups on each topic.

First, after deliberations in Washington at the ILA 16<sup>th</sup> Biennial Conference, the Committee formed a series of working groups to engage Committee Members in surveys of recent developments in rules and practices that manage key natural resources. The scope and focus of the analysis to be undertaken was confirmed and initiated during an international law experts seminar event in Leiden, The Netherlands, on 12-14 November, 2015, which was kindly hosted by Professor Nico Schrijver, the Faculty of Law at Leiden University and the Netherlands Branch of the ILA. After the seminar, scoping notes were prepared by the Committee’s working groups on freshwater resources, on energy resources, on biodiversity resources, and on marine resources. Several brief papers were also prepared by legal specialists, guided by Committee Members, on the contributions of international law and governance to the achievement of key global SDGs related to natural resources, including energy, biological resources, freshwater and fisheries and ocean resources. This work provided the materials and analysis for the Committee’s first Report, which was presented during the ILA’s 77<sup>th</sup> Biennial Conference in Johannesburg in 2016, and after refinements recommended by the Committee Members, adopted and disseminated as part of the Conference Reports.

Building on these efforts, further working groups engaged over email and online with newly appointed Committee Members in order to complete scoping reports on recent developments regarding additional natural resources, on innovative treaty instruments related to environmental, economic and human rights challenges, and on the decisions of international courts and tribunals in relation to natural resources. An international symposium was held in Montreal on 23 June 2017, co-hosted by the Centre for International Sustainable Development Law (CISDL), the McGill University Faculty of Law and the University of Montreal Faculty of Law and chaired by Dr Alexandra Harrington (Colombia Branch) and Professor Marie-Claire Cordonier Segger (Canada Branch and the Committee’s Rapporteur), providing a forum to discuss developments in international courts and tribunals decisions related to sustainable development, and to launch a new book by many Committee Members, edited by Professor Marie-Claire Cordonier Segger with HE Judge CG Weeramantry, former Vice-President of the International Court of Justice and UNESCO Peace Education Prize Laureate. The symposium included a tribute to the memory of HE Judge Weeramantry, recognising his wisdom and kindness, his mentorship for a generation of international lawyers worldwide, and his important contributions to the field of international law on sustainable development, to world peace, and to global justice.

Further, the Committee convened during an international law experts seminar event in Cambridge in the United Kingdom, on 27-28 April 2018, which was hosted by Dr Markus Gehring and Professor

Marie-Claire Cordonier Segger at the Lauterpacht Centre for International Law (LCIL) in the Faculty of Law at the University of Cambridge, the Centre for International Sustainable Development Law (CISDL), and the British Branch of the ILA, thanks to the the coordination of Nadia Sanchez-Castillo Winckels and Cairo Robb, and student hosts Harum Mukhayer, Anna Sidneva and Natalia Kubesch of the University of Cambridge. The meeting began with a very well-attended open international experts panel event at the Faculty of Law of the University of Cambridge on *Sustainability, Natural Resources and International Law*, during which the Committee Members presented papers and discussed developments in relation to the principle and practice of sustainable use of natural resources in international law, chaired by Professor Nico Schrijver, Professor Marie-Claire Cordonier Segger, and Dr Markus Gehring. Then, in an international experts seminar, the Committee examined the status of the obligation of countries to use natural resources in a manner that is sustainable, including issues such as the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest and taking into account the interests and needs of future generations, particularly in relation to mineral commodities, forests and biological resources, as well as precious minerals (an analysis that remains to be further developed). The Committee Members also heard presentations from four further working groups to examine the innovative economic instruments to support sustainable use of natural resources and their status and implementation in international and national law, including measures within regional trade agreements and multilateral economic treaties; the innovative environmental instruments to support sustainable use of natural resources and their status and implementation in international and national law, including measures within multilateral environmental agreements; innovations in international law on natural resources in peacebuilding and post-conflict situations; and innovations in international law on natural resource management as this relates to the enjoyment of human and peoples' rights (with the assistance of a world-recognised expert who kindly provided advice for the initial scoping). Further, a presentation was given by several Committee Members who had cooperated to survey the recent decisions of international courts and tribunals on matters related to natural resource management. The efforts of these working groups, as discussed during the Committee Meeting in Cambridge and then further elaborated, form the basis of this second Report of the Committee.

As the Committee has noted in previous reports, the UN General Assembly Resolution *Transforming Our World: The 2030 Agenda for Sustainable Development* (Agenda 2030),<sup>3</sup> in which UN Member States agreed on 17 SDGs and 169 related time-bound targets and specific means of implementation, has been important to the work of the Committee. Global consensus on the core objectives required for sustainable development was elaborated through the 1992 United Nations Conference on the Environment and Development (UNCED), the 1997 UN General Assembly Special Session on Sustainable Development (SSSD), and the 2002 World Summit on Sustainable Development (WSSD), among other meetings, such that the Rio+20 outcome document *The Future We Want*<sup>4</sup> called upon countries to agree to a series of time-bound global objectives and targets building on the 2000 Millennium Development Goals (MDGs). An intensive process served to engage countries and stakeholders, including through international treaty bodies and organizations, to assist in developing the SDGs. These SDGs and their targets now guide the UN, Member States, other international organizations, and stakeholders across all regions of the world towards more sustainable development worldwide. Their substance has been reflected in the Committee's deliberations, and findings to date.

In particular, as expert law and governance reviews prepared by Committee Members in collaboration

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<sup>3</sup>*Transforming our world: The 2030 Agenda for Sustainable Development*, 25 September 2015, UN Doc A/RES/70/1 ("Agenda 2030").

<sup>4</sup>*Report of the United Nations Conference on Sustainable Development*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc A/CONF.216/16. ("The Future We Want")

with the Centre for International Sustainable Development Law (CISDL) and the United Nations Environment Programme (UNEP) have demonstrated, these SDGs and their targets can be linked to the object and purpose of many important international treaties in the field of sustainable development.<sup>5</sup>

The Committee's scoping work to date has, as such, been prepared in line with the newly agreed global SDGs that shape the international sustainable development policy agenda from 2018-2030. This scoping supports analysis of the contents, legal status and application of the rules of international law related to the sustainable management of certain natural resources in these sectoral areas, assessing the practice of States and international organizations (including treaty bodies).

Building on these foundations, Section III of the present Report provides a review that scopes the rules and practices of international law for sustainable resources management, examining in particular the sustainable management of mineral commodities, including nickel, copper, bauxite and rare earths; the sustainable management of forests; and the sustainable management of biological resources. Then, in section IV, the Report considers how the principle of sustainable use of natural resources is being reflected in international law, including innovations among economic law instruments; environmental law instruments; agreements and measures in environmental peacebuilding and post-conflict contexts; and in relation to human and peoples' rights. Further, in Section V, the Report examines how the principle of sustainable use of natural resources is being reflected in the recent decisions of international courts and tribunals. In Section VI, which will be further developed and finalised during meetings of the Committee in the 78<sup>th</sup> Biennial Conference, the Committee then comments on the evolution of international law in relation to sustainable use of natural resources. The final Section VII further outlines the future research agenda of the Committee.

### **III. Scoping Rules & Practices of International Law for Sustainable Resources Management**

The summaries of broader legal scoping studies and surveys that are found in this section examine recent developments in relation to different natural resources, in order to survey the rules of international law for sustainable management in these areas. In particular, building on the previous Report's work on freshwater, energy, marine resources and biodiversity, this section examines international rules and practice relating to sustainable management of mineral commodities, forests and biological resources, with abstracts for further reviews of precious minerals, petroleum energy resources, and land and soil.

In each case, it considers what instruments are proving most effective, and how the rules are changing to guide practices on the ground in different countries towards achieving the sustainable development goals (SDGs).

#### **1. Rules and Practices of International Law for the Sustainable Management of Mineral Commodities, including Nickel, Copper, Bauxite and Rare Earths**

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<sup>5</sup> See MC Cordonier Segger & E Mrema, eds, *The Contribution of International Law, Policy and Governance to the Sustainable Development Goals Issue Briefs* (CISDL & UNEP, 2016). Part II of this Report shares thoughts with, and features, the conclusions of Committee Members and colleagues in these studies.

with Dr Ilaria Espa, Italian Branch; Maximilian Oehl, Swiss Branch; & Professor Damilola Olawuyi, HQ/Qatar<sup>6</sup>

## 1.1 Introduction

This paper summarizes the Committee's survey of the latest developments in and the main challenges for international law in the sustainable management of mineral commodity resources. This exercise is not only necessary in light of Sustainable Development Goal 12 on sustainable consumption and production patterns (SDG 12) but also reflects the explosion of attention to mineral commodities in recent years due to a number of cyclical and structural factors. The paper elaborates on these factors (Section 1.2) with a view to understanding the regulatory challenges created by the issue of sustainable management of mineral commodities. It identifies existing regulatory gaps in international law (Section 1.3) along with obstacles posed by recent relevant jurisprudence, which could impede the sustainable management of mineral commodities (Section 1.4). Finally, the paper looks into some future trends and research priorities in this field (Section 1.5).

## 1.2 Sustainable Management of Mineral Commodities

Discussions over the role of international law for the sustainable management of mineral commodities have gained centrality in recent years as epitomized by SDG 12, which explicitly mentions “sustainable management and efficient use of natural resources” among its core targets. Attainment of this target requires the minimization of the risks inherent in extractive activities and the maximization of their shared economic benefits. Mining activities may indeed carry (and have often carried) negative environmental and social risks on the ground, while at the same time bringing positive economic gains for both home and host States, generating job creation, industrial and infrastructural development, and counteracting social and political inequality.<sup>7</sup> The multi-faceted challenges raised by mineral extraction and exploitation require balancing between the different interests of investors, host countries, local communities and the home states of investing companies or other importing companies to sustainably manage mineral commodities.<sup>8</sup> To this end, this section disentangles a number of sector-specific factors, both cyclical and structural, that explain the complex interplay between mining activities and sustainability.

First, mineral commodities are by definition non-renewable and therefore cannot be regenerated after exploitation.<sup>9</sup> Unsustainable rates of extraction can lead to their exhaustion.<sup>10</sup> Recycling does in principle constitute a viable alternative to over-exploitation but its potential remains untapped due to its inherent economic costs.<sup>11</sup> Second, mineral commodities remain essential to the manufacturing sector,<sup>12</sup> despite the fact that they account for a relatively minor share of the global goods trade and

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<sup>6</sup> The authors are grateful to Marc Bungenberg for the remarks he provided during the elaboration of the initial version of this brief. Moreover, we would like to thank María del Pilar Vanegas Guzman, Alexandra Harrington, Leticia Sakai, Yea-jen Tseng, Friedl Weiss and Frederic Perron-Welch for their comments on a later version.

<sup>7</sup> See e.g., C Bellmann, *Trade and Investment Frameworks in Extractive Industries: Challenges and Options*, E15 Expert Group on Trade and Investment in Extractive Industries – Policy Options Paper. E15Initiative (ICTSD and World Economic Forum, 2016).

<sup>8</sup> E Bürgi Bonanomi, J Wehrli, D Bucher, S Rist, M Giger, I Espa, S Franzi, M Elsig, SR Gelb, M Holzgang, P Dey, F Wettstein, *The Commodity Sector and Related Governance Challenges from a Sustainable Development Perspective: The Example of Switzerland and Current Research Gaps*, WTI Working Paper, 14 July 2015.

<sup>9</sup> New discoveries and technological improvements can upgrade availability prospects of finite mineral resources. European Commission, *Critical Raw Materials for the EU: Report of the Ad-hoc Working Group on Defining Critical Raw Materials*, 30 July 2010, online: [http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/report-b\\_en.pdf](http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/report-b_en.pdf), 14–21.

<sup>10</sup> WTO, *World Trade Report 2010: Trade in Natural Resources*, online: [www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report10\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf), p. 47.

<sup>11</sup> Cutting-edge technologies have increased the recycling rate of many materials as well as their quality, but they are not broadly diffused. Moreover, lag times and dissipation limit the efficacy of recycling. See, e.g. American Geoscience Institute, *Recycling as a source of mineral commodities*, 31 March 2017, online: <https://www.americangeosciences.org/critical-issues/factsheet/recycling-source-mineral-commodities>.

<sup>12</sup> J Korinek & J Kim, “Export Restrictions on Strategic Raw Materials and their Impact on Trade and Global Supply”, in OECD, *The Economic Impact of Export Restrictions on Raw Materials* (OECD Publishing, 2010), 104.

that their value is declining compared with the value of technically sophisticated products.<sup>13</sup> Many are critically important in key economic sectors and, in particular, irreplaceable in new high-tech applications, clean energy generation equipment and components, and environmentally friendly technologies more generally.<sup>14</sup>

Third, many mineral commodities, and particularly ones employed in cutting-edge technologies, are heavily geographically concentrated.<sup>15</sup> For example, in the case of rare earth elements (REE), China is the largest world mine producer by far, accounting for over 81% of global production in 2017, followed by Australia, the Russian Federation, Brazil, Thailand, and India.<sup>16</sup> While the mine production of nickel, copper and bauxite is relatively less concentrated, in all three cases the top-three world mine producers account for either more than or almost half of the world's mine output.<sup>17</sup> Fourth, although mineral commodities are generally used in small quantities in the production of manufactured goods, world demand for many of them has grown in the last decade and is expected to continue to grow, thus exceeding current levels of world production. REE, for instance, are among those critical commodities that are predicted to experience the highest rates of demand growth (more than 8% per year).<sup>18</sup> Technical innovations and diffusion of new applications have a “clearly visible dominance” on future demand patterns.<sup>19</sup>

Against this backdrop, the price of most critical minerals and metals in the international markets has increased, often sharply, in the last few years, leading to what has been called the 2000s ‘supercycle’.<sup>20</sup> This dynamic was a direct consequence of the typical lagged response of supply to demand surges in the mining sector, characterized by high capital intensity and long development lead times and extraction life cycles.<sup>21</sup> The expansion of world demand and the parallel rise in the world price has, however, generated renewed investment interest and engagement on the part of mining companies. Accordingly, even if the commodity boom has ended and mineral commodity prices are now generally on a steady downward trend compared to their peak levels, the physical availability of the vast majority of critical minerals and metals is not in danger.<sup>22</sup>

Finally, the high volatility of mineral commodity prices has exposed resource-rich developing States, namely the traditional world suppliers of mineral commodities, to a commodity dependence path by

<sup>13</sup> M Radetzki, *A Handbook of Primary Commodities in the Global Economy* (Cambridge University Press, 2010), 10.

<sup>14</sup> Among others, REE elements are used for permanent magnets used in wind turbines and electric vehicles, and the phosphors used in fluorescent lighting; copper is key for the production of efficient electric motors; and nickel is used for carbon capture and storage technologies, solar power tower systems, and second generation biofuels. See Korinek & Kim, “Export Restrictions on Strategic Raw Materials” 106.

<sup>15</sup> For a general overview, see I Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge University Press, 2015), 23-40.

<sup>16</sup> 15.5%, 2.3%, 1.5%, 1.2%, 1.2% respectively; USGS Mineral Commodities Summaries 2018, 132. Other minor producers include Vietnam and Malaysia, but their production hovers around 0.2% of the global mine production. In recent years the US resumed production of REE following the introduction of very stringent export restrictions by China. The US accounted for around 6% of total mine production until 2015, when Molycorp, at the time the only producer of REE in the US, filed for bankruptcy in 2015. Amanda Kay, “Rare Earths: 8 Top Countries”, *Investing News*, 3 April 2018, online: <https://investingnews.com/daily/resource-investing/critical-metals-investing/rare-earth-investing/rare-earth-producing-countries/>.

<sup>17</sup> Australia, China and Guinea cumulatively account for 65.4% of bauxite's total mine production (27.7%, 22.7% and 15%, respectively); Chile, Peru and China for 48.5 % of copper's global mine production (27%, 12.1% and 9.4%, respectively); and Indonesia, the Philippines and Canada for 40.4 % of nickel's global mine production (19.4%, 11% and 10%, respectively). USGS Mineral Commodities Summaries 2018, 31, 53, 113. The current geographical concentration of primary production does not always reflect the global distribution of reserves and, therefore, possible future trends in world production. Brazil, Vietnam and the Russian Federation account together for more than half of the reserves of REE elements (18.3%, 18.3% and 15%, respectively) compared to China's 36.7%; similarly, Guinea holds the largest reserves of REE elements and bauxite, respectively, and Australia is the richest in nickel. *Ibid.*, 21, 113, 132.

<sup>18</sup> European Commission, *Report on Critical Raw Materials for the EU: Report of the Ad-hoc Working Group on Defining Critical Raw Materials*, May 2014, online: [http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/crm-report-on-critical-raw-materials\\_en.pdf](http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/crm-report-on-critical-raw-materials_en.pdf), 42.

<sup>19</sup> *Ibid.*

<sup>20</sup> M Farooki & R Kaplinsky, *The Impact of China on Global Commodities Prices. The Global Reshaping of the Resource Sector* (Routledge Studies in Global Competition, 2012), 117–39; Bellmann, *Trade and Investment Frameworks in Extractive Industries*, 7.

<sup>21</sup> G Peeling, P Stothart & B Toms, “Increasing Demand for and Restricted Supply of Raw Materials”, in OECD, *The Economic Impact of Export Restrictions on Raw Materials* (OECD Publishing, 2010), 156-159; Korinek & Kim, “Export Restrictions on Strategic Raw Materials”, 104.

<sup>22</sup> In a few cases, however, situations of large or small deficits (e.g., in the case of heavy REE elements) are predicted up to 2020. European Commission, *Report on Critical Raw Materials for the EU*, 35.

frustrating attempts at economic diversification.<sup>23</sup> An increasing number of resource-abundant developing States have in turn gradually introduced trade policy instruments in the attempt to encourage industrial base growth through the exportation of greater volumes of higher value-added products, namely export restrictions (taxes, quotas and other quantitative restrictions such as licensing schemes) aimed at subsidizing local strategic downstream sectors.<sup>24</sup> The use of such measures on the part of large suppliers has generated unprecedented tension between newly industrializing resource-rich economies and import-dependent Western countries, leading to three major World Trade Organization (WTO) disputes.<sup>25</sup>

Before turning to the role that recent international jurisprudence has played in addressing issues of sustainable management of mineral resources, however, the next section will review the international law instruments that are currently promoting a more sustainable management of mineral resources. Although there are few specific references to mineral exploration and exploitation in international legal instruments, many international treaties, conventions and declarations deal with subjects that are only at a first glance peripheral to the development of natural resources and that have thus direct implications for mining related activities in light of their social costs and environmental impacts.

### 1.3 Contributions of International Law and Governance to the Sustainable Management of Mineral Commodities

Generally speaking, comparatively few rules stemming from international law and governance deal with (mineral) commodities in a specific manner. Rather, governance challenges related to commodity extraction and trade are oftentimes only touched upon somewhat ‘incidentally’ by several fields of law, such as international trade, environmental or human rights law.<sup>26</sup> There are several rules dealing with *mineral* commodities *indirectly*. These norms can be divided into two groups – one comprising norms that concern mineral commodities due to their *applications/end usages* and another of provisions regulating the *general effects of mining*. As to the former, one prominent usage of mineral commodities concerns the production of renewable energy technologies.<sup>27</sup> As to the latter, many international law rules play a role for concerning the *general effects of mining* and mining-related business activities such as refinement, and construction of pipelines, which are manifold in their socio-ecological impacts.

In general, the principle of permanent sovereignty over natural resources allocates the rights over its commodities, including their extraction, to the respective nation State. This sovereign right is limited

<sup>23</sup> For an account of the importance of diversifying the export base, see R Hausmann & D Rodrik, “What You Export Matters”, *Journal of Economic Growth* 12 (2007), 1. The ‘resource curse’ theory is also based on the premise that mineral-dependent countries may be locked into a path of slower economic growth due to the inverse association between natural resource abundance and economic growth. See J Sachs and A Warner, “Natural Resources and Economic Development: The Curse of Natural Resources”, *European Economic Review* 45 (2001), 827. Somewhat similarly, the so-called Dutch disease predicts that countries that excessively rely on mineral export earnings in periods of high commodity prices will experience a shrinkage of their manufacturing sector. G Davies, “Learning to Love the Dutch Disease: Evidence from the Mineral Economies”, *World Development* 23 (1995), 1765.

<sup>24</sup> B Fliess, C Arriola & P Liapis, “Recent Developments in the Use of Export Restrictions in Raw Materials Trade”, in OECD, *Export Restrictions in Raw Materials Trade: Facts, Fallacies and Better Practices* (OECD Publishing, 2014), 26.

<sup>25</sup> See Espa, *Export Restrictions on Critical Minerals and Metals*, 127-227.

<sup>26</sup> The lack of specific regulation that is both mindful of the significance of commodities, *inter alia* in a North-South trade and development context, and provides targeted legal responses to commodity-related governance challenges, is in itself an impediment when it comes to making the commodity-sector work for the sustainable development mainly of host states. While several norms of international law stemming from *inter alia* human rights, environmental and world trade law, are already – mostly *indirectly* – regulating commodity activities, they have not yet been conceptualised around this specific topic. Further reflections are provided in M Oehl, *Global Commodity Governance* (forthcoming, 2019).

<sup>27</sup> For instance, bauxite is the main ore for the production of aluminium, which is essential for reducing the energy consumption of, for example, electric cars. These cars rely on nickel-based alnico magnets as main components of their electrical motors. On further usages cf. section 1.2 above. In this connection, international hard law instruments such as the UNFCCC, the Kyoto Protocol and the Paris Agreement may be relevant. The *Statute of the International Renewable Energy Agency* (IRENA), which *inter alia* seeks to foster knowledge transfer, international cooperation and aims to become a ‘centre of excellence’ in the interest of supporting the proliferation of ‘renewables’, may also have an impact on the use of several of the mineral commodities named above; cf. S Bruce & S Stephenson, *Contributions of International Law to SDG 7 on Sustainable Energy for All*, Issue Brief (CISDL & UNEP, 2016), 2.

where mining activities lead to human rights violations.<sup>28</sup> In such cases, for instance, the *Universal Declaration of Human Rights*, the *International Covenant on Economic and Social Rights* and the *International Covenant on Civic and Political Rights* apply.<sup>29</sup> Additionally, environmental protection norms, the obligation not to cause transboundary harm, to carry out environmental impact assessments or the principle of preventive action, to name a few, as laid out in texts such as the Stockholm and Rio Declarations, may be applicable whenever mining activities have detrimental effects for the environment.<sup>30</sup>

Turning to rules in international law and governance *specifically* dealing with the sustainable management of mineral commodities, it must be noted that formerly so-called *International Commodity Agreements* had been intermittently put in place, mostly in order to balance market prices and to establish a forum for constant dialogue between producing and consuming countries.<sup>31</sup> However, international law today still provides for rules specifically addressing the management of mineral resources, such as norms contained in the *Convention on the Regulation of Antarctic Mineral Resource Activities* (CRAMRA) and in the *United Nations Convention on the Law of the Sea* (UNCLOS) respectively. CRAMRA aims to ensure that mineral resource activities are conducted in a manner that does not significantly harm the environment, defines mineral resources as “all non-living natural non-renewable resources, including fossil fuels, metallic and non-metallic minerals”, and seeks to ensure that mineral resource activities are conducted in a manner that does not significantly harm the environment.<sup>32</sup> Likewise, the UNCLOS provides a specific regime for the sourcing of mineral commodities that occur on the seabed outside of national jurisdiction (including polymetallic nodules, polymetallic sulphides and ferromanganese crusts).<sup>33</sup> Arts. 150 ff. UNCLOS set out an elaborate

<sup>28</sup> Cf. UN General Assembly resolution 1803 (XVII) of 14 December 1962, *Permanent Sovereignty over Natural Resources*, at Para. 1, according to which permanent sovereignty “must be exercised in the interest [...] of the well-being of the people of the State concerned.” The principle itself exhibits a human rights dimension according to common Arts. 1(2) ICCPR and ICESCR, which *inter alia* gives rise to a right to water, cf. CESCR General Comment No. 15, UN Doc E/C.12/2002/11 of 20 January 2003, Para. 7; cf. also generally H-G Dederer, “Rohstoffausbeutung, -bewirtschaftung und -verteilung aus der Sicht des allgemeinen Völkerrechts” in D Ehlers, C Herrmann, H-M Wolfgang & J Schröder, eds, *Rechtsfragen des internationalen Rohstoffhandels* (Recht und Wirtschaft, 2012). Since, by ratifying respective international agreements, states have usually created these constraints themselves, they should be referred to as ‘self-imposed limitations’, see M Oehl, *Global Commodity Governance*, which builds on this general structure.

<sup>29</sup> Particular human rights that are frequently relevant in a commodity-mining context include labour rights, land rights, the right to information, the right to basic needs, and the right to development amongst others. See M Spohr, *Human Rights Risks in Mining: A Baseline Study*, (MPFPR/BGR: 2016, online: [https://www.bmz.de/rue/includes/downloads/BGR\\_MPFPR\\_2016\\_Human\\_Rights\\_Risks\\_in\\_Mining.pdf](https://www.bmz.de/rue/includes/downloads/BGR_MPFPR_2016_Human_Rights_Risks_in_Mining.pdf) (accessed January 2017).

<sup>30</sup> See Stockholm Declaration, Principle 21 and Rio Declaration, Principle 2. Many of these obligations also translate into ‘soft’ counterparts of pertinence to business actors. Corporate responsibility guidelines (e.g. the UN Guiding Principles, the UN Global Compact, the OECD Guidelines for Multinational Enterprises) seek to increase the compliance of private actors and apply in the commodity sector – a field traditionally dominated by large transnational corporations, cf. Berne Declaration, ed, *Rohstoff: Das gefährlichste Geschäft der Schweiz* (Salis Verlag, 2012). These are further supplemented by ‘soft’ standards designed for the mining sector, e.g. the Africa Mining Vision elaborated by the African Union, online: [http://www.africaminingvision.org/amv\\_resources/AMV/Africa\\_Mining\\_Vision\\_English.pdf](http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf). Many of these standards result from advocacy by either civil society (e.g. the Alliance for Responsible Mining that awards the ‘Fairmined’ label); producer associations, such (e.g. Towards Sustainable Mining initiative in Canada), online: <http://mining.ca/towards-sustainable-mining>; or intergovernmental efforts such as the Extractive Industries Transparency Initiative, online: <https://eiti.org/>.

<sup>31</sup> With regard to minerals, agreements included the treaty creating the International Tin Council, the World Copper Agreement or the International Uranium Cartel. See IA Mallory, “Conduct Unbecoming: The Collapse of the International Tin Agreement”, *American University International Law Review* 5 (1990), 3, 835; on the International Uranium Cartel see R Pikna Jr, “The Uranium Cartel Saga-Yellowcake and Act of State: What Will Be Their Eventual Fate”, *Case Western Reserve Journal of International Law* 12 (1980), 3, 592-594. None of these agreements are in force today. As demonstrated by the financial fallout of the International Tin Council, most of these agreements and their market-interventionist intentions conflicted with the liberalization approach to the global trade system, which witnessed a major intensification in the 1980s. S Chandrasekhar, “Cartel in a Can: The Financial Collapse of the International Tin Council”, *Northwestern Journal of International Law & Business* 10 (1989) 2, 330-332. Consequently, most of their operative provisions were vacated, and they now exist as fora for exchanges on best practices in trade and extraction of the specific commodity. F Weiss, “Internationale Rohstoffmärkte” in C Tietje, ed, *Internationales Wirtschaftsrecht* 2<sup>nd</sup> edn. (De Gruyter, 2015), Paras. 6-25; M Desta, “Commodities, International Regulation of Production and Trade”, *Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2010), Para. 27.

<sup>32</sup> For that purpose – and in order “to ensure that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord”, according to Art. 2(1) CRAMRA – it establishes a procedure for the adoption of so-called Management Schemes applicable to respective ‘blocks’ in which mineral resources are found. See its institutional structure as laid out in its Arts. 18 ff. as well as the provisions regulating the exploration regime, Arts. 39ff. However, lacking ratification of any of the 19 States that signed the CRAMRA, it has never entered into force. Instead, the *Protocol on Environmental Protection to the Antarctic Treaty* has been adopted in 1998.

<sup>33</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982 (in force 16 November 1994), 1833 UNTS 3 (“UNCLOS”). See online: <https://www.isa.org.jm/mineral-resources/55>; polymetallic nodules contain mainly manganese and lower concentrations of nickel, copper and cobalt; Sulphides contain copper, zinc, lead, gold and silver; ferromanganese crusts are of a composition similar to polymetallic nodules, yet contain a higher percentage of cobalt, some platinum and REE elements.

mechanism governing the development of the Area's (mineral) resources. Art. 150 UNCLOS postulates that all activities “be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries...”<sup>34</sup> and thus overtly seeks to strike a balance between onshore producers and consumers of the minerals sourced in the Area. Art. 151(2)ff. UNCLOS establishes specific production policies for nickel, copper, cobalt and manganese.<sup>35</sup>

Apart from these agreements, several intergovernmental fora deal with mining of mineral commodities, most of them created under the framework or in connection with the UN or the United Nations Conference on Trade and Development (UNCTAD) respectively.<sup>36</sup> Furthermore, standards and fora either addressing or established by private actors complete the picture of transnational mineral commodity governance.<sup>37</sup> The International Council on Mining and Metals provides general guidance on best practices of sustainable commodity extraction, but also elaborates specific strategies for the effective recycling of metals.<sup>38</sup> Further examples of standards created by the private sector include the Global Acid Rock Drainage (GARD) Guide<sup>39</sup> as well as the International Tin Supply Chain Initiative.<sup>40</sup> Lastly, rules governing mineral commodities specifically can also be found within the set of norms dealing with international waste management and recycling such as the Basel Convention (applying to copper and zinc compounds)<sup>41</sup> and Minamata Convention on Mercury (aiming to reduce release, usage and emissions of mercury and thus impacts the sourcing of cinnabar, the main mercury ore).<sup>42</sup>

In sum, international law and governance contribute to the sustainable management of mineral commodities in many ways, but often only as a side effect during the pursuit of other regulatory purposes. Nonetheless, specific rules that address challenges related to the extraction and trade of mineral commodities are increasingly being elaborated in both private and intergovernmental fora.<sup>43</sup>

<sup>34</sup> See in this context also Art. 151(1)(a) UNCLOS: “Without prejudice to the objectives set forth in article 150 and for the purpose of implementing subparagraph (h) of that article, the Authority, acting through existing forums or such new arrangements or agreements as may be appropriate, in which all interested parties, including both producers and consumers, participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, at prices remunerative to producers and fair to consumers. All States Parties shall cooperate to this end.”

<sup>35</sup> Yet, these provisions were effectively replaced by Sect. 6 of the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* of 10 December 1982, which bases exploitation activities in the Area on the principles of the GATT and other WTO agreements. Desta, “Commodities, International Regulation of Production and Trade”, Para. 39.

<sup>36</sup> Examples include the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), the International Lead and Zinc Study Group (ILZSG), the International Nickel Study Group (INSG), and the International Copper Study Group (ICSG). The IGF pursues the aim to enhance national governments' capacities for good governance in the mining sector with the overall objective to achieve their respective sustainable development targets, and has adopted a Mining Policy Framework which identifies good governance best practices, online: <http://igfmining.org/mining-policy-framework/> The respective ‘study groups’ were mainly created by UN Member States and aim to provide a forum for regular exchange, *inter alia*, of continuous information regarding supply and demand of the commodity in question including their likely development, and for identifying alternative solutions to malfunctions of the global trade system. The ILZSG therefore aims to ensure the largest possible degree of market transparency through e.g. the ‘monthly publication of statistics, market research and targeted economic studies’. The INSG and the ICSG pursue similar objectives by similar means for nickel and copper respectively.

<sup>37</sup> The OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* likewise primarily applies to diamonds and other precious minerals such as gold and silver. See the abstract by I Feichtner and G-J Kounga, “Rules and Practices of International Law for the Sustainable Management of Precious Mineral Resources, including Silver, Gold & Diamonds” included at Sect. III.5 of this Report.

<sup>38</sup> See online: <https://www.icmm.com/en-gb/publications/demonstrating-value-a-guide-to-responsible-sourcing>; and <https://www.icmm.com/en-gb/news/metals-industry-publishes-declaration-on-recycling-for-sustainable-development>.

<sup>39</sup> Online: [http://www.gardguide.com/index.php?title=Main\\_Page](http://www.gardguide.com/index.php?title=Main_Page).

<sup>40</sup> Online: <https://www.itri.co.uk/itsci/itsci-project-overview/itsci-project-overview>.

<sup>41</sup> *Convention on the Control of Transboundary Hazardous Wastes and their Disposal*, 22 March 1989 (in force 5 May 1992), 1673 UNTS 126 (“Basel Convention”). See on its application to further minerals especially Annexes I, VIII and IX.

<sup>42</sup> *Minamata Convention on Mercury*, 10 October 2013 (in force 16 August 2017). However, since mercury is particularly used in gold production, this agreement is rather important too. See I Feichtner and G-J Kounga, “Rules and Practices of International Law for the Sustainable Management of Precious Mineral Resources”. Yet, mercury also occurs as a by-product in the sourcing of other (non-precious) minerals; see the statement by the ICMM on mercury risk management, online: <https://www.icmm.com/en-gb/members/member-commitments/position-statements/mercury-risk-management-position-statement> (accessed January 2017). On the Minamata Convention see also M Gehring, F-K Phillips and W Shipley, *SDG 12 on Ensuring Sustainable Consumption and Production Patterns: Contributions of International Law, Policy and Governance*, Issue Brief, (CISDL & UNEP, 2016), 5-6.

<sup>43</sup> This emerging scheme requires further legal analysis in order to both understand the interplay of the various norms as well as to detect gaps in the regulatory patchwork. In this respect, see the preliminary work by L Rüttinger, L Griestop and C Scholl, “Umwelt- und Sozialstandards bei der

## 1.4 Legal Obstacles for the Sustainable Management of Mineral Commodities

As explained in section 1.2, one main legal obstacle facing the implementation of SDG 12 on sustainable production and consumption patterns is the lack of multilateral agreements dealing specifically with sustainable management of mineral commodities. Conflict may arise when States acting in the name of sustainable management of mineral commodities commit violations of international obligations assumed under targeted international regimes that only incidentally touch upon governance challenges related to commodity exploitation and trading. An archetypal illustration of such a scenario is the tension between the multilateral trading system and the developing country members making use of export restrictions (mainly export taxes, bans and quotas) on mineral commodities. Such measures have proliferated in recent years, peaking with the commodity boom of the 2000s.<sup>44</sup> Resource-rich countries have consistently defended the right to use such instruments as legitimate sustainable development tools in accordance with the principle of sovereignty over natural resources.<sup>45</sup> Net importers have contested such restraints as beggar-thy-neighbour instruments that exert pressure on world prices and supply.<sup>46</sup> Against this backdrop, two major WTO disputes, *China – Raw Materials* and *China – Rare Earths*, have targeted China's export restrictions (mainly duties and quotas) on various mineral commodities,<sup>47</sup> and a third (*China – Raw Materials II*) is pending.<sup>48</sup> So far, the Appellate Body (AB) has condemned the measures.

China's export duties were found in breach of Paragraph 11.3 of China's Accession Protocol, according to which it assumed a general obligation to eliminate export duties, except on 84 HS 8-digit products listed in Annex 6 to the Protocol. According to the AB, violations of the export duty commitments could not rely on Article XX GATT defences due to the lack of an "objective link" to the GATT therein.<sup>49</sup> In other words, GATT exceptions incorporating sustainable management considerations applicable to mineral resources, such as Article XX(b) or Article XX(g), are *a priori* not available to China to justify export duties, despite being comparatively less restrictive than other types of export restrictions.<sup>50</sup> Despite this, the WTO adjudicators elaborated on the room left to WTO Members for sustainable management of mineral resources, with particular reference to the conservation exception under Article XX(g). They accepted that the term 'conservation' in Article XX(g) incorporated the notion of exercising rights over natural resources in the interests of a Member's economic and sustainable development, and accordingly recognized the right of Members to design

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Metallgewinnung: Ergebnisse der Analyse" in 42 Standards und Handlungsansätzen – UmSoRes-Abschlussbericht Teil 2' (adelphi research, 2016). The Bilateral Dialogue on Raw Materials established under Art. 25.4 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU may further contribute to this gradual proliferation of commodity-specific standards.

<sup>44</sup> Espa, *Export Restrictions on Critical Minerals and Metals*, 1-34. The mineral commodities discussed in this scoping brief have all been subject to at least one type of export restrictive measure in one or more than one form by at least one large supplier. Ibid, 67-98.

<sup>45</sup> See GATT Doc MTN.GNG/NG2/W/40, 8 Aug. 1989; Radetzki, *A Handbook of Primary Commodities*, 207-10; WTO Doc WT/MIN(11)/ST/19, 16 Dec. 2011, cited in WTO Doc WT/TPR/S/277, 13 Feb. 2013, 96; WTO Doc WT/TPR/M/249/Add.2, 28 Oct. 2011, 45; WTO Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (hereinafter, *China – Rare Earths*), WT/DS431/R/, WT/DS432/R/, WT/DS433/R/Add.1, adopted 29 Aug. 2014, as modified by Appellate Body Reports WT/DS431/AB/R, WT/DS432/AB/R WT/DS433/AB/R, Paras. 7.364-615.

<sup>46</sup> Fliess et al., 15-22; Fung & Korinek, 34.

<sup>47</sup> In *China – Raw Materials*, the measures at issue were imposed on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous and zinc. In *China – Rare Earths* the targeted commodities were REE elements, tungsten and molybdenum.

<sup>48</sup> This time the challenged measures are China's export duties imposed on various forms of antimony, chromium, cobalt, copper, ferro-nickel, graphite, lead, magnesia, talc, tantalum and tin, and the export quotas imposed on antimony, indium, magnesia, talc and tin. See online: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds508\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm) and [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds509\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds509_e.htm) (accessed January 2018).

<sup>49</sup> AB Report, *China–Raw Materials*, Para. 293; AB Report, *China–Rare Earths*, Para. 5.65. For a full account, see Espa, *Export Restrictions on Critical Mineral and Metals*, 145-163.

<sup>50</sup> Under Article XX (b), WTO Members may justify measures "necessary to protect human, animal or plant life or health"; and under Article XX (g), they may justify measures "related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption", in derogation of GATT obligations. As per the *chapeau* of Article XX, any such measure cannot be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

their conservation programmes based on “their own assessment of various, sometimes competing, policy considerations and in a way that responds to their own concerns and priorities”.<sup>51</sup>

However, they clarified that, while ‘conservation’ policies may take sustainable economic development into account, measures that have a ‘sustainable economic development’ objective, such as supply management, cannot be pursued under the rubric of ‘conservation’ within the meaning of Article XX(g) GATT.<sup>52</sup> In other words, Article XX(g) cannot be “stretched” into an exception protecting measures that pursue industrial policy goals.<sup>53</sup> The Panel’s conclusion lies in the premise that the exercise of sovereignty over natural resources cannot be intended to enable Article XX(g) to allow a WTO Member to allocate the available stock of a product between foreign and domestic consumers because, once extracted and in commerce, natural resources are subject to WTO law.<sup>54</sup> In other words, under WTO law Members are free to decide to which extent they want to authorize mineral exploitation (e.g. through the granting of mining concessions) within their territories but, once reserves are mined, mineral commodities (i.e. tradable mine output) are treated just like any other goods for the purpose of WTO law application.<sup>55</sup> Importantly, however, the Panel specified that the fulfilment of Article XX(g) parameters should be assessed on a case-by-case basis in light of the factual circumstances of each dispute. It also reassured that the rejection of China’s arguments did not stem from an absolute prohibition on using export quotas as conservation policy instruments.<sup>56</sup> Rather, it posited that Article XX(g) GATT “should not be understood as suggesting that export quotas can never relate to conservation”.<sup>57</sup>

Apart from export restrictions, further legal obstacles can arise that impede the sustainable management of mineral commodities. The lack of commodity-specific regulatory approaches has already been briefly touched upon above.<sup>58</sup> For instance, a certain methodological ambiguity exists regarding the term ‘mineral commodity’ due to the lack of a clear, consistent definition.<sup>59</sup> This fact alone may render effective legal responses to the sustainable management challenge somewhat more difficult. Moreover, particular provisions stemming from the respective domestic legal order can create legal obstacles for the sustainable management of mineral commodities.<sup>60</sup> Investor-State, contracts for instance, can entail provisions, such as stabilisation clauses, which may impede the pursuit of sustainable development objectives.<sup>61</sup> Also weak, missing or unimplemented anti-corruption laws of

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<sup>51</sup> Panel Report, *China–Rare Earths*, Para. 7.459.

<sup>52</sup> *Ibid.*, Para. 7.460. The Panel reiterated that “measures adopted for the purpose of economic development ... are not ‘measures relating to conservation’ but measures relating to industrial policy”.

<sup>53</sup> *Ibid.*, Paras. 7.451–2 and 7.459–60.

<sup>54</sup> Panel Report, *China–Rare Earths*, para. 7.462. As noted by the Panel in *China–Raw Materials*, a State’s sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. Nor ... has China or any other WTO Member ‘given up’ its right to adopt export quotas or any other measure in pursuit of conservation. China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources. *Ibid.*, Para. 7.270.

<sup>55</sup> Accordingly, the Panel deliberately avoided addressing issues of ownership, reflecting general consensus that WTO rules do not apply to natural resources in their natural state. See A. Yanovich, ‘WTO Rules and the Energy Sector’, in Y Selivanova, ed, *Regulation of Energy in International Trade Law* (Kluwer Law International, 2011), 3. In other words, internationally traded natural resources are treated as any other goods in WTO law.

<sup>56</sup> *Ibid.*, Paras. 7.291–2.

<sup>57</sup> *Ibid.*, Para.5.161, citing Panel Report, *China–Rare Earths*, Para. 7.293.

<sup>58</sup> See introductory paragraph of section 1.2 above.

<sup>59</sup> See on the same issue regarding terms like ‘modern energy’ or ‘modern energy services’ Bruce & Stephenson, *Contributions of International Law to SDG 7 on Sustainable Energy for All*, 7-8.

<sup>60</sup> See the references to ‘domestic measures’ *ibid.*, 11-13, and in Gehring, Phillips & Shipley, *SDG 12 on Ensuring Sustainable Consumption and Production Patterns*, 7.

<sup>61</sup> E Oshionebo, “Stabilization Clauses In Natural Resource Extraction Contracts: Legal, Economic And Social Implications For Developing Countries”, 10 *Asper Rev. Int’l Bus. & Trade L.* 1, 1-33; A Sheppard & A Crockett, “Are Stabilization Clauses A Threat To Sustainable Development?” in MC Cordonnier Segger, M Gehring & A Newcombe, eds, *Sustainable Development in World Investment Law* (Wolters Kluwer, 2011), 333-350.

various kinds can hinder the sustainable allocation of exploitation rights and therefore the use of mineral commodity wealth for the sustainable development of the host country.<sup>62</sup>

In this respect, the lack of a licensing procedure that complies with internationally acclaimed good governance standards (particularly transparency and non-discrimination) as well as with the best practice guidelines elaborated by various civil society institutions can be a major obstacle for the sustainable management of mineral commodity exploitation.<sup>63</sup>

## 1.5 Future International Law Research on Sustainable Management of Mineral Commodities

As demonstrated above, there is still much room for research on international law as applicable to mineral commodities. While rules that specifically address mineral commodities are now increasingly being drafted in private as well as intergovernmental fora, the overall field of international commodity law is barely identified and conceptualised as such. Future research could thus revolve around the elaboration of a coherent legal framework for commodity activities, which avoids fragmentation and effectively fosters the sustainable management of (mineral) commodities. In this light, a consistent definition of the key terms could be a first step.

Moreover, with regards to filling the regulatory gaps touched upon in this review, the question remains whether the norms elaborated through dispute settlement bodies and other jurisprudence will suffice, or whether an amendment of existing rules or even the introduction of new rules will be necessary. This need may increase in the case of clashes or inconsistencies, which could arise due to diverging rulings by dispute settlement bodies and courts. Further aspects of future research could revolve around differences between minerals and their relevance for regulatory approaches. For instance, separate regulatory frameworks could be designed for recyclable and non-recyclable commodities respectively. Finally, interfaces of the law as applicable to mineral commodities with other legal regimes would be worthwhile exploring in more detail.

## 2. Rules and Practices of International Law for the Sustainable Management of Forests

*with Professor Christina Voigt, Norwegian Branch, Professor Konstantia Koutouki, Canadian Branch, Mr Frederic Perron-Welch, Canadian Branch & Mr Erick Kassongo Kalonji, HQ/DRC*

### 2.1 Introduction

Forests contain most of the world's terrestrial biodiversity,<sup>64</sup> and perform a host of environmental functions including soil formation, nutrient cycling, air quality control, carbon storage, water quality and availability, and protect against desertification, salinization, landslides, flooding and drought.<sup>65</sup> Forests also provide a range of socio-economic benefits, supplying food, timber, fuel wood, biomass, fibres and non-timber forest products, and providing livelihoods for more than a billion people, and have numerous spiritual and aesthetic benefits.<sup>66</sup> Taken together, these services underscore the

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<sup>62</sup> On the benefits and challenges of licensing and contractual regimes for the allocation of resource rights, cf. extensively D Kienzler et al., *Natural Resource Contracts as a Tool for Managing the Mining Sector*, study commissioned by the Bundesanstalt für Geowissenschaften für Rohstoffe (BGR), June 2015, online: <http://ccsi.columbia.edu/files/2015/07/Natural-Resource-Contracts-as-a-Tool-for-Managing-the-Mining-Sector.pdf> (accessed April 2018).

<sup>63</sup> See fundamentally on the related term of 'sustainable procurement' L Preuss, "Addressing Sustainable Development Through Public Procurement: the Case of Local Government", *Supply Chain Management: An International Journal*, 14 (2009), 3, 213-223.

<sup>64</sup> Food and Agriculture Organization (FAO), *Fact Sheet: Focus Area - Sustainable Forest Management*.

<sup>65</sup> United Nations Economic Commission for Europe (UNECE), *Payments for Forest-related Ecosystem Services: What role for a Green Economy?* Background Paper, Geneva 4-5 July 2011, 4; FAO, *Sustainable forest management*, online: <http://www.fao.org/forestry/sfm/en/>.

<sup>66</sup> Collaborative Partnership on Forests (CPF), *SFM Fact Sheet I: SFM and the multiple functions of forests*, 4. FAO, *Focus Area, supra* n64 .

important need for sustainable forest management (SFM) at the local, subnational, national and global level.<sup>67</sup> The threat to forests from uncontrolled degradation and land conversion means that their sound management and conservation is of international concern.<sup>68</sup> References to forests are rather limited in the 2030 Agenda for Sustainable Development, but references are made in the Sustainable Development Goals (SDGs), namely in Goal 15, which aims to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss. Forests are also relevant to SDG 1 (income from forest products); SDG 13 (carbon capture and storage); SDG 3 (medicinal plants); SDG 2 (nourishment from wild fruit and game); and SDG 6 (freshwater for drinking and irrigation). Deforestation undermines the achievement of SDG 3 (respiratory illness due to forest fires); SDG 1 (increased vulnerability to extreme weather); SDG 2 (reduction in rainfall and loss of crop pollinators); SDG 7 on energy (sedimentation of hydroelectric dams); SDG 9 on infrastructure (damages from landslides and floods); and SDG 14 (loss of coastal fisheries habitat).

## 2.2 Contributions of International Law and Governance to the Sustainable Management of Forests

Sustainable forests management provides benefits to people and the environment through sustainable policies and practices that take into account the ecological and socio-economic functions of forests,<sup>69</sup> supporting livelihoods and income generation, limiting forest degradation and deforestation, and enhancing ecosystem services.<sup>70</sup> There is a progressive shift towards SFM approaches, but conventional forest management still remains the norm.<sup>71</sup> The international framework governing forests is complex as no single treaty on forests has been adopted, nor does any individual treaty address all aspects of forest ecosystems.<sup>72</sup> Many developments have occurred since the 1992 United Nations Conference on Environment and Development (UNCED), including binding and non-binding international instruments aimed at regulating forestry-related activities.<sup>73</sup>

### *Rio Forest Principles*

At UNCED, governments adopted the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*<sup>74</sup> (Forest Principles), which provide a policy platform to promote forest management that balances environment and development, recognizing the common concern of States over the global functions of forests, and national regulatory jurisdiction.<sup>75</sup> They provide a common basis for action at the national, regional, and international levels and have played a significant role in the formulation of forest policies, as well as political and legal developments.<sup>76</sup> After 15 years of negotiations, the Forest

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<sup>67</sup> CPF, *Forest related targets for integration in sustainable development goals, Summary*, 2014. FAO, *Focus Area*, *supra* n64; SFM is defined by the UN as a “dynamic and evolving concept, which aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations”.

<sup>68</sup> UN General Assembly, *Non-legally binding instrument on all types of forests*, UN Doc A/RES/62/98.

<sup>69</sup> FAO, *Focus Area*, *supra* n64; CPF, *Fact Sheet I*, *supra* n66.

<sup>70</sup> FAO, *Focus Area*, *supra* n64.

<sup>71</sup> *Ibid.*

<sup>72</sup> FAO, *Legislative Study: Law and Sustainable Development since Rio - Legal Trends in Agriculture and Natural Resource Management - Chap. 10 Forestry*, (FAO Legal Office, 2002); BMGS Ruis, “No Forest Convention But Ten Tree Treaties” in *Global Conventions Related To Forests*, Unasylva 52.206 (2001), 3-13.

<sup>73</sup> *Ibid.*; FAO, *Legislative Study - Forestry*, *supra* n72.

<sup>74</sup> UN General Assembly, *Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests*. UN Doc A/Conf. Vol. 151.

<sup>75</sup> UN, *The World Conferences: Developing Priorities for the 21st Century: Earth Summit*, UN Briefing Papers, 1997, 2; BH Desai, “Forests, International Protection”, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012), 192, Para. 9.

<sup>76</sup> DA Gilmour, PB Durst & K Shono, “Changing Institutional Mechanisms for Consultation and Dialogue In Forestry” in *Reaching Consensus: Multi-stakeholder processes in forestry: experiences from the Asia-Pacific region*, (FAO Regional Office For Asia And The Pacific, 2007); BH Desai, “Forests, International Protection”, *ibid.*, 193, Para. 17.

Principles were supplemented by the *Non-Legally Binding Instrument on All Types of Forests* (NLBI, renamed the UN Forest Instrument in 2016).<sup>77</sup>

#### *UNFCCC, Kyoto Protocol and Paris Agreement*

The UNFCCC aims to stabilize greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system.<sup>78</sup> As an aspect of climate action, the Parties aim to slow, halt and reverse the loss of forest cover and carbon loss, collectively and considering national circumstances.<sup>79</sup> To this end, UNFCCC calls for all Parties, taking into account their common but differentiated responsibilities and respective capabilities, to promote sustainable management, and to promote and cooperate in the conservation and enhancement of sinks and reservoirs, including biomass, forests, oceans and other terrestrial, coastal and marine ecosystems.<sup>80</sup> REDD+ has been developed to incentivize forest-based mitigation action in developing countries, aiming to reduce GHG emissions by providing finance for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, SFM and enhancement of forest carbon stocks.<sup>81</sup> It generally follows three phases linked to preparation, implementation, and payment for results.<sup>82</sup> Implementing Parties must develop a national strategy or action plan; a national forest reference emission level and/or forest reference level or, as an interim measure, subnational forest reference emission levels and/or forest reference levels; a robust and transparent national forest monitoring system for monitoring and reporting; and a system for providing information on how safeguards are being addressed and respected throughout implementation, while respecting sovereignty.<sup>83</sup> The Warsaw Framework for REDD+, building on earlier COP decisions, sets out the guidance for REDD+.<sup>84</sup> In order to ensure that REDD+ actions do not have negative consequences and deliver positive co-benefits, safeguards have been set up.<sup>85</sup> The safeguards require, *inter alia*, that actions respect the knowledge and rights of Indigenous Peoples and members of local communities (IPLC); the full and effective participation of relevant stakeholders; are consistent with the conservation of natural forests and biodiversity, ensuring that actions are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services; enhance other social and environmental benefits, and address the risks of reversals; and reduce displacement of emissions.

The Paris Agreement aims to strengthen the global response to climate change by keeping a global temperature rise well below 2°C above pre-industrial levels and to take efforts to limit it to 1.5°C.<sup>86</sup> It states that anthropogenic emissions must be balanced with removals by the second half of this century, establishing an important role for forests, and restates the need for the conservation of sinks and reservoirs, encourages the reduction of forest-related emissions in developing countries, and appeals

<sup>77</sup> *Non-legally binding instrument on all types of forests*, *supra* note 68; *United Nations Forest Instrument*, UN Doc A/RES/70/199.

<sup>78</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992 (in force 21 March 1994), 31 ILM 849 (“UNFCCC”). From 2007 to 2015, Parties to the UNFCCC adopted 16 decisions on this matter. UNFCCC, “UNFCCC negotiations”, online: <http://redd.unfccc.int/fact-sheets/unfccc-negotiations.html>.

<sup>79</sup> *Ibid.*

<sup>80</sup> UNFCCC, *supra* n78, Art. 4(1)(d); UNFCCC Secretariat, *Fact sheet: Reducing emissions from deforestation in developing countries: approaches to stimulate action*, 2011, 1.

<sup>81</sup> Paris Agreement, *supra* n2, Art. 5.2. For a discussion of various legal aspects of REDD+. See C Voigt, ed, *Research Handbook on REDD+ and International Law* (Edward Elgar Publishing, 2016); N Harris & F Stolle, *Forests Are in the Paris Agreement! Now What?*, World Resources Institute, online: <http://www.wri.org/blog/2016/01/forests-are-paris-agreement-now-what>.

<sup>82</sup> UNFCCC Decision 1/CP.16, Para. 73.

<sup>83</sup> UNFCCC, “UNFCCC negotiations” *supra* n78.

<sup>84</sup> COP Decisions 9/CP.19, 10/CP.19, 11/CP.19, 12/CP.19, 13/CP.19, 14/CP.19 & 15/CP.19. C Voigt & F Ferreira, “The Warsaw Framework for REDD+: Implications for national implementation and access to results-based payments” *Carbon and Climate Law Review*, 2 (2015), 113-129.

<sup>85</sup> UNFCCC Decision 1/CP.16, Appendix I, Para. 2.

<sup>86</sup> UNFCCC, *The Paris Agreement*, online: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php); *Summary of the Paris Agreement*, online: <http://bigpicture.unfccc.int/#content-the-paris-agreement>.

to Parties to take action and support REDD+ implementation.<sup>87</sup> It requires each Party to formulate its own mitigation actions in the form of nationally determined contributions (NDCs), and to report on their implementation efforts and their emissions.<sup>88</sup> Robust and accurate information on and accounting for emissions and removals from forests is key for environmental integrity and the effectiveness of the Agreement. Paris Agreement implementation guidance are still being negotiated, and an outcome is expected by the end of 2018.

The Green Climate Fund (GCF) was established by the UNFCCC Parties in 2010 to provide funding for mitigation and adaptation actions.<sup>89</sup> GCF invests in low-emission and climate-resilient development and aims to thus encourage the flow of climate finance, and supports REDD+ activities across all three phases.<sup>90</sup> In October 2017, the GCF Board adopted a pilot programme for results-based payments for USD \$500m, which will run until 2022.<sup>91</sup>

The Kyoto Protocol requires annual reporting of information relating to all emissions and removals from land use, land-use change, and forestry (LULUCF).<sup>92</sup> Reporting includes estimates of changes in carbon stocks and GHG emissions from afforestation, reforestation and deforestation that occurred after 1990; forest management, revegetation, cropland management and grazing land management; and wetland drainage and rewetting.<sup>93</sup> It also established the Clean Development Mechanism (CDM) as a market-based mechanism for emissions reductions, including through afforestation and reforestation (A/R) activities in developing countries.<sup>94</sup>

### UNCCD

The UNCCD<sup>95</sup> is an agreement linking environment and development to sustainable land management.<sup>96</sup> With respect to forests, it promotes both the prevention, and restoration, of land and forest degradation through sustainable management practices.<sup>97</sup> It is implemented by way of National Action Programmes (NAPs) which define steps and measures to combat desertification in specific ecosystems, and are developed through a participatory approach involving various stakeholders, including governments, institutions, and local communities.<sup>98</sup> Parties must report on the status of their land cover, which in dryland areas includes grasses, crops, shrubs and trees.

### Convention on Wetlands (Ramsar Convention)

The Ramsar Convention provides a framework for the conservation and wise use of wetlands and their resources.<sup>99</sup> It adopts a broad definition of wetlands that includes forested wetlands and peatlands,<sup>100</sup> recognizing three distinct types of forested wetlands: intertidal forested wetlands; forested

<sup>87</sup> FERN, *The Paris agreement and forests*, online: <http://www.fern.org/campaign/paris-agreement-and-forests>; Climate Focus, *Forests and Land Use in the Paris Agreement*, Climate Focus Client Brief on the Paris Agreement I, 2015,1. Paris Agreement, *supra* n2, Art. 5.

<sup>88</sup> UNFCCC, *The Paris Agreement*, *supra* n86. Paris Agreement, *supra* n2, Art. 4(2). *Supra* n70 **Error! Bookmark not defined.**, 1

<sup>89</sup> GCF, *About the Fund*, online: <http://www.greenclimate.fund/who-we-are/about-the-fund>.

<sup>90</sup> *Ibid.* GCF, *GCF in Brief: REDD+*, online: <http://www.greenclimate.fund/documents/20182/194568/GCF+in+Brief+-+REDD%2B/6ad00075-1469-4248-a066-8a8e622edacd>.

<sup>91</sup> GCF Board Decision B.18/07, Request for proposals for REDD-plus results-based payments.

<sup>92</sup> UNFCCC, *Land Use and Climate Change*, online: [http://unfccc.int/land\\_use\\_and\\_climate\\_change/items/8792.php](http://unfccc.int/land_use_and_climate_change/items/8792.php).

<sup>93</sup> UNFCCC, *Reporting and accounting of LULUCF activities under the Kyoto Protocol*, online:

[http://unfccc.int/land\\_use\\_and\\_climate\\_change/lulucf/items/4129.php](http://unfccc.int/land_use_and_climate_change/lulucf/items/4129.php). Activities under Arts. 3(3), 3(4), 5(2) in the second commitment period.

<sup>94</sup> UNFCCC, online: [http://unfccc.int/kyoto\\_protocol/mechanisms/items/1673.php](http://unfccc.int/kyoto_protocol/mechanisms/items/1673.php). C Robiedo & H Ok Ma, *Why there are so few forestry projects under the Clean Development Mechanism*, Forest Carbon Portal, online: <http://www.forestcarbonportal.com/news/why-there-are-so-few-forestry-projects-under-clean-development-mechanism>.

<sup>95</sup> *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 14 October 1994 (in force 26 December 1996) 1954 UNTS 3; 33 ILM 1328 (“UNCCD”).

<sup>96</sup> UNCCD, online: <http://www2.unccd.int/convention/about-convention>.

<sup>97</sup> UNCCD, online: <http://www.unccd.int/en/programmes/Thematic-Priorities/Forest/Pages/default.aspx>.

<sup>98</sup> UNCCD, online: <http://www2.unccd.int/convention/action-programmes>.

<sup>99</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, (1972) 996 UNTS 245; 11 ILM 963 (“Ramsar Convention”); Ramsar Convention Secretariat, *About the Ramsar Convention*, online: <https://www.ramsar.org/about-the-ramsar-convention>

<sup>100</sup> Ramsar Convention Secretariat, *Keep Peatlands wet for a better future*, Fact Sheet 8, 2015; *Classification System for Wetland Type*:

peatlands/peat bogs; and freshwater, tree dominated wetlands.<sup>101</sup> The COP to the Convention has adopted a global action plan for the wise use and management of peatlands,<sup>102</sup> as well as Guidelines for Global Action on Peatlands.<sup>103</sup> Parties implement the Ramsar Convention in their respective territories, and also collaborate on shared transboundary projects.

#### *World Heritage Convention (WHC)*

The WHC<sup>104</sup> defines the types of natural or cultural sites that may be considered for inscription on the World Heritage List, the duties of Parties in identifying potential sites, and their role in protecting and preserving them. It requires Parties to report regularly to the World Heritage Committee on the state of conservation of their World Heritage properties.<sup>105</sup> The World Heritage Forest Programme was established in 2001 to further forest conservation on a global scale, and it is committed to the identification and conservation of the world's most outstanding forests.<sup>106</sup> Over 75 million hectares of forest in 110 sites across all biogeographic regions are now included.<sup>107</sup>

#### *Convention on International Trade in Endangered Species (CITES)*

CITES seeks to ensure that international trade in wild animals and plants does not threaten their survival,<sup>108</sup> and is achieved through the adoption of implementing legislation by Parties.<sup>109</sup> It functions by subjecting international trade in specimens of selected species to certain controls and a licensing system, and is used to help countries with forest sustainability as it regulates trade in listed timber and non-timber forest products to ensure legality, sustainability and traceability.<sup>110</sup> Over 900 tree species are protected, including some of the world's most economically valuable. In 2017 alone, over 300 new timber species were brought under trade controls.<sup>111</sup>

#### *Indigenous and Tribal Peoples Convention; African Charter; and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

The Indigenous and Tribal Peoples Convention, 1989<sup>112</sup> (ILO Convention 169) aims to protect indigenous/tribal social, economic, and cultural rights, including land rights. It includes provisions related to forests, such as the recognition of rights of ownership and possession over lands traditionally occupied, and the safeguarding of rights to natural resources pertaining to such lands. This includes the right to participate in the use, management and conservation of resources, as well as the sharing of benefits and fair compensation for damages.<sup>113</sup> Although there is no specific focus on forests, the implementation programme includes activities on the management of ancestral domains, and environmental and natural resources management.<sup>114</sup> The African Charter on Human and Peoples'

[http://archive.ramsar.org/cda/en/ramsar-documents-guidelines-classification-system/main/ramsar/1-31-105%5E21235\\_4000\\_0\\_\\_](http://archive.ramsar.org/cda/en/ramsar-documents-guidelines-classification-system/main/ramsar/1-31-105%5E21235_4000_0__).

<sup>101</sup> C Fenerol, *The Ramsar Convention and the Conservation and Wise use of Forested Wetlands*, Ramsar Convention Secretariat; See also *Classification System for Wetland Type*, *ibid*.

<sup>102</sup> Ramsar Secretariat, *Recommendation 7.1: A global action plan for the wise use and management of peatlands*, "People and Wetlands: The Vital Link", Ramsar COP 7, 1999.

<sup>103</sup> Ramsar COP Resolution VIII.17: Guidelines for Global Action on Peatlands, "Wetlands: water, life, and culture".

<sup>104</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972 (in force 17 December 1975)1037 UNTS 151; 27 UST 37; 11 ILM 1358 ("World Heritage Convention").

<sup>105</sup> UNESCO, online: <http://whc.unesco.org/en/convention/>; UNESCO, online: <http://whc.unesco.org/en/118/>.

<sup>106</sup> UNESCO, online: <http://whc.unesco.org/en/forests/>; M. Patry & R. Horn, "A Selection of World Heritage Forest Indicators", in *Adapting to Change: The State of Conservation of World Heritage Forests in 2011*, 17.

<sup>107</sup> UNESCO *supra* n105.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973 (in force 1 July 1975), 993 UNTS 243 ("CITES"), *CITES Highlights its Contribution to Sustainable Forest Management on International Day of Forests 2017*, online: [https://www.cites.org/eng/CITES\\_highlights\\_its\\_contribution\\_to\\_sustainable\\_forest\\_management\\_on\\_International\\_Day\\_of\\_Forests\\_2017\\_21032017](https://www.cites.org/eng/CITES_highlights_its_contribution_to_sustainable_forest_management_on_International_Day_of_Forests_2017_21032017)

<sup>111</sup> *Ibid*.

<sup>112</sup> *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 27 June 1989 (in force 5 September 1991), 72 ILO Official Bull. 59; 28 ILM 1382 ("Indigenous and Tribal Peoples Convention").

<sup>113</sup> *Ibid*, Arts. 13-19.

<sup>114</sup> *Ibid*.

Rights contains similar provisions indicating that all peoples shall freely dispose of their wealth and natural resources in the exclusive interest of the people. In no case shall a people be deprived of it. UNDRIP is also a tool to promote and secure the rights of indigenous peoples to manage their forests and other natural resources.<sup>115</sup> Some provisions are relevant to forest management and conservation, *inter alia*, the right to conservation and protection of the environment and the productive capacity of lands or territories and resources, and the establishment and implementation of assistance programmes; the right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of sciences, technologies and cultures; the right to determine and develop priorities and strategies for the development or use of lands or territories and other resources; and, the right to access financial and technical assistance from States and through international cooperation for the enjoyment of these rights.<sup>116</sup> It enshrines the principle that free, prior, and informed consent (FPIC) be obtained prior to any relocation from lands or territories, and before any development takes place.<sup>117</sup>

#### *International Tropical Timber Agreement*

The International Tropical Timber Organization (ITTO) governs the use and trade of tropical forest resources.<sup>118</sup> It operates under the *International Tropical Timber Agreement, 2006*,<sup>119</sup> which aims to promote the sustainable management of tropical timber producing forests and the development and diversification of tropical timber trade from sustainably managed and legally harvested forests.<sup>120</sup> ITTO's programme addresses issues related to the management, marketing, and trade of tropical forest timber, and the development of forest-based industries. Its action programme includes SFM aspects such as community forestry, reduced impact logging, fire management, biodiversity, and transboundary conservation.<sup>121</sup> ITTO formulates policies to promote conservation and SFM and helps tropical member countries to implement these policies in a manner adapted to local circumstances, gathers and disseminates data, and conducts analyses on the production and trade of tropical timber.

#### *World Trade Organization*

The *Agreement establishing the World Trade Organization* (WTO) refers to sustainable development and environmental protection amongst its objectives.<sup>122</sup> The WTO agreements also include provisions addressing environmental concerns<sup>123</sup> and allow members to take measures to protect the environment, public health, animal health, and plant health.<sup>124</sup> They do not consider trade measures for environmental protection (e.g. protection of plant life and conservation of exhaustible natural resources) as conflicting with basic WTO principles of non-discrimination and transparency,<sup>125</sup> but Members cannot use environmental protection measures as a means of disguising protectionist policies.<sup>126</sup> The GATT regime is of particular relevance to forests as it regulates all international trade, and because trade liberalization impacts the exploitation of natural resources.<sup>127</sup> The WTO Committee on Trade and Environment recommends changes that may be needed in the Agreements when

<sup>115</sup> KW Painemilla et al., *Indigenous Peoples and Conservation: From Rights to Resource Management*, (Conservation International, 2010), 1.

<sup>116</sup> UN General Assembly resolution 61/295 of 13 September 2007, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 ("UNDRIP"), Arts. 29, 31, 32(1), 39; UN Human Rights Council (UNHRC), *Report of the Special Rapporteur on the rights of Indigenous Peoples*, 15 September 2017, UN Doc A/HRC/36/46, at Paras. 54, 74.

<sup>117</sup> CPF, online: <http://www.cpfweb.org/32825-0c3cd8211ec6ccb8cae04bf30e975a362.pdf>, 2.

<sup>118</sup> Members represent about 80% of the world's tropical forests and 90% of the global tropical timber trade.

<sup>119</sup> *International Tropical Timber Agreement, 2006* (in force 7 December 2011).

<sup>120</sup> *Ibid.*, Art.1.

<sup>121</sup> ITTO, online: [http://www.itto.int/at\\_work/](http://www.itto.int/at_work/); ITTO, online: [http://www.itto.int/sustainable\\_forest\\_management/](http://www.itto.int/sustainable_forest_management/).

<sup>122</sup> *Ibid.*; Preamble to the *Agreement Establishing the World Trade Organisation*.

<sup>123</sup> *Ibid.*

<sup>124</sup> WTO, online: [https://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_stand\\_for\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm).

<sup>125</sup> *Ibid.* Clauses exist in the agreements on goods, services and intellectual property that permit governments to prioritize their domestic environmental policies

<sup>126</sup> *Ibid.* See *General Agreement on Trade and Tariffs*, Article XX.

<sup>127</sup> Ruis, "Ten Tree Treaties", *supra*, n72.

environmental issues and policies have a significant impact on trade,<sup>128</sup> and has discussed several relevant issues, e.g. ecolabelling, improved market access, community-based processing and marketing, full cost internalization and SFM, and certification.<sup>129</sup>

### 2.3 Legal Obstacles to the Sustainable Management of Forests in International Law

There are numerous legal obstacles to SFM. First, there is a multiplicity of international instruments on the subject, which can lead to differing approaches, duplication of efforts, or even conflicting goals (e.g. biodiversity conservation vs. augmentation of carbon stocks). Second, the strictures of trade law can place a greater weight on the economic value of forests and trade liberalization when they come up against the flexible approaches allowed under multilateral environmental agreements. Third, the wide range of approaches taken for protected areas management lead to different results and the potential for conflict with local communities. Last, the diversity of certification schemes and standards may lead to a lowest common denominator approach to corporate legal compliance.

### 2.4 Future International Law Research on the Sustainable Management of Forests

There is a diverse research agenda pertaining to SFM. First, research can be carried out on increasing synergies between conventions, e.g. in the context of the Aichi Biodiversity Targets and Sustainable Development Goals. Second, there are also possible synergies to investigate between CDMs, REDD+, the Paris Agreement and the SDGs. Third, the question remains whether to adopt an all-encompassing agreement to follow up on the Forest Principles and NLBI. Fourth, questions pertain to the deployment of payments for ecosystem services. Fifth, the role of protected areas management and governance must be further investigated, including the implementation of peace parks and best practices for forest conservation in conflict-sensitive forest areas. Sixth, the role of forest certification schemes in supporting international norms can be examined. Seventh, important research on the role of IPLC in advancing SFM must be carried out, and on ensuring the security of rights by establishing formal ownership and tenure rights and legal status of community and micro-enterprises. Last, the role of trade (CITES, ITTA and WTO) in advancing SFM, enforcing contracts and effective monitoring and control of forest management, forest products, and trade should be investigated.

## 3. Rules and Practices of International Law for the Sustainable Management and of Biological Resources

*with Professor Jorge Cabrera Medaglia, HQ/Costa Rica & Mr Frederic Perron-Welch, Canada*

### 3.1 Introduction

A number of international treaties refer to the sustainable management of biological resources writ large, but the principle's best-known elaboration is in the *Convention on Biological Diversity*<sup>130</sup> (CBD). The interlinked objectives of the CBD are the conservation of biodiversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (GR), including by appropriate access to GR and transfer of relevant technologies, and by appropriate funding.<sup>131</sup> The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (SR Environment) recognizes the importance of sustainably using biodiversity in his Report to the 34<sup>th</sup> Session of the

<sup>128</sup> T Tekebeng Lele, *The conservation of natural resources in WTO law: the case of tropical forest resources*, online: [https://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_9july10\\_e.htm](https://www.wto.org/english/res_e/publications_e/wtr10_9july10_e.htm).

<sup>129</sup> Ruis, "Ten Tree Treaties", *supra* n72.

<sup>130</sup> *Convention on Biological Diversity*, 5 June 1992 (in force 29 December 1993), 31 ILM 822. ("CBD")

<sup>131</sup> *Ibid.*, Art. 1.

Human Rights Council in 2017, wherein he indicates that “the full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems. The provision of ecosystem services depends on the health and sustainability of ecosystems, which in turn depend on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermines the ability of human beings to enjoy their human rights.”<sup>132</sup> Several Sustainable Development Goals (SDGs) explicitly mention relevant sustainable use/management targets, such as 12.2, 14.2, 14.7, 14.c, 15.1, 15.2, and 15.b.<sup>133</sup>

### 3.2 Contributions of International Law and Governance to the Sustainable Management of Biological Resources

#### *Convention on Biological Diversity (CBD)*

The CBD is the only global and comprehensive agreement addressing all different aspects of biodiversity.<sup>134</sup> Biodiversity is defined therein as “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”<sup>135</sup> Of primary importance for this brief, it defines biological resources as including “genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity” and genetic resources (GR) as “genetic material of actual or potential value.”<sup>136</sup> Including genetic and ecosystem diversity into the definition of biodiversity goes further than earlier biodiversity treaties, which largely aim to protect listed species or areas from human threats and destruction or extinction.<sup>137</sup>

The CBD is similarly one of the few international treaties to define the concept of sustainable use, namely “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”<sup>138</sup> Sustainable use focuses on the active management of biodiversity, providing incentives for conservation by allowing for benefits from use that does not threaten the conservation status of a species or ecosystem integrity.<sup>139</sup> These definitions demonstrate the tremendous breadth of the subject matter addressed in this section of the report. As international law on specific living natural resources are being addressed by other members of the Committee, this section of the Report will be limited to an analysis of the provisions of the CBD.

The CBD builds on the international principle of permanent sovereignty over natural resources (PSNR), making it clear once and for all that biodiversity is not a shared global resource, but rather

<sup>132</sup> *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/34/49, Para. 5.

<sup>133</sup> Agenda 2030 12.2: By 2030, achieve the sustainable management and efficient use of natural resources; 14.2: By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans; 14.7: By 2030, increase the economic benefits to Small Island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism; 14.c: Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of oceans and their resources, as recalled in paragraph 158 of “The future we want”; 15.1: By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements; 15.2: By 2020, promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally; and 15.b: Mobilize significant resources from all sources and at all levels to finance sustainable forest management and provide adequate incentives to developing countries to advance such management, including for conservation and reforestation.

<sup>134</sup> N Matz-Lück, “Biological Diversity, International Protection”, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012) Para. 2.

<sup>135</sup> CBD, Art. 2.

<sup>136</sup> *Ibid.*

<sup>137</sup> Matz-Lück, “Biological Diversity, International Protection”, Para. 2.

<sup>138</sup> CBD, *supra* n130, Art. 2.

<sup>139</sup> Matz-Lück, “Biological Diversity, International Protection”, Para. 20.

that States have sovereign rights over their own biological resources, and the right to exploit their own resources pursuant to their own environmental policies.<sup>140</sup> This shift is quite consequential, as most biological resources are found under the jurisdiction of States.<sup>141</sup> This basic principle is buttressed by the recognition that, based on PSNR, national governments have the authority to determine access to genetic resources based on national legislation.<sup>142</sup> This was a fundamental shift in international law, as genetic resources were formerly perceived to be the common heritage of humanity.<sup>143</sup>

Yet, the CBD also places limitations on the exercise of PSNR in ways that favour the sustainable management of natural resources for development. It is argued that PSNR focuses on achieving the responsible exercise of state sovereignty, rather than overriding it.<sup>144</sup> The operational scope of the CBD applies to biodiversity in areas of national jurisdiction, but the CBD also applies to processes and activities carried out under each Party's jurisdiction or control, regardless of where their effects occur, both within national jurisdiction and beyond the limits of national jurisdiction, which arguably extends its scope to all biodiversity.<sup>145</sup> Parties are also expected to cooperate with other Parties directly, or through international organizations, on conservation and sustainable use of biodiversity in areas beyond national jurisdiction, and on other matters of mutual interest.<sup>146</sup>

Its objectives establish a clear link between the conservation and sustainable use of biodiversity, and the sharing of benefits resulting from access. This linkage is affirmed in the objective of the Nagoya Protocol on Access and Benefit Sharing (ABS), which associates fair and equitable sharing of the benefits arising from the utilization of GR with the conservation of biodiversity and the sustainable use of its components, and encourages users and providers to direct benefits arising from the utilization of GR towards the conservation of biodiversity and the sustainable use of its components.<sup>147</sup> It establishes general measures that States must undertake for the conservation and sustainable use of biodiversity, namely the development of national biodiversity strategies and action plans (NBSAPs) for the conservation and sustainable use of biodiversity, or adapt for this purpose existing strategies, plans or programmes, and the integration of the conservation and sustainable use of biodiversity into relevant sectoral or cross-sectoral plans, programmes and policies.<sup>148</sup>

With specific regard to the sustainable use of biological resources, Parties must integrate consideration of the conservation and sustainable use of biodiversity into national decision-making; adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biodiversity; protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; support local populations to develop and implement remedial action in degraded areas where biodiversity has been reduced; and encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.<sup>149</sup>

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<sup>140</sup> CBD, *supra* n130, Preamble and Art. 3; C Willmore, "Sovereignty, conservation and sustainable use" in E Morgera & J Razzaque, eds, *Biodiversity and Nature Protection Law, Elgar Encyclopedia of Environmental Law: Volume III* (Edward Elgar, 2017).

<sup>141</sup> Matz-Lück, "Biological Diversity, International Protection" Para. 11.

<sup>142</sup> CBD, *supra* n130, Art. 15. The Nagoya Protocol on ABS reaffirms the principle of sovereign rights over natural resources and recalls Art. 15 in its Preamble.

<sup>143</sup> J Cabrera Medaglia, "Access and Benefit-Sharing: North-South Challenges in Implementing the Convention on Biological Diversity and its Nagoya Protocol" in S Alam, S Atapattu, CG Gonzalez & J Razzaque, eds, *International Environmental Law and the Global South* (Cambridge University Press, 2015), 192.

<sup>144</sup> Willmore, "Sovereignty, conservation and sustainable use", 31.

<sup>145</sup> CBD, *supra* n130, Arts. 4(a), 4(b); N Matz-Lück, "Biological Diversity, International Protection", Para. 28.

<sup>146</sup> CBD, *supra* n130, Art. 5; J Cabrera, F Perron-Welch & B PisupatiSDG15 on Terrestrial Ecosystems and Biodiversity: Contributions of International Law, Policy and Governance, Issue Brief, (CISDL & UNEP, 2016).

<sup>147</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Resulting from their Utilization*, 29 October 2010 (in force 12 October 2014), UN Doc UNEP/CBD/COP/10/27 ("Nagoya Protocol") Arts. 1, 9.

<sup>148</sup> CBD, *supra* n130, Art. 6.

<sup>149</sup> *Ibid.*, Arts. 10(a) – (e).

Limitations on PSNR that apply specifically to GR include the obligation that Parties endeavour to create conditions to facilitate access to GR for environmentally sound uses by other Parties and not to impose restrictions that run counter to the objectives of the CBD, access based on mutually agreed terms (MAT) and subject to the prior informed consent (PIC) of the providing Party, and the taking of legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of GR with the Party providing the GR upon MAT.<sup>150</sup> The Nagoya Protocol on ABS provides a legal framework for the effective implementation of the benefit-sharing obligations of the CBD, providing greater legal certainty for providers and users of genetic resources and helping to ensure benefit-sharing when GR leave the providing country.<sup>151</sup> By enhancing legal certainty and promoting benefit-sharing, it encourages the advancement of research and development, which creates incentives to conserve and sustainably use biodiversity and enhancing biodiversity's contribution to development and human well-being.<sup>152</sup>

The CBD also calls for States to recognize the value of the traditional knowledge, innovations and practices (TKIP) of indigenous and local communities (ILC) embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity, promote their wider application with the approval and involvement of the holders of the TKIP, and encourage the equitable sharing of the benefits arising therefrom.<sup>153</sup> The Nagoya Protocol on ABS goes further and states that Parties shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with GR are shared in a fair and equitable way with indigenous and local communities holding such knowledge.<sup>154</sup>

In 2010, the 10<sup>th</sup> Conference of the Parties (COP) to the CBD adopted the Strategic Plan for Biodiversity 2011-2020 with the purpose of inspiring broad-based action by all countries and all stakeholders in order to meet the three objectives of the CBD through the establishment of a shared vision and mission, grounded in 5 cross-cutting strategic goals and 20 targets known as the Aichi Biodiversity Targets. Several of the Targets are pertinent to the sustainable use of biodiversity, e.g. Targets 3, 4, 6, 7, and 18.<sup>155</sup>

The CBD COP has also adopted a series of programmes of work that further the sustainable use of biodiversity in particular ecosystems, including the *Programme of Work on Dry and Sub-humid Lands*, *Expanded Programme of Work on Forest Biological Diversity*, *Programme of Work on Mountain Biodiversity*, and *Revised Programme of Work on Inland Water Biological Diversity*, as well as a series of principles, guidelines and other tools to support implementation of specific provisions of the CBD,

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<sup>150</sup> *Ibid*, Art. 15.

<sup>151</sup> Cabrera Medaglia, "Access and Benefit-Sharing: North-South Challenges in Implementing the Convention on Biological Diversity and its Nagoya Protocol", 194-5.

<sup>152</sup> *Ibid*, 195.

<sup>153</sup> CBD, Preamble and Art. 8(j).

<sup>154</sup> Nagoya Protocol on Access and Benefit Sharing, *supra* n147, Art. 5(5).

<sup>155</sup> 3: By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimize or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the CBD and other relevant international obligations, taking into account national socio economic conditions; 4: By 2020, at the latest, Governments, business and stakeholders at all levels have taken steps to achieve or have implemented plans for sustainable production and consumption and have kept the impacts of use of natural resources well within safe ecological limits; 6: By 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits; 7: By 2020 areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity; 18: By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and 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 CBD with the full and effective participation of indigenous and local communities, at all relevant levels.

such as the *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*, *Guidelines on Biodiversity and Tourism Development*, *The Ecosystem Approach*, and *Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*.<sup>156</sup> These COP decisions provide substantive assistance to Parties in implementing the general provisions of the CBD. The *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*<sup>157</sup> in particular elaborate on the CBD's sustainable use obligations in the context of adaptive management, interdisciplinary research, minimizing waste and environmental impact and optimising benefits from uses, the needs of ILC and fair and equitable sharing of benefits, and the internalization of costs of management and conservation.<sup>158</sup>

### 3.3 Legal Obstacles Facing the Implementation of Sustainable Management of Biological and Resources

The inclusion of sustainable use in the body of the CBD raises it to an international legal obligation, but this has not led to precise formulation in domestic measures.<sup>159</sup> National reports provided by Parties to the CBD in accordance with Article 26 provide a window on the lamentable status of implementation in many countries. The decline of biodiversity does not appear to be significantly reduced by the new regulatory techniques incorporated in modern biodiversity treaties like the CBD.<sup>160</sup> A reality check in terms of how countries are progressing towards achieving the Strategic Plan for Biodiversity, provided by the fourth edition of the Global Biodiversity Outlook (GBO 4), indicates that, in most cases, progress on meeting the Aichi Biodiversity Targets is insufficient to achieve the targets set for 2020, and that additional action is required to keep the Strategic Plan for Biodiversity on course.<sup>161</sup> Unfortunately the CBD does not have any direct compliance mechanisms, with compliance depending on reporting and implementation reviews based on national self-assessments.<sup>162</sup>

The inclusion of sustainable use extends the Convention's scope to economic activities including forestry, agriculture and fisheries,<sup>163</sup> yet the lack of mainstreaming across sectors has meant that the sustainable use of biodiversity has remained a secondary consideration in laws governing primary resource sectors, causing direct impacts (e.g. unsustainable exploitation practices) and indirect impacts (e.g. harm to ecosystems) that remain a considerable problem.<sup>164</sup> Much of global governance lies outside of the CBD regime, and the powers and influences of those instruments may be more significant.<sup>165</sup> One key difficulty is how to effectively combine different approaches at the international and national level in order to make them mutually supportive.<sup>166</sup> A key limitation on the sustainable use of biological diversity is territoriality, e.g. the mismatch between jurisdictional boundaries and key biodiversity areas/ecosystems.<sup>167</sup> The CBD depends almost exclusively on national implementation programmes and plans.<sup>168</sup> Repeated calls have been made through various governing bodies of multilateral environmental agreements (MEAs) and UN Environment to use the NBSAPs as a key entry point to deal with both legal preparedness and policy coherence on issues of biodiversity and ecosystem governance. Targeted intervention is urgently required at the national level to ensure that the international environmental legal and policy commitments made through the CBD

<sup>156</sup> Cabrera, Perron-Welch & Pisupati.

<sup>157</sup> *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*, 27 February 2004, UN Doc UNEP/CBD/COP/7/12, Annex II. (Addis Ababa Principles)

<sup>158</sup> *Ibid.*, 4, 11, 12 and 13.

<sup>159</sup> Willmore, "Sovereignty, conservation and sustainable use", 35.

<sup>160</sup> Matz-Lück, "Biological Diversity, International Protection", Para. 4.

<sup>161</sup> Cabrera, Perron-Welch and Pisupati.

<sup>162</sup> Willmore, "Sovereignty, conservation and sustainable use", 41.

<sup>163</sup> Willmore *ibid.* 36.

<sup>164</sup> Matz-Lück, "Biological Diversity, International Protection", Paras. 6-7.

<sup>165</sup> Willmore, "Sovereignty, conservation and sustainable use", 31.

<sup>166</sup> Matz-Lück, "Biological Diversity, International Protection", Para. 9.

<sup>167</sup> Willmore, "Sovereignty, conservation and sustainable use", 36.

<sup>168</sup> Matz-Lück, "Biological Diversity, International Protection", Para. 10.

are seriously pursued using principles of both environmental and sustainable development law, and supported by more effective governance measures. Though countries have shown better policy preparedness to deal with the issue of achieving the objectives of the Strategic Plan, current legal and governance measures need to be further strengthened through, for example, increasing the scope and ambition of their NBSAPs.<sup>169</sup>

In addition to weaknesses in legal and institutional frameworks for the sustainable use of biodiversity, procedural obstacles are also impeding the sustainable use of biodiversity. Weaknesses often exist in the assessment of the social and environmental impacts of all proposed projects and policies that may affect biodiversity; the provision of public information about biodiversity, including environmental and social assessments of proposals, and ensuring that the relevant information is provided to those affected in a language that they understand; providing for and facilitating public participation in biodiversity-related decisions; and providing access to effective remedies for the loss and degradation of biodiversity.<sup>170</sup>

### 3.4 Future International Law Research on Sustainable Management of Biological Resources

The failure of Parties to meet the Strategic Plan's biodiversity target for 2010, and the impending failure to meet a number of the 2020 Aichi Biodiversity Targets points to a significant research agenda. From a practical perspective, much remains to be ascertained as to why measures on the sustainable use of biodiversity are not meeting their objectives, and how to further strengthen legal and governance measures to ensure the sustainable use of biological resources across sectors. The seeds of such work have been planted at COP 13 with the biodiversity mainstreaming agenda,<sup>171</sup> which will also be addressed at COP 14 in 2018 along with new a new post-2020 strategic plan and targets that are aligned with the SDGs.<sup>172</sup>

International law on the sustainable use of biological and genetic resources in areas beyond national jurisdiction (ABNJ) is under development. Discussions are taking place through the UN General Assembly, which adopted a resolution in late 2017 convening an Intergovernmental Conference (IC) to elaborate the text of an international legally binding instrument under the *United Nations Convention on the Law of the Sea* (UNCLOS) on the conservation and sustainable use of marine biological diversity of ABNJ, with a view to rapidly developing an instrument.<sup>173</sup> The IC will meet four times, with the last meeting in mid-2020. Key topics under discussion are the conservation and sustainable use of marine biological diversity of ABNJ, and marine GR, including particular focus on the issue of benefit-sharing. The work of the IC builds on a Preparatory Committee, which issued a report of its discussions indicating that further discussions are required on marine GR and benefit-sharing in relation to whether the instrument should regulate access; the nature of the resources covered; the benefits shared; intellectual property rights; and monitoring utilization of marine GR in ABNJ. Consensus exists on the following: the objective of contributing to the conservation and sustainable use of marine biological diversity in ABNJ, building the capacity of developing countries to access and use marine GR in ABNJ, and that the principles and approaches guiding benefit-sharing

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<sup>169</sup> Cabrera, Perron-Welch and Pisupati; *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/34/49, *supra*, Para. 70

<sup>170</sup> *Ibid.*, Para 67. The Special Rapporteur indicates that stronger implementation of these procedural rights is imperative to safeguard human rights to biodiversity.

<sup>171</sup> *Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-being*, 6 December 2016, UN Doc UNEP/CBD/COP/13/24.

<sup>172</sup> See Agenda Item 18: Long-term strategic directions to the 2050 Vision for Biodiversity, approaches to living in harmony with nature and preparation for the post-2020 global biodiversity framework in *Annotated Provisional Agenda*, 20 February 2018, UN Doc CBD/COP/14/1/Add.1.

<sup>173</sup> *Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, 24 December 2017, UNGA Res 72/249.

could include being beneficial to current and future generations and promoting marine scientific research and research and development.<sup>174</sup>

The above only covers a part of the negotiations taking place that are pertinent to the development of sustainable use of biological resources. Future research will need to continue monitoring and take into consideration work across the multiplicity of treaties and institutions where the future of the concept is being formalized in rules of international law. Much work remains to be done in this regard.

#### **4. Rules and Practices of International Law related to Socio-Environmental Risks in Fossil Fuel Resources**

*Abstract by Dr Kishan Khoday, HQ/UNDP and Professor Damilola Olawiyu, HQ/Qatar, for development*

In the next phase of the Committee's mandate, a new scoping brief shall be prepared for the Committee on the socio-environmental risks of fossil fuels, including coal, petroleum, and natural gas (potentially also shale gas). Fossil fuel resources, particularly petroleum and natural gas, continue to hold their position as among the most critical natural resources in the world economy. They play an important role in the development trajectory of many countries around the world, especially in oil and gas rich developing countries where oil and gas exports provide vital revenues for achieving local development goals. With oil and gas demand growth in emerging economies expected to continue into the future, recent years have seen an increase in new exploration ventures. The growing footprint of large fossil fuel corporations has resulted in a rise in social and environmental risks for local communities - from complicity in human rights abuses and corruption, to toxic impacts of coal exploitation, oil spills or fracking on people and planet. This applies to conventional oil reserves, as well as the rapidly expanding non-conventional fossil fuel sectors including shale gas fracking, offshore oil extraction, and the entry into the Arctic. New mechanisms for accountability have been developed in recent years, responding to rising inequality around the generation of fossil fuel wealth, and serious ecological impacts. Higher expectations have emerged for the role of international and domestic law in creating more accountable use of coal, oil and gas wealth as a public good, combating corruption, preventing the squandering of natural wealth and preserving the environment for future generations. In the face of concern, fossil fuel-rich countries have held firm to the international law norm of permanent sovereignty over natural resources. This norm can be perceived by some as providing countries with a 'legal shield against infringement of their economic sovereignty', with international social and environmental standards seen as potential constraints for development from this view. An international regulatory framework to manage social and environmental risks has thus been slow in the making, however some progress can be seen. Triggered by bottom-up social movements for change, new legal measures are being adopted in tandem with progressive development of both voluntary and normative standards at the international level. The new scoping brief will survey the growing challenge of managing social and environmental risks of fossil fuel resources, and survey current international attempts to increase compliance of large corporations with social and environmental standards through model codes and treaties under the United Nations, rules issued by international agencies and multilateral development banks, and measures by the global finance sector.

#### **5. Rules and Practices of International Law for the Sustainable Management of Precious Mineral Resources, including Silver, Gold and Diamonds**

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<sup>174</sup> *Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, 31 July 2017, UN Doc A/AC.287/2017/PC.4/2, 10, 17.

*Abstract by Professor Isabel Feichtner, German Branch & Dr Guy Jules Kounga, HQ/Cameroon, for development*

In the next phase of the Committee's mandate, a new scoping brief will set out the economic relevance of precious mineral resources, the main mining sites and trade flows. The demand for gold, in particular, increases in times of global financial instability as gold performs a monetary function as a store of value. Not only developing countries perceive gold mining as a potential way to stimulate the economy, to generate employment and public revenue. Indeed, Europe has seen a renewed interest in gold mining during the Eurocrisis, for example in Greece and France. Given the high environmental costs of gold mining as well as the limited demand for gold by the real economy this development can be deemed worrisome from a sustainability perspective. It raises the question of how the institutions of money and finance may be reformed to de-incentivize gold mining which is driven purely by a profit or money motive. After sketching the politico-economic context of precious mineral extraction the scoping brief will give an overview of the international and transnational law, including soft law initiatives, seeking to promote their sustainable management. The focus will be on legal regimes of particular relevance for the precious minerals industry. These include regimes that aim to contain trade in conflict minerals such as the Kimberley Process Certification Scheme, US and EU legislation on conflict minerals trade, as well as regimes that seek to contain the environmental damage caused by mining, such as the Minamata Convention of 2013 which seeks to phase out mercury use and specifically regulates the informal sector of artisanal and small-scale gold mining. Finally, the scoping brief will indicate obstacles to the realization of the legal regimes' objectives, such as enforcement deficits (e.g. of the Kimberley Process standards) or unintended side effects such as trade diversion caused by conflict minerals certification regimes. The brief will further discuss how such obstacles may be overcome, an important innovation in this area being technologies that allow for the tracing of minerals. The brief will propose further research on the question of how the international financial system promotes unsustainable resource extraction and how financial institutions may be reformed to enhance the sustainable management of precious minerals.

## **6. Rules and Practices of International Law for the Sustainable Management of Land and Soil**

*Abstract by Ms Cairo Robb, British Branch, Professor Daniëlla Dam-de Jong, Netherlands Branch, Dr Alexandra Harrington, Colombian Branch, Professor Cymie Payne, American Branch and Dr Barbara Janusz-Pawletta, Kazakhstan Branch, for development*

In the next phase of the Committee's mandate, a new scoping brief will examine the rules and practices of international law for sustainable management of soil and land resources. Land and soil provide the basis for over ninety percent of the world's food production. They provide a myriad of ecosystem services including facilitating filtration and storage of freshwater the world over and supporting biodiversity, energy production and healthy human settlements. Land access and tenure also play a vital role in ensuring peace, preventing or promoting conflict, and in the post-conflict and peace-building phases. Over recent decades the crucial role of land and soil in these respects, as well as in terms of climate change adaptation and mitigation has been increasingly, if slowly, recognized at the political level.

Following the establishment of the Global Soil Partnership (GSP) in 2012, the UN declared 2015 the first 'International Year of Soil', and in the same year the FAO adopted its Revised World Soil Charter. Healthy soil and land resources are crucial to the achievement of the objectives and targets of many of

the SDGs set out in Agenda 2030, not least those relating to food security (1, 2, 3), health (2), water security/resources (3, 6), climate change (13), biodiversity (15), and land management (2, 13, 15).<sup>175</sup>

Earlier this year a thematic assessment of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services highlighted that land degradation is a pervasive systemic phenomenon occurring in all parts of the world and taking many forms, with the main direct drivers being expansion of crop and grazing lands into native vegetation, unsustainable agricultural and forestry practices, climate change, and in specific areas, urban expansion, infrastructure development and extractive industry. It emphasized that avoiding, reducing and reversing land degradation is essential for meeting the SDGs, and that timely action to avoid, reduce and reverse land degradation can contribute substantially to the adaptation and mitigation of climate change and could also contribute to the avoidance of conflict and migration.<sup>176</sup>

The international law response to land and soil protection and their sustainable management in the context of development has been limited, piecemeal and often tangential.<sup>177</sup> The potential for use of existing and new hard and soft law instruments and concepts in this area is now receiving greater attention.<sup>178</sup> While the UNCCD is the only global treaty dealing explicitly with the issue of land degradation, it is being recognized that there is space within the UNCBD and UNFCCC, and their respective protocols and mechanisms, to address land and soil issues, and some steps have been taken in this direction.<sup>179</sup> Regional treaties have included more express provisions,<sup>180</sup> and the conclusion of the *Protocol on the Implementation of the Alpine Convention in the area of Soil Protection*, 1998 (ACSPP) provides an indication of what is possible. The brief will survey the existing soft and hard law with implications for sustainable management of land and soil, and consider the obstacles and gaps existing, as well as the proposals being made to address these, including calls for a dedicated international instrument and regime.<sup>181</sup>

The brief will also examine the significance and application of general principles of international law to land and soil issues for sustainable development, and the implications of emerging concepts such as the ‘common concern of humanity’. International case law dealing with land and soil will also be identified. The seminal arbitral award in the *Trail Smelter Case*, for example, dealt explicitly with the issue of damage to soil, and encompassed the assessment and valuation of, and remedy for, such damage.<sup>182</sup> Issues relating to land and soil degradation have featured also, for example, in cases before

<sup>175</sup> SD Keesstra et al., “The significance of soils and soil science towards realization of the United Nations Sustainable Development Goals”, *SOIL* 2(2016), 111-128.

<sup>176</sup> IPBES 2018, *Summary for policymakers of the assessment report on land degradation and restoration of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. Approved by the Sixth Session of the Plenary of IPBES, Medellin, Colombia, 18-24 March 2018. IPBES/6/15/Add.5 section IA.

<sup>177</sup> E.g., treaties relating to air pollution and waste disposal have implications for land and soil quality.

<sup>178</sup> For an account of the history and latest developments see BW Boer, H Ginzky and IL Heuser, “International Soil Protection Law: History, Concepts and Latest Developments”, *International Yearbook of Soil Law and Policy* 2016, 49-72. In a similar vein see ET Alori and C Nwapi, “The International Legal Regime for Sustainable Soil” in R Huks T Ako & D.Olawuyi, eds, *Food and Agricultural Law: Readings on Sustainable Agriculture and the Law in Nigeria*, (Afebabalola University Ado Ekiti, 2014), 98-114. See the activities of the IUCN Environmental Law Program in this area since 2000, including, e.g., EPLP Papers No 45, *Legal and Institutional Frameworks for Sustainable Soils*, 2002 and No 52, *Drafting Legislation for Sustainable Soils: A Guide*, 2004, and the more recent work of the IUCN World Commission on Environmental Law (WCEL) Soil, Desertification, and Sustainable Agriculture Specialist Group (SDSA). More generally, see *Yearbook of International Soil Law and Policy*, 2016 and 2017.

<sup>179</sup> See Boer, Ginzky and Heuser, “International Soil Protection Law”, 57-63.

<sup>180</sup> The *African Convention for the Conservation of Nature and Natural Resources*, as originally adopted on 15 September 1968, and since revised, has included soil as a natural resource (Art. III) and has obliged Member States to take measures for the conservation and improvement of soil from its outset (Arts II, III, 1968).

<sup>181</sup> See references at n178 above, and B Boer and I Hannam, Developing a Global Soil Regime, *International Journal of Rural Law and Policy* (2015)(1), 1-13.

<sup>182</sup> *Trail Smelter case (Canada/USA)*, 3 UNRIAA, 1905, 1925-6; 1 IELR 231, 264-5. The Tribunal stated: In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, it may be contended that special damage has occurred for which indemnity should be awarded by reason of impairment of the soil contents through increased acidity caused by sulphur dioxide fumigations acting directly on the soil or indirectly through increased sulphur content of the streams and other waters. Evidence has been given in support of this contention. The Tribunal is of opinion that such injury to the soil up to this date, due to increased acidity and affecting harmfully the

the ICJ, international and human rights tribunals, and the United Nations Compensation Commission.<sup>183</sup> The interplay with recent international trade law cases relating to mineral resources<sup>184</sup> will also be explored. Finally, the intrinsic relationship between land resources and the targeting of land rights activists for abuse and violence, whether in the context of those protecting indigenous community rights (i.e. in Brazil), those seeking to assist in protecting the rights of the poor and marginalized, particularly in post-conflict settings (i.e. in Colombia), or those seeking to defend the environment (i.e. in Nigeria) will be addressed.

## **7. Forward Agenda for Scoping Rules and Practices in Sustainable Management of Resources**

In summary, to date the Committee has examined and considered cross-cutting trends in international law on sustainable development of renewable energy, biodiversity, freshwater, oceans, and also mineral commodities, forests and biological resources, taking into account links to the SDGs, relevant treaty law, and recent tribunal decisions. Future work of the Committee shall consider petroleum and shale gas, precious minerals as well as land and soil resources. Building on these surveys, it should be possible to discern good practices and cross-cutting lessons learned, and to better understand the current relevance and role of international law in the sustainable management of natural resources, both transboundary and, more problematically, in the purely domestic context. The preliminary findings to date will be provided, after discussions during Committee Meetings at the 78<sup>th</sup> Biennial Conference of the ILA in Sydney Australia, in Section VI below.

## **IV. The Principle of Sustainable Use of Natural Resources in International Law**

This section presents the findings from legal working papers undertaken in the past year, for instance drawing on the surveys of instruments to support sustainable use of natural resources and their status and implementation in international law. Scoping research by the Committee focused on how the principle of sustainable use of natural resources, as expressed in the 2002 ILA New Delhi Declaration and the 2012 ILA Sofia Guiding Statements, is being reflected in international law. They examined how the principle is being expressed in treaty instruments, and how it is being taken into account by courts and tribunals in deciding cases related to sustainable resources management.

### **1. The Principle of Sustainable Resources Use in Innovative Economic Law Instruments**

*with Dr Markus Gehring, German Branch, Dr Fabiano de Andrade Correa, Brazilian Branch & Dr Matteo Barra, Belgian Branch.*

#### **1.1 Introduction**

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production of crops or otherwise, has not been proved—with one exception, as follows: There is a small area of farming property adjacent to the boundary, west of the river, that was injured by serious increase of acidity of soil due to fumigations. Such injury, though caused, in part, prior to January 1, 1932, may have produced a continuing condition which cannot be considered as a loss for a limited time—in other words, in this respect the nuisance may be considered to have a more permanent effect, in which case, under American law (*Sedgwick on Damages* 9th Ed. (1920) Sections 932, 947), the measure of damage was not the mere reduction in the value of the use of the land but the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

<sup>183</sup> E.g., *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)* ICJ Reports 1992, 240; *Case 7615 (Brazil)*, Resolution of the Inter-American Commission on Human Rights, 5 March 1985, *Inter-American Yearbook of Human Rights*, 1985, 264, 3 *IELR* 841; UNCC Report and Recommendations made by the Panel of Commissioners Concerning Part 2 of the 4<sup>th</sup> Instalment of “F4” Claims. UN Doc S/AC.26/2004/17 (2004).

<sup>184</sup> As discussed in sections III.1 and IV.1 of this Report..

Recent trade and investment agreements have tended towards express acknowledgment of the importance of integrating trade and investment policy, on the one hand, and sustainable development on the other. This typically occurs in preambular language<sup>185</sup> as well as in policy statements in ‘Environment’ or ‘Sustainability’ Chapters,<sup>186</sup> in addition to the implications of the more operative provisions discussed below. In general, ‘sustainable development’ in this context appears to be the integration of trade and investment objectives and environmental and labour protection, under which the use of natural resources clearly fits.<sup>187</sup> However, as will be seen below, trade and investment agreements tend to directly address natural resource use primarily in the context of encouraging market mechanisms for sustainable production and consumption, or by reference to existing multilateral agreements. Many other implications for natural resource use must be drawn from general provisions, which, broadly speaking, rebalance rights and obligations between States and investors and external trading partners, and in particular the regulatory freedom of States with respect to sustainable development measures.

Many recent treaties address the need to strengthen sustainable use laws and develop new approaches in terms of encouragement of market mechanisms. Some also contain non-regression clauses which bar allowing the lowering of environmental standards to attract investment. These include promotion of accreditation and assurance schemes,<sup>188</sup> reference to existing structures such as the climate change treaty regime’s Clean Development Mechanism/Sustainable Development Mechanism and measure for Reducing Emissions from Deforestation and land Degradation (REDD+),<sup>189</sup> and general encouragement to develop and strengthen ‘flexible, voluntary and incentive-based’ systems.<sup>190</sup> The promotion of international trade in ‘climate-friendly’, ‘sustainable’ or ‘environmental’ goods and services (broadly, EGS), including by prioritising liberalisation measures in these areas, has been a popular approach.<sup>191</sup>

Recent treaties have also focused attention on existing obligations under multilateral environmental and labour agreements, and on clarifying the interaction between those agreements and trade and investment agreements. An emerging trend to provide for full implementation of multilateral environmental and labour agreements to which the States are party, including those relating specifically to the sustainable use of natural resources, can be identified.<sup>192</sup> Some agreements also

<sup>185</sup> See for example *European Union-Southern African Development Community Economic Partnership Agreement* (EU-SADC EPA) (2016); *EU-Singapore Comprehensive Free Trade Agreement* (EUSFTA) (2013), *EU-Vietnam Free Trade Agreement* (EUVFTA) (2016), *EU-Colombia-Ecuador-Peru Free Trade Agreement* (EUCEPFTA) (2012), *North American Free Trade Agreement* (NAFTA), *Canada-Peru Free Trade Agreement* (2006), *Canada-Jordan Free Trade Agreement* (2009); *Common Market for Eastern and Southern Africa Investment Agreement* (COMESA Investment Agreement) (1993); *Japan-Switzerland FTA* (2009).

<sup>186</sup> See for example *EU-SADC EPA* Part 1; *EUSFTA* Ch. 12; *EUVFTA* Ch. 15. *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam) (CPTPP) splits the subject across two chapters, Ch. 20 on the ‘Environment’ and Ch. 23 on ‘Development’. Ch. 23.8 provides that the chapter has no effect to the extent of any inconsistency with another Chapter, while Ch. 23.9 excludes the chapter from dispute settlement under Ch. 28.

<sup>187</sup> *EUSFTA* and *EUVFTA* ‘Sustainable Development’ Chapters refer extensively to environmental and labour policy, but not expressly to social issues such as poverty, inequality or indigenous rights. An arguable exception is the *European Free Trade Association-Singapore Free Trade Agreement* (2002) according to which the Parties “reaffirm their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights.”

<sup>188</sup> *EUVFTA* Art. 15(9)(e) obliges Parties to “encourage the development of and participation in [voluntary initiatives] including voluntary sustainable assurance schemes such as fair and ethical trade schemes and eco-labels”, including an option to use the EU FLEGT Programme. See also *EUSFTA* Art. 12.11(1).

<sup>189</sup> Many of these commitments are carbon-focused in line with the development of domestic and international carbon markets. *EUVFTA* Art 15(5)(2); *Mexico-Japan Free Trade Agreement* Art. 147.

<sup>190</sup> *EUCEPFTA* Art. 271; *EU-Central America Regional Trade Agreement* Art. 50.

<sup>191</sup> *EUSFTA* Art. 12.11 commits Parties to “make continuing special efforts to facilitate and promote trade and investment in environmental goods and services” and to “pay special attention to facilitating the removal of obstacles to trade or investment concerning climate-friendly goods and services”; see also *EUVFTA* Art. 15(9)(b); *EU-Korea FTA* Art.13.6; See generally E Lendo, *Defining Environmental Goods and Services: A Case Study From Mexico*, ICTSD Trade and Environment Series Issue Paper No 1 (2005). EU has promoted its FLEGT VPA system in some agreements, which provides assurance for accredited timber products to freely enter the EU market on the basis of cooperatively developed standards for ‘legal timber’.

<sup>192</sup> Art. 12.3 *EUSFTA* commits Parties to “respecting, promoting and effectively implementing the principles concerning the fundamental rights at work” in accordance with the ILO *Declaration on Fundamental Principles and Rights at Work*, to “effectively implementing the ILO Conventions”

include sector-specific commitments, such as those pertaining to forest law enforcement and governance, sharing of sustainable forest management tools and information, and the effective use of existing forest product trade regimes in a range of recent trade agreements.<sup>193</sup> The fishery subsidies provisions of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) deserve to be highlighted in this regard as a particularly positive step.<sup>194</sup>

Several States have responded to concerns that trade and investment agreements may ‘chill’ regulation for the purposes of sustainable use of natural resources by explicitly reserving policy space and regulatory discretion. Broad ‘right to regulate’ provisions,<sup>195</sup> exceptions to liberalisation or investor protections for sustainable use objectives,<sup>196</sup> and the provisions clarifying interaction with multilateral environmental and labour agreements discussed above are common approaches. Another approach, albeit less common, has been to acknowledge the validity of, or even encourage, subsidies for clean energy.<sup>197</sup>

Many trade and investment agreements seek to ensure that this regulatory freedom is applied in favour of the sustainable use of natural resources, among other relevant objectives. These agreements have taken a two-track approach by first prohibiting ‘race to the bottom’ regulatory strategies<sup>198</sup> and,

ratified and to “make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions”; Art. 12.6 commits Parties to “effectively implement... the multilateral environmental agreements to which they are a party” and that “nothing in this Agreement shall prevent either party from adopting or maintaining measures” for such implementation so long as those measures are non-discriminatory or disguised restrictions on trade. Arts. 12.7 and 12.8 oblige parties to comply with and enforce *CITES* and *FAO* principles and relevant UN instruments relating to sustainable fisheries, respectively; See also *EUVFTA* Art 15(3)-(4); *EU-Mexico* (In Principle agreement April 2018); *EU-Korea FTA* (2011) Art. 13.4-5. *Canada-Costa Rica FTA* (2001) Art. I.4; *Canada-Chile FTA* (1997) Art. A-04; *Canada-Colombia FTA* (2008) Art. 103 and Annex 103; *NAFTA* Art. 104, all provide that “[i]n the event of any inconsistency between this Agreement and specific trade obligations set out in *CITES*, *Montreal Protocol* and *Basel Convention* [Canada-Colombia adds the *Rotterdam Convention*] such obligations shall prevail to the extent of the inconsistency provided that where a Party has a choice among equally effective and reasonable available means of complying with such obligations the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement”.

<sup>193</sup> See eg. *EU-Central America RTA* Art. 289; *EUSFTA* Art. 12.7; *USA-Peru BIT* (2006) Ch. 6.

<sup>194</sup> Art. 20.16(5) of the CPTPP prohibits the granting or maintenance of subsidies for fishing that negatively affects fish stocks in an overfished condition, and that are provided to fishing vessels listed by their flag state or a relevant RFMO or arrangement for IUU fishing. Existing subsidies are to be phased out within three years of entry into force for the Party in question. All subsidies are to be reviewed by the Environment Committee established under the CPTPP, and Parties are to use their ‘best efforts’ to refrain from enhancing, extending or introducing them. CPTPP is the first treaty to address fishery subsidies in this way; negotiations on such a solution under the WTO have stalled, while the closest other example - The *Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)* Art. 7.4 - merely commits Parties to cooperate on a solution, see M Gehring, *Lessons from Fisheries Subsidies for Energy and Climate Change*, CIGI Paper 2018.

<sup>195</sup> *EUSFTA* Art. 12.2(1); *EUCEPTFTA* Art. 268; *EUVFTA* Art. 15(2)(1).

<sup>196</sup> Such exceptions are very varied. Art. 608 *Canada-Peru FTA*, for example, provides for a narrow exception to interested party participation in “technical regulations and conformity assessment procedures where urgent problems of... environmental protection... arise or threaten to arise.” *CETA* Art. 1.9 makes clear that water “in its natural state...is not a good or product” and is therefore subject *only* to provisions in the agreement relating to environmental protection unless commercial use is made of the resource. See also *EUSFTA* exception from National Treatment obligation for supply of potable water in the *Understanding 1 in relation to Singapore’s Specific Constraints of Space or Access to Natural Resources*. A much broader exception provision is contained in the *EU-South Korea FTA*, whereby measures taken under the agreement “shall not prejudice the fulfillment of legitimate policy objectives such as the protection of national security, health and the environment” and non-discriminatory measures to protect natural resources are specifically allowed. Similarly, the *Canada-Peru BIT* (2006) Art 10(1)(c) provides that the agreement does not preclude non-discriminatory or protectionist measures “for the conservation of living or non-living exhaustible natural resources.”

<sup>197</sup> *EU-Central America Association Agreement* Art. 50.4(b) provides for the “creation of incentives and mechanisms” for clean energy, indicating some support for subsidisation. *El Salvador-Honduras-Taiwan FTA* is more explicit, stating that “cooperation in this field will be carried out, mainly, by means of...support for the use of alternative and renewable energies”. It is important to note agreements continuing fossil fuel subsidies or subsidies for other unsustainable resource use.

<sup>198</sup> For example, *EUCEPTFTA* Art. 277 provides: 1. No Party shall encourage trade or investment by reducing the levels of protection afforded in its environmental and labour laws. Accordingly, no Party shall waive or otherwise derogate from its environmental and labour laws in a manner that reduces the protection afforded in those laws, *to encourage* trade or investment [emphasis added]; 2. A Party shall not fail to effectively enforce its environmental and labour laws through a sustained or recurring course of action or inaction, in a manner *affecting* trade or investment between the Parties. [emphasis added]; 3. The Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title.

Practically identical formulations can be found in the *US Model BIT* (2012) Art. 12; *Canada-Chile FTA* Art. G-15; *EU-Korea FTA* Art. 13.7; *USA-Peru FTA* Art. 18.3; *CPTPP* Art. 20.3(6); *Morocco-Nigeria BIT* (2016) Art. 15, 18(4). Cf. *EUSFTA* Art. 12.2; *EUVFTA* Art. 15.10, under which waiver or derogation ‘in a manner *affecting* trade or investment *between the Parties*’ [emphasis added] is prohibited. *EUSFTA* does not contain an equivalent of *EUCEPTFTA* Art. 277(3). Some investment agreement preambles express the view that the economic goals of the agreement “can be achieved without relaxing health, safety and environmental measures of general application”: *Finland-Ethiopia BIT* (2006); see also *Finland-Armenia BIT* (2004), *Netherlands-Suriname BIT* (2005); *Netherlands-Burundi BIT* (2007), *US-Mozambique BIT* (1998); *US-Jordan BIT* (2003); *US-Bahrain BIT* (2001), *Japan-Korea BIT* (2002); *Japan-Vietnam BIT* (2003).

second, by committing States to maintaining positive social and environmental regulations. The latter objective is pursued by way of explicit, albeit often aspirational, undertakings to ensure ‘high levels of environmental and labour protection’,<sup>199</sup> commitments to improve laws and policies in those areas,<sup>200</sup> and the affirmation of existing obligations under multilateral environmental and labour agreements.<sup>201</sup>

In the investment context, many agreements have renegotiated common investor protections in order to secure policy space. There is a trend towards clarifying and/or confining the scope of ‘like circumstances’ for the purposes of ‘national treatment’ provisions with respect to the development status of the Parties, effects on local communities and environmental effects.<sup>202</sup> Similarly, ‘fair and equitable treatment’ (FET) provisions have been refined in several ways, including by confining FET to narrower established minimum standards of treatment,<sup>203</sup> obliging tribunals to consider a country’s level of development,<sup>204</sup> or even excluding FET protections altogether.<sup>205</sup> The applicability of expropriation protections in cases of indirect expropriation has also been confined in recent agreements. Under such agreements, non-discriminatory measures for ‘legitimate’ public policy or welfare objectives are not to be considered indirect expropriation.<sup>206</sup> This is in addition to general commitments to maintaining and strengthening environmental and labour laws, at least, which are likely to affect interpretations of an investor’s ‘legitimate expectations’.

The State’s right to regulate is balanced against new or expanded obligations of trading partners and foreign investors. This includes commitments to corporate social responsibility in accordance with national standards or international best practice,<sup>207</sup> and more specific obligations such as the

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<sup>199</sup> *EUCEPFTA* Art. 268; *EUSFTA* Art. 12.2(2)

<sup>200</sup> See *EUSFTA* Art. 12.2(2); Under *EUVFTA* Art. 15(5) Parties “commit to cooperate on the development of the future legally-binding international climate change agreement applicable to all parties under the UNFCCC”.

<sup>201</sup> See on MEAs section IV.2 of this Report.

<sup>202</sup> In the *COMESA Investment Agreement* ‘like circumstances’ is required to be considered on a case by case basis with respect to a range of criteria including the relative development status of the Parties. Similarly, the *Morocco-Nigeria BIT* Art 6(3) and *South African Development Community (SADC) Model BIT* (2012) Art. 4.2 prompt consideration of, *inter alia*, the effects on third persons and the local community, and the effects on the local, regional or national environment including cumulative effects of all investments within a jurisdiction on the environment.

<sup>203</sup> NAFTA Free Trade Commission, *Note of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) 2 (online: [http://www.naftaclaims.com/commissionfiles/NAFTA\\_Comm\\_1105\\_Transparency.pdf](http://www.naftaclaims.com/commissionfiles/NAFTA_Comm_1105_Transparency.pdf)) under which “fair and equitable treatment” is confined to the “customary international law minimum standard of treatment of aliens” (MST/CIL); see also *Morocco-Nigeria BIT* Art. 7; *COMESA Investment Agreement* Art. 14.2. The *SADC Model BIT* provides for two options for Art. 5 on FET: MST/CIL which further “required the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency”; or a “fair administrative treatment” standard which guarantees procedural justice taking into consideration the level of development of the State Party. The latter option draws directly from *Neer v Mexico*, Opinion, 15 October 1926, 4 RIIA (1926) 60: see SADC, *SADC Model Bilateral Investment Treaty Template with Commentary* (July 2012) (online: <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>). For a discussion of FET and MST/CIL see OECD, *Fair and Equitable Treatment Standard in International Investment Law* 2004.

<sup>204</sup> *COMESA Investment Agreement* Art. 14.3. The second option presented in Art 5 SADC Model BIT (2012) includes such a consideration.

<sup>205</sup> *Brazil-Angola Cooperation and Investment Framework Agreement* (2015); *Brazil-Mozambique Cooperation and Investment Framework Agreement* (2015).

<sup>206</sup> *Annex 1 to the Investment Protection Agreement* under *EUSFTA* provides that: [E]xcept in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures...designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.

Similarly, *COMESA Investment Agreement* Art. 126 provides that “bona fide regulatory measures...designed and applied to protect or enhance legitimate public welfare objectives” are not to be considered indirect expropriation. See also *Annex on Expropriation and Compensation to the ASEAN-Australia-New Zealand FTA* Art. 4; *SADC Model BIT* Art 6.7. The sustainable use of natural resources is a ‘legitimate’ objective in this sense: see *United States – Important Prohibitions of Certain Shrimp and Shrimp Products*, Report of the Panel WT/DS58/R May 1998 and Appellate Body Report WT/DS58/AB/R October 1998.

<sup>207</sup> *Morocco-Nigeria BIT* Art. 18(2)-(3) obliges investors and investments to uphold human rights and core labour standards; Art 19 requires investments to ‘meet or exceed’ international standards, including the ILO *Tripartite Declaration on Multinational Investments and Social Policy*; Art. 23 contains a broader obligation on investors to ‘strive to make the maximum feasible contributions to the sustainable development of the host State and local community.’ See also *EU-Korea FTA* Art. 13.6(2), which implies that Parties can grant preferential treatment to investors who comply with CSR standards; *EUCEPFTA* Art. 271, *Brazil-Angola CIFA* Art. 10 and Annex II.

undertaking and maintenance of environmental management systems.<sup>208</sup> Obligations can also be identified in conditions on the protection afforded by international investment agreements (IIAs).<sup>209</sup>

A number of trade and investment agreements have sought to streamline cooperation, implementation and dispute resolution by establishing consultation boards or committees.<sup>210</sup> Some trade and investment agreements provide public participatory rights in relation to those boards, ranging from periodic stakeholder consultation<sup>211</sup> to mandatory consideration of and response to public submissions.<sup>212</sup> Impact assessment of trade rules is also becoming more frequent and conducted by more countries.

## 1.2 Integration and Implementation of the Principle of Sustainable Use

Trade and investment are critical dimensions of the international economic and legal order of sustainable natural resource use. The full application of the sustainable use principle as outlined in the ILA New Delhi Principles, has yet to be integrated into the text of trade agreements. The EU Treaty on the Functioning of the European Union recognises in Art. 219 that the sustainable use of natural resources is one of the objectives of EU environmental policy but very few regional trade agreements contain similar provisions.

Some have argued that, in line with degrowth or dematerialisation strategies, it is necessary to *reduce* trade and investment in natural resources in absolute terms in order to remain within planetary bounds, and that economic liberalisation policies are counterproductive in this regard.<sup>213</sup> Similarly, it is said that the modalities of trade liberalisation through multinational corporations and preferential agreements could have detrimental effects on individuals and communities in developing countries if the wrong kind of trade is emphasised.<sup>214</sup>

Sustainable natural resource use *can* be positively integrated with the objectives of economic liberalisation:<sup>215</sup> first, by attempting to harness trade and investment as engines for more equitable and

<sup>208</sup> *Morocco-Nigeria BIT* Art. 18; *SADC Model BIT* Art. 14 under which environmental management systems (EMS) are to be modulated according to the size and nature of the investment and with respect to the precautionary principle. The *SADC Model BIT* Art. 14 additionally requires that the EMS is to be continuously improved over the life of the investment, shall 'strive to exceed legally applicable standards' and include a closure fund in accordance with good industry practice.

<sup>209</sup> See for example *Costa Rica-Netherlands BIT* (1999) Art. 10 which provides that the agreement applies to investments made *before or after* its entry into force "in accordance with the laws and regulations of the [Host State] including its laws and regulations on labour and environment." *Morocco-Nigeria BIT* Art. 1 defines 'investment' as 'an enterprise within the territory of one State established, acquired, expanded or operated in good faith by an investor of the other State...which contribute [sic] sustainable development of that Party' [emphasis added]. Strictly construed, investments which do not contribute to the sustainable development of the host State may not be protected; but the present authors agree with Gehring and Kent that such a determination should be made *ex ante* rather than when a dispute arises, and the BIT discloses no mechanism for doing so: M Gehring & A Kent, "International Investment Agreements and Sustainable Development: Future Pathways" in S Alam et al., eds, *Routledge Handbook of International Environmental Law* (Taylor & Francis Group, 2012), 578.

<sup>210</sup> For example, *CETA* Chs. 25 and 26 establishes a Joint Committee on Trade with a specialist committee on trade and sustainable development, and Bilateral Dialogues on Forests, Raw Materials, Biotech and Science and Technology, respectively, with obligations to consult stakeholders on relevant issues. Such bodies have a dispute prevention mandate in the sense that Parties are obliged to seek non-adversarial resolution before arbitration can occur. *EUVFTA* Art 15.15 establishes a Specialised committee on Trade and Sustainable Development comprising senior officials, while Art. 15.16 provides for dispute resolution by consultation via this committee, and involving 'due consideration to the works of the ILO or relevant multilateral environmental organisations or bodies'; See also *Morocco-Nigeria BIT* Art. 26(1).

<sup>211</sup> *CETA* Ch. 25 and Art. 26.2(1)(g); *COMESA Investment Agreement* Art. 126.

<sup>212</sup> *CPTPP* Art. 20.9 obliges parties to receive and consider public submissions on the implementation of Ch. 20 ('Environment'), and to respond publicly in a timely manner. Moreover, if a submission asserts that a Party is failing to effectively enforce its environmental laws 'any other Party may request the Committee on Environment discuss that submission' to consider whether cooperative activities are appropriate; *USA-Colombia FTA* Article 18.4 of the US-Colombia FTA takes a similar approach. Both come short of actually granting public enforcement rights.

<sup>213</sup> See for example Arno Behrens, Stefan Giljum, Jan Kovanda and Samuel Niza, 2007 'The material basis of the global economy: Worldwide patterns of natural resource extraction and implications for sustainable resource use policies' 64 *Ecological Economics* 444, 451-2, in which the authors find that despite relative decoupling of global resource extraction and global GDP, a scale effect has meant absolute resource extraction continues to increase in the face of significant consumption, structural and technological offsetting effects.

<sup>214</sup> See generally T Cottier, J Pauwelyn & E Burgl, eds, *Human Rights and International Trade* (OUP, 2005).

<sup>215</sup> The manner in which States have sought to integrate principles of sustainable use of natural resource has been remarkably consistent with the recommendations of international organisations and legal commentators. See for example UNCTAD *Sustainable Investment Policy Framework* 2012,

sustainable economic development, including by encouraging trade in EGS' and promoting market-based sustainable natural resource use mechanisms; and second, by attempting to regulate trade and investment with reference to existing principles and institutions such as multilateral environmental agreements (MEAs), labour agreements and the 'precautionary principle', or by limiting liberalisation measures in key areas. The former approach has tended to be more specific to natural resources, while the latter has tended to offer general but nonetheless significant rules as to the nature of global economic liberalisation in the context of natural resource use.

A dual trend towards ensuring a broad right to regulate by rebalancing the rights and obligations of States and external parties, on the one hand, and structuring that regulatory freedom for obligations to enforce environmental and labour protections and relevant multilateral agreements, on the other, can be seen as in line with the ILA New Delhi Declaration.<sup>216</sup> Principle 1 identified the duty to manage natural resources sustainably and with respect to the development of the State's peoples as corresponding to the sovereign right over those resources.<sup>217</sup> As Professor Marie-Claire Cordonier Segger has noted, 'in the [Sustainable Development Goals (SDGs)], trade and investment were characterised as a *means* of implementation for sustainable development'<sup>218</sup> while at the same time SDG 17.15 contemplates mutual respect for 'each country's policy space and leadership'. This correspondence, and the concept of a State's *duty* to ensure sustainable use of natural resources, is increasingly integrated into international economic instruments in terms of direct regulatory action as well as in the promotion of EGS and other market-based mechanisms.

A number of specifically trade- and investment-related SDGs are promoted by recent agreements, although the actual effects of these agreements remains to be seen. Likely productive outcomes are from SDG 17.11, which calls for an increase in exports of developing countries, and target 2.B, which calls specifically for correction of trade restrictions and distortions in agricultural markets. SDG 8 commits to 'promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all', goals which are at least nominally pursued by the instruments discussed above by integration of multilateral labour agreements into economic development goals.

### 1.3 Regional Trade and Investment Agreements for Sustainable Resources Management

SDG 17.5 calls for the adoption and implementation of "investment promotion regimes for least developed countries." The key, in this respect, is to look into how much trade/investment agreement conduct has been going on with LDCs, and what it looks like. Similarly, SDG 10.a on differential treatment is important for investment.

For example, the Southern African Development Community (SADC) includes several LDCs, namely Angola, DRC, Lesotho, Malawi, Mozambique, Namibia, Tanzania, and Zambia. The EU-SADC EPA, providing for an established relationship between the EU and SADC recognises the special circumstances of Botswana, Lesotho, Namibia and Swaziland (BLNS States) in the preamble. It goes in to address the need to take into account the trading partners as developing countries and a LDC (i.e. Lesotho), which necessitates special and differential treatment and asymmetry. The Agreement relies

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2015; WTO *Trade Policy Review 2014: Natural Resources*; L Cotula, *IIED Handbook on Investments and Natural Resources*; Gehring & Kent, "International Investment Agreements and Sustainable Development: Future Pathways" ; MC Cordonier Segger, "Inspiration for integration: Interpreting international trade and investment accords for Sustainable Development" *Canadian Journal of Contemporary and Comparative Law* 3(1) (2017),159.

<sup>216</sup> International Law Association, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Netherlands International Law Review 49(2), 2002, 299 ("New Delhi Declaration").

<sup>217</sup> Ibid Principles 1.1-2; see also *Rio Declaration* Article 4; MC Cordonier Segger, "Inspiration for integration"; Sofia Guidelines.

<sup>218</sup> MC Cordonier Segger, "Inspiration for integration", 159, 176. See especially *Transforming our World: The 2030 Agenda for Sustainable Development*, *supra* n3.

on cooperation for trade and investment issues relating to sustainable development, in particular environmental and labour matters. Further, in the Agreement, the EU undertakes to support development in accordance with the Cotonou Agreement, commits Parties to establishing a development finance system for the SADC region, and allows safeguards to be maintained in the case of an “infant industry”.

The development of the complementary principles has mirrored the development of the concept of sustainable development generally, in that it relates to “a comprehensive and integrated approach to economic, social and political *processes*”<sup>219</sup> as well as to social, economic and environmental objectives.<sup>220</sup> To the extent that this calls for improved transparency, accountability and inclusive decision-making processes, existing economic instruments discussed do not make great advances in this area. Even within the context of broader instruments, the recognition of State sovereignty over resources, although tempered by commitments to environmental and social integration, by no means guarantees that equitable political or beneficial rights in relation to natural resources will be respected.

Since the international economic instruments discussed have focussed on altering the balance of rights and obligations in those agreements to provide a structured regulatory freedom to States, a discussion of some of the technical ways in which this objective has been pursued follows.

#### *Trade Protectionism and Non-Discrimination*

Even when broad regulatory rights are reserved, WTO Member States will not be allowed to engage in discriminatory or protectionist trade practices.<sup>221</sup> Indeed, trade agreements containing regulatory discretion provisions often provide that environmental or social protections cannot be implemented for protectionist purposes or in a discriminatory manner.<sup>222</sup> The regulatory freedom reserved for States will therefore be balanced not only by commitments to promote sustainable development objectives, but also by the need to do so in a manner which maintains a relatively open trading environment which may, as has been seen in numerous WTO disputes, circumscribe natural resource regulations.<sup>223</sup> A similar sentiment is echoed by the Rio +20 outcome document, *The Future We Want*, which urged UN Member States to implement green economy policies so that they do “[n]ot constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country and ensure that environmental measures addressing transboundary or global environmental problems, as far as possible, are based on international consensus.”<sup>224</sup>

#### *‘Race to the Bottom’, Regulatory Freedom and Non-regression*

Recent trade agreements have sought to address the problem of trade and investment pressures encouraging lax social and environmental protections. The relevant provisions in a set of EU comprehensive agreements offer useful comparisons. EUSFTA and EUVFTA state that the exercise of regulatory rights should be “consistent with the principles of internationally recognised standards or agreements to which [the State in question] is a party.”<sup>225</sup> It is not clear that regulatory discretion

<sup>219</sup> New Delhi Declaration (emphasis added).

<sup>220</sup> The ‘principle of integration’, *ibid* Art 7.

<sup>221</sup> *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, [WT/DS412/AB/R](#) / [WT/DS426/AB/R](#), adopted 24 May 2013, DSR 2013:I, p. 7.

<sup>222</sup> See eg. EU-South Korea Art. 7.50

<sup>223</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, [WT/DS381/AB/R](#), adopted 13 June 2012, DSR 2012:IV, 1837.

<sup>224</sup> UN General Assembly, *The Future We Want. Resolution 66* (2012), 288.

<sup>225</sup> Art. 12.2(1) see also EUVFTA Art. 15(2)(1): Parties “recognise the right of each Party to determine its sustainable development objectives, strategies, policies and priorities, to establish its own levels of domestic protection in the environmental and social areas as it deems appropriate and to

would be strictly limited by what is ‘consistent’ with those principles, or that the Parties contemplated that the sustainable and just use of natural resources was such a principle. Explicit comments - preambular and otherwise - directing the agreement towards sustainable natural resource use objectives may be used as interpretive tools to refine the right.<sup>226</sup> Art. 12.12 of the EUSFTA, for example, prohibits waiver or derogation from environmental or labour laws “in a manner *affecting* trade or investment *between the Parties*.”<sup>227</sup> EUSFTA does not contain an equivalent of Art. 277(3) of the EUCEPFTA. The prohibition of waiver or derogation ‘affecting’ trade or investment is *prima facie* wider than that directed to waiver or derogation ‘to encourage’, though the precise parameters are unclear. The former is, however, limited to conduct touching trade or investment “between the Parties”, while the latter is apparently of more general application. A most recent development is the demand by the EU that there should be a so-called non-regression clause in the EU-UK post-Brexit Trade Agreement,<sup>228</sup> i.e. the commitment that the implementation of the agreement cannot constitute valid grounds for reducing the general level of environmental protection. These clauses are new to natural resources law as they have thus far only been used in employment related treaties.<sup>229</sup>

### *Investor Protections and Disputes*

Under liberalised regimes subject to international dispute settlement systems, the regulation of natural resource use has historically been prone to challenge on the basis of a range of liberalisation and investor protection provisions.<sup>230</sup> The *Vattenfall* litigation offers a good example of the implications such challenges can have for the capacity of States to proactively and sustainably manage natural resources. Indirect expropriation and fair and equitable treatment (FET) protections in IIAs, in particular, are significant in this regard, and have each been addressed directly in terms of what investors’ protected ‘legitimate expectations’ may be. ‘Indirect expropriation’ refers to conduct of a host State which results in “substantial deprivation”<sup>231</sup> or “depriv[ation]...in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property”<sup>232</sup> subject to investment protections. The line between legitimate regulatory action and ‘indirect expropriation’ is hazy, not least because arbitral decisions have typically been made on the basis of specific treaty language situated in “different historical and social contexts”<sup>233</sup> Nonetheless, or perhaps because of this lack of clarity, States may be wary of environmentally- or socially-oriented regulations which affect the value of a protected investment.<sup>234</sup> By expressly excluding bona fide efforts in ‘legitimate public policy’ or ‘public welfare’ regulatory areas from the scope of prohibited indirect expropriation, the agreements discussed above make a substantial advancement towards regulatory freedom and legal clarity in the area of natural resource use.<sup>235</sup>

However, arbitral tribunals appear to be more willing to find a breach of FET standards than of indirect expropriation protections on the basis of regulatory action.<sup>236</sup> Several States and commentators have expressed concern that tribunals have interpreted such standards very broadly, raising the threshold of

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adopt or modify accordingly its relevant laws and policies, consistently with the principles of internationally recognised standards or the agreements, to which it is a party”.

<sup>226</sup> See eg. CISDL online: [http://cisdl.org/public/docs/news/cisdl\\_studie\\_asia.pdf](http://cisdl.org/public/docs/news/cisdl_studie_asia.pdf)

<sup>227</sup> Art. 12.12 emphasis added; see also EUVFTA Art. 15.

<sup>228</sup> Daniel Boffey, “EU will seek ‘non-regression’ clause to tie UK to environmental standards” *The Guardian*, 10 Apr 2018.

<sup>229</sup> See S Peers “Non-regression Clauses: The Fig Leaf Has Fallen”, *Industrial Law Journal*, 39(4) (2010), 436.

<sup>230</sup> It is possible that around 70% of ISDS claims have been environmentally related.

<sup>231</sup> *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/08, Award 12 May 2005.

<sup>232</sup> *Metalclad Corp v United Mexican States*, 5 ICSID Reports 212.

<sup>233</sup> *Continental Casualty Company v Argentina* ICSID Case No ARB/03/9, Award 5 September 2008, 277.

<sup>234</sup> See eg., K Tienhaara, *The Expropriation of Environmental Governance: Protecting foreign investors at the expense of public policy* (Cambridge University Press, 2009).

<sup>235</sup> Sustainable use of natural resources is almost certainly a ‘legitimate’ purpose.

<sup>236</sup> UNCTAD 2012, 147; P Leon, “Creeping Expropriation of Mining Investments: An African Perspective”, *Journal of Energy & Natural Resources Law* 27(4) (2009), 597, citing *Pope & Talbot, Inc v Government of Canada*, 7 ICSID Reports 69, Para. 102 (‘Pope & Talbot’); *Metalclad supra* n233, Para 103; *CMS Gas Transmission Company supra* n234, Para. 262.

‘fair’ and ‘equitable’ to levels which unreasonably chill regulations in important areas.<sup>237</sup> Agreements which have sought to clarify the meaning of these terms as discussed above strike different balances of regulatory freedom.

In addition to direct clarifications, the efforts at general integration of sustainable use principles into trade and investment agreements outlined above are very likely to have a significant impact on an investors’ protected ‘legitimate expectations’.<sup>238</sup> In particular, provisions relating to the enforcement of MEAs and labour agreements, to ‘high levels’ of environmental and labour protection, and to continuous improvement of those protections, would likely preclude a wide range of challenges on the basis of regulatory changes in those areas. Regulation which was non-discriminatory, proportionate to its objective, and otherwise ‘fair and equitable’ in a more narrow procedural sense would be more likely to survive a challenge and, therefore, more likely to be contemplated by States.

## **2. The Principle of Sustainable Resources Use in Innovative Environmental Law Instruments** *with Professor Marie-Claire Cordonier Segger, Canadian Branch, Dr Alexandra Harrington, Colombian Branch, Dr Arie Trouwborst, Netherlands Branch & Ms Cairo Robb, British Branch*

### **2.1 Introduction**

Environmental challenges – and opportunities for more sustainable development of natural resources – often extend beyond the sovereign boundaries of States. International accords on the environment and on sustainable development of natural resources, in recent decades of intensive treaty negotiations and implementation efforts, are setting new standards, and trying innovative new approaches to common resources management problems. Interested coalitions of States, and broader epistemic communities, the networks of State and non-State actors involved in problem-solving and collaboration related to the object and purpose of the treaties, have mobilized, and sought rules by which they could secure better management practices.

The myriad and inter-connected processes in these fields, this paper will argue, contribute to realization of the global Sustainable Development Goals (SDGs), which were adopted by the UN in 2015 to chart an international cooperation agenda forward to 2030.<sup>239</sup> While a number of SDGs are implicated by the principle of sustainable use of natural resources, several are of particular note, such as goals 6, 7, 13, 14, 15,<sup>240</sup> and targets 1.4, 8.4, and target 9.4.<sup>241</sup> At the same time, they highlight the ways in which the principle of sustainable use of natural resources has become ingrained in, and essential to, multilateral environmental agreements (MEAs) across a wide range of topics. In this light, the paper provides an examination of the principle of sustainable use of natural resources, examining first the innovations which have emerged as part of MEA practice and then the ways in which this reflects the continued viability and fundamental importance of the principle. Finally, the paper proposes avenues for future research undertakings that include these lessons and the pressing needs of the international community.

### **2.2 Innovations from International Environmental Law**

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<sup>237</sup> UNCTAD 2012, 2015; See also OECD, *Fair and Equitable Treatment Standard in International Investment Law* 2004, 2.

<sup>238</sup> Gehring & Kent, “International Investment Agreements and Sustainable Development: Future Pathways”; Leon, “Creeping Expropriation”.

<sup>239</sup> Agenda 2030, *supra* n3.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

In recent decades, there has been a significant strengthening of international environmental governance (IEG). As UN Environment explains, this work has continued unabated in the last decades, and as of 2018, the international community has adopted over 500 MEAs, which have produced a number of innovations in their topic fields and in international law as a whole.<sup>242</sup>

### *Reporting Requirements and Action Plans*

At the international and regional levels, MEAs have increasingly included reporting requirements for Parties to assess the means through which the terms of a particular agreement are implemented. The motivations for this include the need for assessment of compliance in itself, which implicates the State's own interests, and the need for the international (or regional) community to have information on environmental threats and progress. Such assessments are innovative as they are integral to the success of any MEA. This duality can be seen in the terms of the Vienna Convention and associated Montreal Protocol, which allow Parties to generate policies that regulate harmful substances, while at the same time requiring that States report these policies and their effects to the larger international community that is, as a whole, impacted by such policies.<sup>243</sup> Similarly, some of the essential terms of the Stockholm Convention relate to multiple reporting requirements for Parties in regard to persistent organic pollutants (POPs), their production, and transportation, which include elements that relate to using methods that protect the natural environment.<sup>244</sup> Further, the Minamata Convention, one of the newest MEAs, requires States to obtain information regarding the production and stocks of mercury in their territories and to regulate and restrict the production and storage of mercury in their jurisdiction as well as the transportation of mercury.<sup>245</sup> This includes control and oversight of the import and export of mercury within and between Parties.<sup>246</sup> Additionally, the Convention on Migratory Species (CMS) creates obligations for Parties to ensure that their actions and decisions do not have a harmful impact on the environment in other states as well as within their own jurisdictions.

In addition, some MEAs require Parties to file periodic action plans in order to articulate the current and future plans for compliance with the MEA and for adaptation, mitigation, and other means necessary to ensure compliance. A key example comes from the 1994 UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD)<sup>247</sup>, which requires Parties to create and implement a National Action Programme (NAP) "to identify the factors contributing to desertification and practical measures necessary to combat desertification and mitigate the effects of drought."<sup>248</sup>

### *Use of Environmental Impact Assessments*

Environmental impact assessments (EIAs) have become of increasing value in the international and regional systems created by MEAs and reflect the practice of many States at the national level as well. EIAs offer a unique area at which scientific collaboration, transparency, public participation and governance systems overlap and inform each other. By allowing for ongoing changes in this relationship, EIAs are a continuously renewing and thus innovative system in international law and governance. For example, Parties to the UN Convention on Biological Diversity (CBD) are required to include considerations of sustainable use of biological diversity in planning and decision-making.<sup>249</sup>

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<sup>242</sup>UN Environment, *International Environmental Governance* (UNEP, 2017) online:

<http://staging.unep.org/delc/EnvironmentalGovernance/tabid/54638/Default.aspx>

<sup>243</sup> Vienna Convention for the Protection of the Ozone Layer, 22 March 1985 (in force 22 September 1988), 1513 UNTS 323; Montreal Protocol on Substances that Deplete the Ozone Layer, 14-16 September 1987 (in force 1 January 1989), 1522 UNTS 3 ("Montreal Protocol").

<sup>244</sup> *Ibid.*, Art. 6.

<sup>245</sup> Minamata Convention on Mercury (2013), *supra* n42, Art. 3.

<sup>246</sup> *Ibid.*

<sup>247</sup> *UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (1994)

<sup>248</sup> *Ibid.*, Art. 10.

<sup>249</sup> *Convention on Biological Diversity* (1992), Art. 10.

A key aspect of this is the requirement that Parties introduce impact assessment that takes biodiversity considerations into account within their jurisdictions.<sup>250</sup> Additionally, the 1997 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)<sup>251</sup> is innovative in listing of projects that require EIAs as it contains a number of activities which implicate the sustainable use of natural resources.<sup>252</sup> At the same time, the inherent flexibility of the Espoo Convention and subsequent protocol allow for the inclusion of additional areas for EIAs as needed.

### *Public Awareness and Participation*

One of the increasingly prominent aspects of MEAs – international or regional – is their focus on and inclusion of the public participation, transparency, and similar actions as well as the promotion of public awareness of actions subject to the MEA's terms. This includes measures that empower the public to join in the discussions and debates regarding activities falling under the scope of the MEA and to serve as active participants in the public sphere. Including individuals and civil society in national and international law realms formerly reserved for States is innovative in its philosophy and its ability to ensure that the true needs and interests of affected communities are heard.

An example of the educational aspects involved in MEAs comes from the Stockholm Convention, which provides for extensive public education and awareness activities by State Parties, as well as requiring the Parties to report their measures for compliance to the governance entity established under the Stockholm Convention.<sup>253</sup> In another example, the Aarhus Convention has generated a separate system for ensuring transparency through monitoring and oversight including through the Compliance Committee, which receives complaints regarding Parties conduct from other States and members of the public. The Aarhus Convention establishes duties for States and individuals to protect the environment, and natural resources contained in it, for current and future generations.<sup>254</sup> This allows for the voices of citizens, including those speaking for future generations, to be heard and included in State decision-making processes. While the New Delhi Declaration includes the principle of public participation and access to information and justice as a principle in its own right, it notes that the principle of sustainable use of natural resources specifically includes a duty on non-state actors.

An unusual method of addressing transparency in the MEA context comes from the African Union promulgated Bamako Convention, which requires that waste generators themselves report their activities to the Convention Secretariat, which then releases a compilation of this information for all Parties.<sup>255</sup> This requirement places an obligation directly on the industry as well as on Parties, which stresses the importance of citizen participation in the Convention governance process, but might also result in inconsistencies in data, depending on whether review is robust.

### *Cooperation and Assistance*

Cooperation and assistance between States, particularly neighbours, has become an increasingly commonplace element of MEAs. While at first this might not seem innovative in itself, the ability of MEAs to include cooperation and assistance requirements flexibly and in a variety of situations indicates their ongoing innovative status.

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<sup>250</sup> *Ibid.*, Art. 14.

<sup>251</sup> *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, (in force 1997), 1989 UNTS 309.

<sup>252</sup> *Ibid.*, Appendix I.

<sup>253</sup> *Convention on Persistent Organic Pollutants*, 22 May 2001 (in force 17 May 2004), 2256 UNTS 119, (“Stockholm Convention”), Arts. 10, 15.

<sup>254</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access To Justice in Environmental Matters*, 28 June 1998 (in force 30 October 2001) (“Aarhus Convention”) Preamble, Art. 1.

<sup>255</sup> *Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 30 January 1991 (in force 22 April 1998), 2101 UNTS 177 (“Bamako Convention”), Art. 4(3).

In terms of information sharing, the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*<sup>256</sup> (Water Convention) contains provisions mandating that a State notify other potentially effected States in the event of some form of pollution or other emergency involving the transboundary watercourse.<sup>257</sup> In implementing the terms of the Water Convention, the Parties are encouraged to create further bilateral and international agreements relating to particular bodies of water that are classified as transboundary in nature.<sup>258</sup> A certain level of international cooperation on transboundary watercourses, including wetlands, is also facilitated by the venerable 1971 *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention).<sup>259</sup> Within the Ramsar Convention is the requirement that Parties consult with each other on wetlands protection and related issues,<sup>260</sup> and this requirement has particular significance where a designated wetland area crosses Party boundaries.<sup>261</sup> Based on this requirement, Parties can decide to manage such transboundary wetlands jointly as ‘Transboundary Ramsar Sites’, which has happened in 16 instances so far.<sup>262</sup>

A similar mechanism, based on requirements to cooperate, operates within the 1972 UNESCO World Heritage Convention,<sup>263</sup> where some 20 transboundary natural areas have been included in the World Heritage List.<sup>264</sup> Also noteworthy is the progressive establishment of transfrontier conservation areas (TFCAs) within the framework of the Southern African Development Community’s *Protocol on Wildlife Conservation and Law Enforcement*, where the conservation and sustainable use of wildlife resources are coordinated between two or more countries sharing TFCAs.<sup>265</sup>

As part of the regime to protect migratory species, UNCLOS requires States that are home to such species to cooperate with each other and coordinate protections for the species and the facilitation of their travel.<sup>266</sup> Similarly, UNCLOS requires that States cooperate in the conservation of living maritime resources on the high seas in order to protect these resources using methods that are sustainable as well as productive.<sup>267</sup> In these ways, UNCLOS seeks to create new international law regimes and reinforces existing international law practices regarding methods and mechanisms for joint governance of areas of mutual influence. An example of such practices is the designation of various high seas marine protected areas in the North-East Atlantic within the framework of the OSPAR Convention.<sup>268</sup>

A range of mechanisms to coordinate the conservation of migratory species has evolved within the framework of the aforementioned CMS, including treaties, memoranda of understanding, ‘special species initiatives’ and action plans.<sup>269</sup> Particularly innovative are various mechanisms for coordinating the conservation and sustainable use of goose populations at the flyway level, developed under the aegis of the African-Eurasian Waterbird Agreement<sup>270</sup> (a CMS subsidiary instrument). A

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<sup>256</sup> *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992 (in force 6 October 1996), 1936 UNTS 269 (“Helsinki Convention” or “Water Convention”).

<sup>257</sup> *Ibid.*, Art. 14.

<sup>258</sup> *Ibid.*, Art. 2(6).

<sup>259</sup> Ramsar Convention, *supra* n99..

<sup>260</sup> *Ibid.*, Art. 5.

<sup>261</sup> *Ibid.*

<sup>262</sup> See Ramsar COP Resolution VII.19 (1999) and online: [http://archive.ramsar.org/cda/en/ramsar-documents-trss/main/ramsar/1-31-119\\_4000\\_0..](http://archive.ramsar.org/cda/en/ramsar-documents-trss/main/ramsar/1-31-119_4000_0..)

<sup>263</sup> World Heritage Convention, *supra* n104.

<sup>264</sup> Online: <http://whc.unesco.org/en/list>.

<sup>265</sup> See *SADC Protocol on Wildlife Conservation and Law Enforcement*, 18 August 1999 (in force 30 November 2003), Art. 4.

<sup>266</sup> *Ibid.*, Art. 64.

<sup>267</sup> *Ibid.*, Arts. 118-119.

<sup>268</sup> *Convention for the Protection of the Marine Environment of the North-East Atlantic*, 22 September 1992 (in force 25 March 1998) 2354 UNTS 67 (“OSPAR Convention”); online: <http://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>.

<sup>269</sup> See online: <http://www.cms.int>.

<sup>270</sup> *Agreement on the Conservation of African-Eurasian Migratory Waterbirds* 16 June 1995 (in force 1 November 1999), 2365 UNTS 203.

significant innovative feature is the determination of goose removal targets at the international population level, and its translation into hunting bag quotas for the individual countries involved.<sup>271</sup>

### *Dispute Settlement Mechanisms*

Setting disputes peacefully and without recourse to conflict or other forms of retaliation has become a mainstay of MEAs. This is an innovative method of addressing dissent between Parties to a particular international regime. Further, it is innovative as it demonstrates the ability of MEAs to implement effective and meaningful dispute settlement systems across a wide spectrum of topical and geographical areas. UNCLOS contains a strong dispute settlement mechanism through a special International Tribunal on the Law of the Sea (ITLOS), which addresses conservation and resource management.<sup>272</sup> This has since been used to allow concepts such as environmental protection and sustainable development to be incorporated into the UNCLOS regime. In this way, the UNCLOS' dispute settlement regime has fostered transparency within the context of the treaty and, as such, through the broader global system of maritime conservation. Additionally, the Water Convention Implementation Committee was established as part of the governance structure.<sup>273</sup> While the Committee doesn't evaluate whether a Party is complying with its requirements, it does hear and issue opinions on requests for advisory opinions on compliance-related issues.<sup>274</sup> Parties or invited experts and advisors may participate, but complaints cannot be brought by individuals or groups.<sup>275</sup>

### **2.3 Links to the New Delhi Principle on Sustainable Resources Use**

There are many developments that have occurred in the last few years to assist in the implementation of the principle as it is reflected in the MEAs. Data is shared with State decision-makers, and in certain instances, becomes the platform for States and non-State actors to reach consensus on environmental problems and work to address them together. In some cases, the MEAs have also supported efforts to 'fail forward' into cooperative instruments to address them.<sup>276</sup> Many MEAs include terms and requirements that evince a broad-based inclusion of the principle of sustainable use of natural resources. This has been a noticeable trend since the New Delhi Principles were adopted and has only strengthened the period to date.

For example, the UNFCCC embraced the principle of sustainable use of natural resources in its Preamble, calling upon Parties to use natural resources in ways that do not harm the environment at the same time that it affirms States' control over territory and the use of natural resources in it.<sup>277</sup> Similar provisions are found in such varied MEA regimes as the Vienna Convention and Montreal Protocol, Ramsar Convention and the CBD.

Dispute settlement forms an important element of MEA innovation and practice. MEAs help States resolve disputes on treaty interpretation peacefully, both through the inclusion of dispute settlement provisions, and through the encouragement of their appropriate use. The awards and decisions of these bodies not only resolve disputes that might otherwise further degrade the contested areas, but also assist States to understand their binding obligations and principles, interpreting the treaty law with an independent and respected voice.<sup>278</sup> In so doing, the principle of sustainable use of natural resources

<sup>271</sup> See e.g., online: <http://pinkfootedgoose.aewa.info/>.

<sup>272</sup> UNCLOS, *supra* n33, Part VII Sect. 2..

<sup>273</sup> Decision VI/1 Support to implementation and compliance, ECE/MP.WAT/37/Add.2 (2012).

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*, DA Bolton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development & International Law* 27 (1996), 125.

<sup>277</sup> UNFCCC, *supra* n78, , Preamble.

<sup>278</sup> UN Environment, InforMEA, online : <https://e-learning.informea.org/>.

is reflected by ensuring that there are sufficient juridical and quasi-juridical venues for the principle to be applied and interpreted.

Transparent reporting, monitoring and verification practices have become more common in international law. By encouraging greater transparency in the treaty negotiation and implementation process, in part through the provision of important national information, international law and procedures have advanced. Treaty regimes on the environment rely upon public participation and dissemination of information to generate awareness, ownership and support for their work on all levels, and the UN assists in this process. Public access to information through technology and media is generating new potentials for meaningful public participation and engagement.<sup>279</sup> Each of these mechanisms directly reflects the contents and intent of the principle of sustainable use of natural resources. For example, the Stockholm Convention contains multiple reporting requirements for Parties in regard to POPs, their production, and transportation, which include elements that relate to using methods that protect the natural environment.<sup>280</sup>

States have sovereignty over natural resources, and are vested with authority to regulate development activities that can drive or cumulatively exacerbate environmental problems.<sup>281</sup> In many cases, international efforts to address problems will fail without broad-based cooperation. In this way, the Espoo Convention supports the principle of sustainable use of natural resources by recognizing the obligation of the State to ensure that activities within its borders do not cause harm to the environment or natural resources. An additional example of the balance between national and international concerns under both MEAs and the principle of sustainable use of natural resources, CBD Parties are required to include considerations of sustainable use of biological diversity in planning and other State activities and decision making, and within these activities are required to make the protection of biological diversity a key element.<sup>282</sup> This further supports the principle of sustainable use of natural resources through placing obligations on States regarding protection of their domestic environment.

At the same time, the principle reflects the need to ensure that cross-boundary impacts of national activities are assessed and that neighbouring States are given notice of such activities. Examples include the Water Convention, under which Parties are encouraged to create further bilateral and international agreements relating to particular bodies of water that are classified as transboundary in nature.<sup>283</sup> As an extension, Parties that share watercourses are required to create joint bodies and practices under the auspices of the Water Convention.<sup>284</sup> Further, the principle of sustainable use of natural resources is directly connected to many existing and emerging MEA regimes through their efforts to preserve, protect and enhance areas that are common heritage of humankind, which include maritime resources. An example of this is the UNCLOS Straddling Stocks Agreement, under which Parties must protect natural resources from over exploitation, particularly fishing, and to engage in responsible exploitation.<sup>285</sup>

## 2.4 Future Research Avenues

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<sup>279</sup> Duyck, Jodoin & Lofts. .

<sup>280</sup> Stockholm Convention, *supra* n253, Art. 6.

<sup>281</sup> N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP, 2007).

<sup>282</sup> CBD, *supra* n130, Art. 10.

<sup>283</sup> Water Convention, *supra* n256, Art. 2(6).

<sup>284</sup> *Ibid.*, Arts. 9, 11.

<sup>285</sup> *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 December 1995 (in force 11 December 2001), 2167 UNTS 88 (“Straddling Stocks Agreement”, Preamble, Art. 2.

This summary of findings has highlighted emerging trends in international collaborations, including transboundary sustainable resources management, different levels of government and the private sector, and many forms of dispute resolution. These measures, among others, are furthered and made more meaningful through the MEA negotiation and implementation process. While weak and imperfect, the efforts of States, through their MEAs, to address emerging challenges, and the ever-increasing contributions of these and other international accords towards achieving world's broader SDGs, remain positive signs. Still, issues remain for the future application of the principle of sustainable use of natural resources and MEA regimes and these issues will merit additional research. At present, the international community faces challenges regarding the implementation of sustainability, particularly from fragmentation and incoherence among multiple efforts on one hand, and growing trends of intolerance and parochialist populism that risk defeating the efforts of key countries on the other. As States and their non-State partners struggle to build and implement, by consensus, increasingly complex systems of rules and actions, across uncertain science and diverse societies, treaties can do a world of good. The extent and transferability of MEA obligations is thus an essential venue for future research.

These important efforts to foster interactional mechanisms constitute innovations for sustainable natural resources management. Despite many positive aspects, recent increases in the complexity and numbers of international treaties in the field of environment are presenting important challenges, particularly for coherent, effective treaty implementation across a broad cross-section of Parties. Fragmented, overlapping, incoherent or even contradictory priorities with limited resources have become an important obstacle for progress in implementing any treaty, and this is particularly clear in the environmental arena. Such overlaps, particularly where environmental and other development concerns are all at stake, can be difficult to manage.<sup>286</sup> A further challenge occurs when a State, particularly a major power, decides or threatens to withdraw from the treaty regime, trailing broken commitments. In this context, an in-depth study of the ways in which MEA regimes function is critical to the generation of meaningful future outcomes, laws and rules that have their intended effects and can assist current and future generations.

### **3. Principle of Sustainable Use of Natural Resources in Human Rights Law**

*with Dr Alexandra Harrington, Colombian Branch & Dr Leticia Sakai, French Branch, thanking Dr Surabhi Ranganathan, HQ/India for her ideas and guidance.*

#### **3.1 Introduction**

For many years, natural resources were at the center of strategic, economic and security policy concerns. With the evolution of human rights in international law, the issue of access to natural resources joined the lexicon of topics related to the enjoyment of human rights. The normative development by international and national legal regimes and jurisprudence has consolidated the connection between natural resources and the obligation to respect, protect and fulfill other fundamental human rights, solidifying a right to which everyone is entitled, all humankind in current and future generations. The present paper aims to highlight some innovative developments in the consolidation of the connection between natural resources and human rights, particularly through jurisdiction and standing, oversight and monitoring requirements, and forms of ownership and control, as well as explicit juridical connections that have been recently confirmed by international courts and tribunals. In this context, it is observed that, in general, human rights instruments – most of them

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<sup>286</sup> MC Cordonier Segger & A Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford University Press, 2004).

adopted before the development of the New Delhi Principles – do not mention the principle of the use of natural resources. However, today, the application of the protection of human rights in conjunction with sustainable use of natural resources may be related to the growth of the principle. These new developments nevertheless face challenges and could be object of future reflections and research.

### 3.2 Survey of Innovations

#### *Jurisdiction and Standing*

From the outset, international human rights instruments have provided extensive protection for individuals, including for economic, social and cultural rights that are associated with access to natural resources.<sup>287</sup> Similarly, the jurisdiction of international courts and tribunals has been steadily expanded to include not only individuals but also groups and peoples, such as indigenous peoples. This has been accomplished through jurisprudence from a number of areas.<sup>288</sup>

Whether in the context of international human rights treaties or international courts and tribunals, the expansion of jurisdiction and standing is innovative – and, arguably, essential – to natural resource protection for many reasons. Firstly, it reflects a deeper understanding of the relationship between natural resources and human rights involving rights with different scopes, for instance, the human rights to food, to housing, to health, or to property. Secondly, these developments also expand the constituencies in number (individuals, groups, communities, and generation) and in time (present and future generations) who are entitled to seek or to benefit from legal protections in relation to natural resources. Finally, these innovations in turn correlate to many aspects of the SDGs and their achievement in that they provide mechanisms for the SDGs to be included in governmental and juridical contexts relating to human rights as well as purely to environment, such as SDGs 2, 11, 12, 13, 14, and 15.

#### *Oversight and Monitoring Requirements*

Most human rights treaties do not refer to environmental impact assessments (EIAs), however, the majority of them require State Parties to report on their compliance with the terms and spirit of the treaty.<sup>289</sup> This, in turn, generates the requirement that a designated treaty oversight mechanism be used to evaluate implementation and provide guidance on the status and meaning of the treaty in application. In this context, innovative interpretations and applications of treaty terms over time have allowed well-established international human rights treaty regimes to adapt and include tenets that are increasingly related to the sustainable use of natural resources. For example, the Committee on the Elimination of Discrimination against Women has recognized the threats that climate change and disasters pose to women and girls and has issued an in-depth General Recommendation discussing the role of sustainable use of natural resources in mitigating these issues.<sup>290</sup>

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<sup>287</sup> See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (in force 3 January 1976), 993 UNTS 3 (“ICESCR”); *International Covenant on Civil and Political Rights*, 19 December 1966 (in force 23 March 1976), 999 UNTS 171 (“ICCPR”).

<sup>288</sup> Examples of this include *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, African Commission on Human and Peoples’ Rights 155/96 (2001), Paras 44–46; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, African Commission on Human and Peoples Rights 276/03 (2005), Para. 156; *African Commission on Human and Peoples’ Rights v Republic of Kenya*, Application No. 006/2012 (2017), Para. 123; *Moiwana Community v Suriname*, Inter-American Court of Human Rights (2005); *Yakye Axa indigenous Community v Paraguay*, Inter-American Court of Human Rights (2005); *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights (2001); *Sawhoyamaya Indigenous Community v Paraguay*, Inter-American Court of Human Rights (2006); *Saramaka People v Suriname*, Inter-American Court (2007); *Xakmok Kasek Indigenous Community v Paraguay*, Inter-American Court of Human Rights (2010); *Los Pueblos Indígenas Kuna de Madungandí y Embera de Bayano y Sus Miembros v Panama*, Inter-American Court of Human Rights (2014).

<sup>289</sup> See ICESCR, *supra* n287; *Convention on the Elimination of all forms of Discrimination Against Women*, 18 December 1979 (in force 3 September 1981), 1249 UNTS 13.

<sup>290</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation 37 on Gender-related dimension of disaster risk reduction in the context of climate change*, CEDAW/C/GC 37 (2018).

At the same time that international courts and tribunals increasingly concern themselves with EIAs and similar mechanisms, as well as social impacts, these are taken into account in planning at the State level. Natural resources and their sustainable use figure prominently in these cases, often in instances where challenges have been brought to a State's grant of concessions or contracts for natural resource exploitation.<sup>291</sup> In these instances, courts have used EIAs and other similar evaluation mechanisms as vehicles to require inclusion of the individuals impacted voices, especially those from indigenous communities or vulnerable communities, in decision-making regarding natural resource use.<sup>292</sup> As a corollary, the concept of free, prior and informed consent for transfers and/or exploitation of territory and natural resources has become a key component of international law. This has been recognized by international human rights instruments, courts and tribunals.<sup>293</sup> Included in the analysis of free, prior and informed consent is the understanding of how the territory and natural resources will be used and the impact that such uses will have on the sustainability of lands and communities around them.<sup>294</sup>

In this regard, allowing the affected individuals and communities to be heard in different methods and contexts and to participate in the decision-making is innovative. In addition, this allows courts and tribunals to reach decisions that are informed by complete knowledge of the role of natural resources in society and the necessity of sustainable use of natural resources to protect the concerned communities.

#### *Forms of Ownership and Control*

The method of analyzing issues relating to ownership rights and territorial control that have direct relationships to natural resources used by the international jurisprudence is innovative in that, as a whole, it extends beyond traditional constructs of paper-based title to assert ownership and control rights in order to determine the historically appropriate rights holders for territory and natural resources.

For example, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), provides for the right to self-determination and/or self-government for indigenous and tribal communities, including over natural resources located within their territories.<sup>295</sup> Beyond this, it vests indigenous peoples with ownership and access rights to lands they have traditionally occupied and over natural resources located on them as well as traditional knowledge and the use of traditional cultural expressions and practices.<sup>296</sup> The holdings of international courts and tribunals have been instructive in this regard. As an example, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, the African Commission on Human and Peoples' Rights recognized that the traditional use of territory – and the natural resources on it – can be the basis for a valid assertion of ownership by indigenous communities.<sup>297</sup> The *Endorois* case further articulated that the indigenous community at issue was the holder of the right to natural resource use in their territories and to consultation with the State when natural resources were to be used.<sup>298</sup>

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<sup>291</sup> See e.g., *Kichwa Indigenous People of Sarayaku v Ecuador*, Inter-American Court of Human Rights (2012); *Comunidad Garifuna de Puenta Piedra y Sus Miembros v Honduras*, Inter-American Court of Human Rights (2015)

<sup>292</sup> See e.g., *Kichwa Indigenous People of Sarayaku*, *supra* n291.

<sup>293</sup> See United Nations Declaration on the Rights of Indigenous Peoples (2007), *supra* n116, Arts. 10, 19; *Inter-American Convention Against All Forms of Discrimination* (2013), Art. 4(xiv); *Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance* (2013), Art. 15; African Commission on Human and Peoples' Rights, *supra* n3, Para. 131; *Saramaka People*, *supra* n3; *Kichwa Indigenous People*, *supra* n6; *Comunidad Garifunda Triunfo de la Cruz y Sus Miembro v Honduras*, Inter-American Court of Human Rights (2015).

<sup>294</sup> *Ibid.*

<sup>295</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2007), *supra* n116.

<sup>296</sup> *Ibid.*, Arts. 26, 31.

<sup>297</sup> *Endorois*, *supra* n288, Para. 184.

<sup>298</sup> *Ibid.*, Paras. 267, 268.

Ownership of natural resources has raised the concomitant issue of expropriation in instances where prior consultation has been conducted by the State. In these instances, international courts have found that there is a necessary balancing test of public interests and private ownership rights rather than allowing the State free range to expropriate these resources.<sup>299</sup> This balancing test includes assessments of the sustainable use of the natural resource at issue.<sup>300</sup> Even in instances where State ownership of a natural resource is uncontested, international courts and tribunals have been willing to insert human rights laws into attempts to ensure sustainable use of natural resources.<sup>301</sup>

By recognizing expanded ownership rights for traditional territory and natural resources to people, international human rights law treaties and international courts and tribunals are the sites of innovation for the connection between human rights and natural resources. These regimes have provided, and continue to provide, structures within which to validate previously unused methods of asserting control and ownership over territory and the resources on it. At the same time, these regimes are innovative in their methods of incorporating traditional practices and constructs involving natural resources into a larger system for recognizing communal rights and ensuring that they are included in domestic and international assessments.

### *Explicit Juridical Connections*

In 2017, the Inter-American Court of Human Rights issued an advisory opinion, *Environment and Human Rights*, at the request of Colombia. This opinion offered a summary of not only relevant practices in the region but also practices from other regional courts, international courts and tribunals, and international treaty regimes.<sup>302</sup> The provision of an advisory opinion on such a broad scale is in itself innovative. Beyond this, the advisory opinion contains several innovative methods of analyzing issues relating to sustainable use of natural resources at the regional and international levels. As a preliminary matter, the Court established that there is an inherent relationship between human rights and environmental rights, one that is damaged by issues such as climate change.<sup>303</sup> Sustainable development and its tenets play a significant role in these relationships.<sup>304</sup> This was deemed to be of particular importance for indigenous and tribal communities that are uniquely dependent on and threatened by unhealthy environments.<sup>305</sup> In making this determination, the Court focused on the relationship between indigenous and tribal communities and natural resources, highlighting that the lack of sustainable use of natural resources results in increased vulnerabilities to these communities.<sup>306</sup> Overall, natural resources, sustainable use and protection are regarded as essential to human rights and environmental rights.<sup>307</sup> Accordingly, the Court recognizes the State's duty to protect the environment as being intertwined with its human rights obligations.<sup>308</sup> This extends to extractive industries as well, demonstrating the need to balance the economic aspects of human rights with environmental rights.<sup>309</sup>

### **3.3 Links to the New Delhi Principle on Sustainable Resources Use**

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<sup>299</sup> See *Arsovski v Former Yugoslav Republic of Macedonia*, European Court of Human Rights, Application No. 30206/06 (2013), Paras. 52-62; *Los Pueblos Indígenas Kuna*, *supra* n288; *Comunidad Garifuna de Puenta Piedra*, *supra* n291.

<sup>300</sup> See *Bogdel v Lithuania*, European Court of Human Rights, Application No. 41248/06 (2014); *Los Pueblos Indígenas Kuna*, *supra* n3; *Comunidad Garifuna de Puenta Piedra*, *supra* n291.

<sup>301</sup> See *Haraldsson and Sveinsson v Iceland*, Human Rights Committee Communication No. 1306/2004 (2007), Para. 10.4; *Xakmok Kasek Indigenous Community*, *supra* n288.

<sup>302</sup> See *Opinion Consultiva OC 23-17, Medio Ambiente y Derechos Humanos*, Inter-American Court of Human Rights (2017).

<sup>303</sup> *Ibid.*, Para. 47.

<sup>304</sup> *Ibid.*, Paras. 54-55.

<sup>305</sup> *Ibid.*, Para. 48.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, Para. 62.

<sup>308</sup> *Ibid.*, Para. 69.

<sup>309</sup> *Ibid.*, Para. 126.

When examining international human rights law instruments it is essential to acknowledge that many of these were created before the principle of sustainable use of natural resources was articulated.<sup>310</sup> This does not, however, lessen the connections with the principle. The implementation mechanisms for international human rights instruments have applied their terms with an evolving recognition of and commitment to the underlying requirements of the principle.<sup>311</sup> Further, where the rights of peoples over natural resources found within their territories were recognized in international instruments, often these rights did not make mention of sustainable use or sustainable development per se.<sup>312</sup>

Thus, the evolution of international human rights law from an early recognition of communal rights over territory and natural resources to the current state of wider acceptance of the need to assert these rights in conjunction with sustainable use of natural resources is a reflection of the growth of the principle. Issues relating to essential resources such as food and water have been clarified since the creation of various treaty regimes to include specific links with environmental and sustainable use.<sup>313</sup> At the same time, international courts and tribunals have recognized the obligation of States to prevent activities that would undermine the sustainability of food sources, thereby bolstering the principle of sustainable use of natural resources.<sup>314</sup>

The principle of sustainable use of natural resources can be seen in newly promulgated international human rights instruments. The Inter-American Convention Against all Forms of Discrimination and Intolerance places an obligation on State Parties to prevent and punish discriminatory and intolerant acts that, in relevant part, pertain to restrictions on individual access to and sustainable use of natural resources.<sup>315</sup> In conjunction with this, the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance contains the same provisions and protections, highlighting the complementarity between human rights laws and protections and natural resources.<sup>316</sup> The 2005 African Youth Charter embraces the need for inclusion of current and future generations as policy concerns and as the crafters of policy in a number of areas including those relating to sustainable use of natural resources and environmental protection.<sup>317</sup> Similarly, the African Union has promulgated an additional instrument which provides for the involvement of women in matters relating to sustainable use of natural resources at the domestic, regional and international levels.<sup>318</sup>

The balancing of interests to ensure sustainable use of natural resources has been endorsed by international courts and tribunals.<sup>319</sup> In this way, arguably, fluidity in development within a State can be seen as assisting in the achievement of the principle of sustainable use of natural resources and its entrenchment as a matter of international law.

### 3.4 Future Research Avenues

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<sup>310</sup> Though it can be argued it has a long tradition, see e.g., HE Judge Weeramantry, "Sustainable Justice Through International Law" in MC Cordonier Segger & HE CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals*, 1992-2012 (Routledge, 2017), 117-123.

<sup>311</sup> See e.g., Committee on the Elimination of Racial Discrimination, *General Recommendation XXII on the Rights of Indigenous Peoples* (1997).

<sup>312</sup> See UN General Assembly resolution 1803 (XVII) of 14 December 1962, *Permanent Sovereignty over Natural Resources*; UN General Assembly resolution 2542 (XXIV), *Declaration on Social Progress and Development* (1969).

<sup>313</sup> See Committee on Economic, Social and Cultural Rights, *General Comment 12 – the right to adequate food*, E/C.12/1999/5 (1999); Committee on Economic, Social and Cultural Rights, *General Comment 15 – the right to water*, E/C.12/2002/11 (2002).

<sup>314</sup> See *SERAC*, *supra* n288; *Yakye Axa indigenous Community*, *supra* n288.

<sup>315</sup> *Inter-American Convention Against All Forms of Discrimination*, 6 June 2013, Art. 4(xiv).

<sup>316</sup> *Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance*, 5 June 2013, Art. 4(xiv).

<sup>317</sup> *African Youth Charter*, 2 July 2006 (in force 8 August 2009).

<sup>318</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 11 July 2003 (in force 25 November 2005), Arts. 18, 19.

<sup>319</sup> See *Dubetska and Others v Ukraine*, European Court of Human Rights, Application No. 30499/03 (2011); see also *Herrmann v Germany*, European Court of Human Rights, Application No. 9300/07 (2012); *Jugheli and Others v Georgia*, European Court of Human Rights, 38342/05 (2017); *Yakye Axa indigenous Community*, *supra* n288.

This paper has highlighted emerging trends in international collaboration, including the development of innovations regarding the connection between natural resources and human rights. Notably, regarding jurisdiction and standing, international human rights instruments have provided protection for individuals associated with access to natural resources, and this protection has been extended to groups and communities. Regarding oversight and monitoring, international courts and tribunals have allowed that concerned communities affected by natural resource to use have access to justice in different contexts and methods. Another interesting development is that international courts have been trying to reach a balancing test of public interests and private ownership rights by affirming an inherent relationship between human rights and environmental rights. These innovations are correlated to many aspects of the SDGs and could provide mechanisms to achieve them, especially those related to access to natural resources, building capacity for sustainable use of natural resources and crediting local knowledge and initiatives to sustainably use natural resources (Goals 2, 11, 12, 13, 14, and 15).<sup>320</sup> This could be a subject for future reflection.

Regarding the observance of the principle of the sustainable use of natural resources in the application of human rights law, some of the developments made to date may be reserved to the regional level. However, similar challenges are faced at the global level. The consolidation of developments made by international courts and tribunals regarding the connection between the sustainable use of natural resources and human rights in a legally binding text has yet to be achieved on a global scope. The contents of existing and yet to-be-created texts could bring a better structure in terms of the articulation of the relationship, and validate the place and abilities of rights-holders, legal capacity and access to justice.<sup>321</sup> It could also facilitate the identification of those responsible for the rights' violations, for example in instances where the use of natural resources by international corporations is questioned. It could also recommend methods to better coordinate and integrate the several topics involved in the intersection between human rights and natural resources protections (for instance, commodities, commerce, or bioethics). These challenges could be the object of future research.

Finally, another point for reflection and future research is the new course in the global climate effort brought about by the UNFCCC Paris Agreement (2015),<sup>322</sup> the text of which mentions, in its Preamble, that “*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...*”. This can certainly work as an important tool in the application of the principle of sustainable use of natural resources in human rights law.

#### **4. The Principle of Sustainable Use of Natural Resources in Instruments for Post-Conflict Contexts and Environmental Peacebuilding**

*with Ms Amanda Kron, Swedish Branch & Dr Kishan Khoday, HQ/UNDP*

Future work of the Committee shall examine how the principle of sustainable use of natural resources, as discussed in the New Delhi Principles and in the Sofia Guiding Statements, is reflected in the agreements and instruments that govern post-conflict contexts and environmental peacebuilding.

The environment and natural resources have been described as a “silent victim” of armed conflict, and are often severely impacted both at the outset, during, and after an armed conflict. Unsustainable

<sup>320</sup> United Nations Sustainable Development Goals, see online: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

<sup>321</sup> See e.g. UN Special Rapporteur on Human Rights and the Environment, *Framework Principles on Human Rights and the Environment* (2018), UN Doc A/HRC/37/59.

<sup>322</sup> Paris Agreement, *supra* n2.

management of the environment and natural resources can contribute to the outbreak of conflict, fuel and finance existing conflicts, and increase the risk for conflict relapse. Environmental impacts and the degradation of natural resources can pose a serious threat to the livelihoods of communities based in the affected area and stymie development. In addition, environmental harm can disrupt the functioning of important ecosystems, and prevent effective peacebuilding and reconstruction processes. On the other hand, natural resources have also been recognized as a platform for peaceful dialogue. Protecting the environment through international law and promoting the use of natural resources to support good governance in peacebuilding is one of the tools available to the international community to prevent and mitigate these effects. This section of the report serves as a brief introduction to the matter, and lays the groundwork for a more detailed study that will be provided in the next Committee report.

In the 2014 report of the Committee, “the relationship between armed conflict and natural resource management” is underlined as a key development challenge.<sup>323</sup> Similarly, the 2016 First Report of the Committee highlights the way in which “SDG 16 powerfully reaffirms the critical importance of sound governance and the rule of law in curbing violence and terrorism as being essential for achieving sustainable development”.<sup>324</sup> In Principle 1, the ILA New Delhi Principles reference the responsibility of States to “to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction” and their “duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems”. Principle 6 on good governance also notes that “good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development”. Among the principles of the 1992 Rio Declaration, Principle 24 states that: “*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.*” Good governance is also at the heart of Sustainable Development Goal 16 on peace, justice, and strong institutions.

In recent decades, the promise of international law on this matter has come to the forefront, with developments e.g. in the work of the International Law Commission<sup>325</sup> and the International Criminal Court.<sup>326</sup> The role of climate change and environmental change as a “threat multiplier” has also gained increasing attention within the international community, e.g. through UN Security Council Resolutions and Presidential Statements.<sup>327</sup> The UN Environment Assembly is also increasingly addressing links between conflict, peacebuilding and the environment.<sup>328</sup> In addition, the Sustainable Development Goals (SDGs) serve to both mitigate fragility, corruption and environmental hazards on the one hand (e.g. SDGs 3.9, 15.7, 16.4, 15.2), and enable good governance on the other (e.g. SDG 16.7, 5.a, 2.3, 12.2, 16.8), thus providing a good entry point for the work of the Committee.

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<sup>323</sup> ILA Committee on Role of International Law for the Sustainable Management of Natural Resources for Development, Preliminary Draft Note for discussion at the Washington Conference (2014), 2.

<sup>324</sup> ILA Committee on Role of International Law for the Sustainable Management of Natural Resources for Development, First Report of the Committee (2016), 31.

<sup>325</sup> See e.g., *Official Records of the General Assembly, Seventy-first session, Supplement No. 10 (A/71/10)*, Paras. 139-189.

<sup>326</sup> See e.g., Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (2016), Para. 41: *The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land (emphasis added)*”

<sup>327</sup> See e.g., UNSC Resolution 2349 (2017) on the situation in the Lake Chad Basin region (31 March 2017) and UNSC Presidential Statement S/PRST/2018/3 on Peace consolidation in West Africa (30 January 2018)

<sup>328</sup> See e.g. UNEA Res. 2/15 on Protection of the environment in conflict-affected areas; UNEA Res 3/L.5 on Pollution mitigation and control in areas affected by armed conflict or terrorism.

## 5. Forward Agenda for Analysis of the Principle of Sustainable Use of Natural Resources

In summary, during the Cambridge meeting of the Committee, Members discussed the working papers for the first time, considering the most important recent developments and trends in each area of law, links to the SDGs, relevant treaty law, recent tribunal decisions and other issues. Upon consideration of the final versions of the papers at the meetings of the Committee during the ILA 78<sup>th</sup> Biennial Conference in Sydney, Australia, in August 2018, it should be possible discern several good practices and cross-cutting lessons learned, and to better understand the current relevance and role of international law in the sustainable management of natural resources, and these findings can be provided in Section VI below.

## V. Principle of Sustainable Use of Natural Resources in International Law in the Decisions of International Courts and Tribunals

*With Professor Marie-Claire Cordonier Segger, Canadian Branch; Professor Freya Baetens Belgian Branch; Dr Ilaria Espa, Italian Branch & Dr Alexandra Harrington, Colombian Branch.*

International law is constantly evolving and developing new contours and this is in no area more evident than in the law relating to natural resources.<sup>329</sup> For example, it is possible to trace a growing acceptance by international courts and tribunals of the need for cooperation on certain common procedural and substantive points in securing more sustainable transboundary resources management from the *Trail Smelter* case<sup>330</sup> to the *Pulp Mills* case<sup>331</sup> and onward. Each of these cases represents certain advances in themselves, and taken together, the increasing number of disputes being resolved also represent steps on a pathway toward increased development of international law relating to natural resources as it is applied in courts and tribunals. The Committee, in its future report, will discuss a range of decisions by international courts and tribunals of relevance to the sustainable management of natural resources, discerning common trends and analysing the current state of the law. (See Annex 1 – XXX). In this initial summary, a selection of key decisions rendered during the 2016-2018 are briefly presented, in order to lay the foundations for later joint reflection and findings.

In terms of the ILA *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*<sup>332</sup> and the subsequent *Sofia Guidelines*,<sup>333</sup> there has been demonstrable growth in the judicial forums that are willing to accept and apply them as standard tenets of international law since 2002. As articulated in these Principles, and subsequently accepted through various courts and tribunals, the principle of sustainable use of natural resources means that the natural resources of a State will be used in a way that is sustainable for current and future generations and that is not harmful to neighbouring States.<sup>334</sup> Not only has the number of courts and tribunals applying the Principles and Guidelines increased, the number of cases in which they are used and the complexity of the cases in which they are used strengthens their place in the lexicon of international law. This has, in turn,

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<sup>329</sup> Marie-Claire Cordonier Segger & HE Judge CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals*, 1992 – 2012 (Routledge, 2017).

<sup>330</sup> *Trail Smelter* case (*Canada/USA*), 3 UNRIAA, 1905 (1952); 1 IELR 231..

<sup>331</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, 14.

<sup>332</sup> ILA *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (2002) (New Delhi Declaration/Principles).

<sup>333</sup> *Sofia Guiding Statements on the Judicial Elaboration of 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development* (2012) (Sofia Guidelines).

<sup>334</sup> See New Delhi Principle 1.

influenced the ways in which domestic law, international law, and international organizations<sup>335</sup> function and view their mandates.

The following are a selection of cases issued by various international courts and tribunals from 2016 to July 2018, alongside a decision from 2014. These opinions have been issued by different entities with varying mandates and abilities. The parties differ in identity, goals, and arguments. Yet what unites these decisions is their inclusion of aspects of the principle of sustainable use of natural resources as a matter of law and policy.

*Opinion Consultiva OC 23-17, Medio Ambiente y Derechos Humanos*, Inter-American Court of Human Rights (2017)<sup>336</sup>

In this advisory opinion issued at Colombia's request, the Inter-American Court of Human Rights established that there is an inalienable relationship between human rights and environmental protection, one that is inherently damaged by issues such as climate change and the lack of enjoyment of full human rights. In making this determination, the Court focused on the relationship between indigenous and tribal communities and natural resources, highlighting that the lack of sustainable use of natural resources result in increased vulnerabilities to these communities. Accordingly, the Court recognizes the State's duty to protect the environment as being intertwined with its human rights obligations. This extends to extractive industries as well, demonstrating the need to balance the economic aspects of human rights with environmental rights. This advisory opinion links directly to New Delhi Principles 1.2, relating to State management of natural resources, and 1.3, relating to the "protection, preservation and enhancement of the natural environment."

*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean /Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, International Court of Justice (2018)<sup>337</sup>

In this case, originally filed in 2010, Costa Rica contended that Nicaragua violated international law, including the Ramsar Convention, by encroaching and maintaining a presence upon the lawful territory of Costa Rica. In addition to the occupation issue per se, Costa Rica asserted that Nicaragua had conducted digging and activities associated with the creation of a dam on Costa Rican territory without prior informed consent and a proper transboundary environmental impact assessment. In this decision, the Court provided boundaries, largely based in the Ramsar Convention, to a State's requirement to perform an EIA when the work in question will occur solely within its territory, including considerations of whether there will be lasting environmental damage. Further, the Court held that there would be a general requirement for Nicaragua to inform Costa Rica of potentially damaging transboundary environmental impacts - such as those impacting natural resources - from an activity such as dredging. In this instance, however, the Court found that such allegations were not substantiated. This opinion links directly to New Delhi Principles 1.1, especially the requirement that States "do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction," and 1.2 relating to the necessary internal measures to be taken by a State in attempts at developing its territory.

*Jugheli and Others v Georgia*, European Court of Human Rights (2017)

This case was brought by several residents of apartment complexes located near a thermonuclear plant in Tbilisi. The plant operated as a State facility during the Soviet era and was subsequently privatized, although it experienced functional issues under both regimes, causing it to fully or partially cease

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<sup>335</sup> See AR Harrington, *International Organizations and the Law* (Routledge, 2018).

<sup>336</sup> *Opinion Consultiva OC 23-17, Medio Ambiente y Derechos Humanos*, Inter-American Court of Human Rights (2017).

<sup>337</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean /Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, ICJ Nos. 157, 165 (2 February 2018).

operations on several occasions. The residents claimed that the plant caused various forms of nuisance, from air pollution to water pollution, and that these were never properly addressed under Georgian or European law. The Court found that there were sufficient markers of damage from air pollution generated by the plant and that this was a violation of the State's responsibility and the States's regulatory responsibility once the plant had been privatized. In this way, the *Jugheli* decision reflects the principle of sustainable use of natural resources, namely Principle 1.2, through the requirement that there is a duty for States to sustainably manage their natural resources and take the needs of future generations into account.

*Commission v Poland*, European Court of Justice (2018)<sup>338</sup>

This case was brought by the Commission against Poland in order to challenge a 2016 order to remove certain trees from several forests within the State that were covered by Natura 2000 and recognized as UNESCO world heritage sites. Poland asserted that these actions were necessary because the trees in question had died and become diseased, while the Commission asserted that insufficient information on how these measures would be carried out for the remainder of the protected forest areas had been provided. The Court found that the State had not properly investigated the impacts that the proposed actions would have, reinforcing the principle of sustainable use of natural resources, particularly in an area that was designated as having cultural and environmental value. This opinion links directly to New Delhi Principles 1.2, relating to conserving natural resources for current and future generations, and 1.3, relating to “the proper management of climate system, biological diversity and fauna and flora of the Earth.”

*African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court of Human and Peoples Rights (2017)<sup>339</sup>

In this case, the Court heard claims brought on behalf of the Ogiek Community in Kenya, an indigenous community seeking relief from Kenyan orders that it leave its ancestral territories. In addition to fundamental questions regarding the propriety of the eviction order, the case involved, at its core, the question of whether the State was obliged to recognize a collective property right that would accommodate communities such as the Ogieks. As a response, the Court recognized the ability of a community such as the Ogieks, which is a verified and established indigenous community having a connection to the territory at issue, to assert collective property rights. This had a direct bearing on the inclusion of the appropriate parties in evaluation of land use that impacts the environment, reflecting the principle of sustainable use of natural resources, particularly Principle 1.2, which explicitly requires the inclusion of indigenous peoples in decision-making and rights holding.

*Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana v Cote D'Ivoire)*, ITLOS (2017)<sup>340</sup>

In this case, the ITLOS was asked to set the precise maritime boundary, including coordinates, between Ghana and Cote D'Ivoire. An essential aspect of this territorial dispute was the ability of the successful State to exploit the natural resources found in the implicated seabed and exclusive economic zone. Concomitantly, it was required to address the question of whether oil exploitation practice can be used as a method of determining the parameters of a maritime boundary between two states. The Panel established that exploitation mechanisms alone cannot be used to set territorial boundaries, having impact for the parties and also for the principle of sustainable use of natural resources, as it seeks to ensure that natural resources in the seabed are not exploited for purposes which might render them as

<sup>338</sup> *European Commission v Republic of Poland*, C-441/17, ECLI:EU:C:2018:255) (17 April 2018).

<sup>339</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No. 006/2012 (2017).

<sup>340</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana v Cote D'Ivoire)*, International Tribunal on the Law of the Sea, Case No. 23 (2017).

unsustainable simply because of their territorial potential. This opinion links directly to New Delhi Principles 1.1, particularly the requirement that State activities “do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction,” and 1.2, particularly the requirement that States not use natural resources wastefully.

*China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, World Trade Organization Dispute Settlement Body (2014)

This dispute centered on the ways in which China restricted the exports and placed limitations on access to rare earths metals for foreign corporations and States. The targeted minerals have become of increasing value on the world market due to their use in items such as cellular phones and computers, China had argued that these measures were necessary in order to allow the State to protect the environment from damage incurred by mining efforts for rare earths minerals in the short and long term and to promote sustainable development. In response several States complained that these measures violated the GATT. The Panel and Appellate Body asserted that these measures would be laudable if properly applied, but that the way in which they were applied and materializing as laws without application in reality. This opinion links directly to New Delhi Principles 1.2 in relation to the State’s “duty to manage natural resources . . . in a rational, sustainable and safe way,” and 1.3 in relation to “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.”

*Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, World Trade Organization (2016)

The Fukushima Dai-ichi nuclear power plant disaster in Japan resulted in many internal issues for residents and for Japan. It also resulted in a massive quantity of nuclear materials being discharged into the surrounding sea, causing massive pollution issues that were distributed to underwater life, as well as terrestrial agricultural life. In response, Korea imposed a number of sanitary measures regarding products from Japan in order to assess their safety prior to allowing them on the Korean market. Japan, in turn, argued that this was a violation of the GATT and that the ways in which the Korean measures were imposed were discriminatory. The Panel found that the majority of the Korean mechanisms were in fact over broad, and thus discriminatory, despite the damage to the environment that was deemed to be a threat to the human and environmental population. This opinion links directly to New Delhi Principles 1.1, regarding not harming other States through environmental management and other activities, and 1.3, regarding the protection of the environment.

Whether on land or at sea, the selected cases demonstrate the innovation of the principle of sustainable use of natural resources being applied across jurisdictions and legal fields. At the same time, the ways in which these international courts and tribunals have applied the principle highlights the flexibility that is inherent in the principle of sustainable use of natural resources. Even a quick review of cases currently pending in courts and tribunals such as the World Trade Organization and the International Court of Justice supports this assertion and the future viability of the principle. Indeed, through work based on earlier collaborations and Committee findings, the Committee analysed the key decisions of international courts and tribunals on matters related to natural resource management from 2002 – 2017. It found that in several cases, important guidance is being provided by the international judiciaries based on the principle of sustainable use of natural resources. These conclusions are found in a new volume, edited by Professor Marie-Claire Cordonier Segger with HE Justice CG Weeramantry, in collaboration with Dr Alexandra Harrington, that was released by Routledge Publishers in 2017.<sup>341</sup>

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<sup>341</sup> MC Cordonier Segger & HE Judge CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals*, 1992 – 2012 (Routledge, 2017).

The conclusions of this volume, as they relate specifically to the ILA New Delhi Principle on Sustainable Use of Natural Resources and the related Sofia Guiding Statements, and taking into account further developments in international law, shall be discussed in greater depth in subsequent reports of the Committee.

## **VI. The Evolution of International Law in relation to Sustainable Use of Natural Resources**

This section shall, space permitting, provide a brief analytical discussion of the Committee's findings to date on the evolution of the principle of sustainable use of natural resources in international law, analyzing the duty of countries to use natural resources in a manner that is sustainable, considering the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest, and taking into account the interests and needs of future generations. This analytical piece shall be based on the outcomes of the Committee's meetings in Sydney at the ILA's Conference and shall be included in the final version of this Committee's Second Report.

The papers in this Report highlight that as time moves on, the extent of guidance provided by international law over the management of natural resources is growing, through a mix of binding principles and treaty rules, supported by related 'soft law' standards and governance regimes. At the same time, the preliminary scoping of how international law affects sustainable management of Mineral Commodities and Forests, as well as Land and Soil, to mention only a few examples, speak to the largely piecemeal and incidental way that international law encourages more sustainable management. The arguments for and against these trends are potentially myriad. It remains unclear whether the response should be attempts for new comprehensive regimes or seeking to use the existing regimes in more innovative and effective ways. This suggests that continuing work and analysis by those able to offer expert insights from international and national perspectives is essential.

Nevertheless, from a reading of all the papers and abstracts in this Report, it is clear that the following have established themselves as critical elements in the international rules and practice for the sustainable management of natural resources:

(1) Recognition that the science and technology underpinning the management of the world's natural resources is becoming more global. This can be seen in relation to the:

- establishment of the Global Soil Partnership, and the associated Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services in the Land and Soil abstract, initiated under the auspices of the FAO mirror to some extent the similarly global Intergovernmental Panel on Climate Change (IPCC), emphasising the need for multidisciplinary collaborative scientific inquiry at a global level.
- importance of identifying and understanding the world's reserves of natural resources, with a view to their current and future equitable, peaceful and sustainable management. Linked to this is the international significance of technological development, such as achieving economically viable recyclability of currently non-recycled natural resources, as alluded to in the Mineral Commodities paper.
- requirement for suitably detailed EIAs as an essential component of natural resource management in national and international law, especially, but not only, in relation to understanding transboundary and global impacts.

(2) Related to the above, the crucial role of data collection, access to information, transparency and public engagement, as well as effective anti-corruption laws and mechanisms, including in the regulation of land and resource ownership. For example:

- The International Environmental Instruments paper leads us through a variety of mechanisms in this regard, which are mentioned also in other papers, and are now becoming commonplace in international law for sustainable natural resource management.
- It is also evident in the Biological Resources and Human Rights papers that traditional knowledge, and human and peoples rights, including rights of Indigenous Peoples and local communities, are increasingly being acknowledged in international legal instruments as well as international courts and tribunals, in relation to sustainable use and management of natural resources, in line with the New Delhi Principle of sustainable use.

(3) Collaboration between and within countries is essential in relation to sustainable use of shared natural resources and the resources that are of common concern and common heritage of humankind.

- The papers show collaboration taking many forms, including the fulfilment of national reporting and strategic planning requirements, such as NBSAPs under CBD, NAPs under UNCCD, NDCs under the Paris Agreement, and the scientific collaboration mentioned above, as well as capacity building and technical and financial cooperation mechanisms such as those described, e.g., in the Forests and International Economic Instruments papers.
- The relevance of sustainable use of natural resources to conflict and post-conflict situations and peace building comes through strongly throughout the Report, not just in the Post-conflict and Peacebuilding abstract, and likewise highlights the importance of a collaborative, inclusive process.

(4) Clarification of the interfaces between different regimes is increasingly required, such as between international trade and investment agreements and environmental protection regimes, as discussed in the International Economic Instruments paper, including in the WTO disputes featuring elsewhere in the Report and described in the Courts and Tribunals paper. Indeed, as the Forests paper notes, sometimes even within the same field there can be a multiplicity of international instruments on the subject, which can also lead to differing approaches, duplicating efforts or even conflicting goals.

Overall the Report speaks to the need, at the very least, to clarify the relationships and increase synergies between the existing conventions, instruments and regimes, which the Guidelines proposed will aim in some measure to address. It remains to be seen whether there is any appetite for additional international principles or treaty regimes.

## **VII. Future Work Programme and Forward Agenda**

### **7.1 Future Work Programme**

The Future Work Programme of the Committee considers three further issues. In particular, it will examine the principle of sustainable use of natural resources in international law over the next two years, alongside the regulation of natural resources in developing countries, in order to inform the next

report. Finally, it will consider possible recommendations for guidelines for sustainable management of natural resources in accordance with international law. In particular, the focus shall be on:

**(ii) Principle of Sustainable Use of Natural Resources in International Law**

With regards the second tranche of work, on the **Principle of Sustainable Use of Natural Resources in International Law**, the following activities and deliverables are planned:

*Activity 2:* As final steps in the second tranche of work, form further working groups to engage interested Committee Members in discussions and drafting of remaining short working papers leading to a report for peer discussion during the 2020 Biennial Conference in Kyoto, Japan.

*Report III:* An examination of the principle of sustainable use of natural resources, analyzing the duty of countries to use natural resources in a manner that is sustainable, considering the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest and taking into account the interests and needs of future generations, drawing on several Annexes:

Annex III-1: Rules and Practices of International Law for Sustainable Management of Precious Mineral Resources

Annex III-2: Rules and Practices of International Law for Sustainable Management of Socio-Environmental Impacts of Petroleum

Annex III-3: Rules and Practices of International Law Sustainable Management of Land and Soil Resources

**(iii) Regulation of Natural Resources in Developing Countries**

With regards the third tranche of work, on **Regulatory Approaches to Natural Resources in Developing Countries**, the following studies leading to deliverables are proposed:

*Activity 3:* Form a working group to engage interested Committee Members in discussions and drafting of a series of short working papers leading to a report, supported by a task team of legal researchers from Member law faculties, for peer review during an online process and an international conference event in 2020, and

*Report 3:* A report examining innovative national and international approaches to the regulation of natural resources, commenting on the impact of such approaches on the sustainable use of natural resources and on the evolution of international law in this field, based on:

Working Paper III-1: Review of innovative legal approaches to address the growing external ecological footprint from natural resource demand by major economies (tbc);

*Annex – Working Paper III-2:* Survey of innovative national approaches to support greater citizen access to transparency, accountability and participation in decision-making over natural resources (Dr Kishan Khoday, HQ/UNDP & Ms Amanda Kron, Sweden);

*Annex – Working Paper III-3:* Review of regulatory approaches to combat illicit flows and enhance governance of natural resource revenues (Professor Isabel Feichtner, Germany)

**(iv) Guidelines for Sustainable Management of Natural Resources in Accordance with International Law**

*Activity 4:* Rapporteurs and Committee Members draw together key issues and lessons learned from Reports 1-3 and their Annexes, in consultation with IUCN and other relevant partners, taking into account the SDGs related to natural resources agreed in the post-2015 development agenda negotiations of the UN General Assembly, producing draft Guidelines and a leading commentary for broad consultation and discussion in a parallel event during ILA 2018, and launch in ILA 2020.

*Final Product 4:* As a final product, the Committee intends to elaborate practical Guidelines for the Sustainable Management of Natural Resources in Accordance with International Law, in a first draft to be submitted at the ILA 2018 Biennial Conference and to be finalized and accompanied by a leading commentary, preferably in 2018 but no later than at ILA 2020 Biennial Conference in Kyoto.

## 7.2 The Forward Agenda

The Committee agreed the Work Programme and Methodology at the ILA 2014 conference in Washington, adopting a collaborative and inclusive approach, seeking to engage Committee Members as experts in joint preparation of Committee outcomes, using both in-person and online approaches. The Work Programme was finalized and agreed by email in 2014-15, as Committee Membership increased. Committee Members are forming Working Groups based on their interests and research/practice agendas, towards elaboration of outcomes. Depending on their interests and expertise, Committee Members are welcomed in any/all working groups, and commit to the series of deliverables as co-author. The Reports are based on substantive analytical briefs or papers, prepared collaboratively by responsible Committee experts. Outcomes of working groups are sent to all Committee members for review, and discussed in international meetings prior to adoption as Reports. Working groups organize research events with online collaborative elements, and as a space for peer discussions working papers and draft reports, this is likely to lead to book publications. Committee Members also engage young scholars and professionals to serve as pro bono research assistants in documenting innovative natural resources regulations and other tasks. Seminars to date have included a legal expert seminar kindly hosted by the Committee Chair, Professor Nico Schrijver from 12-14 November in the Faculty of Law of Leiden University in 2015 after the adoption of the SDGs by the United Nations, an international law symposium in Montreal in 2017 for the launch of the Committee's new book on *Sustainable Development in International Courts and Tribunals* (Routledge 2017), and an international legal experts panel and seminar in 2018 hosted by the Committee Rapporteur, Professor Marie-Claire Cordonier Segger and Dr Markus Gehring at the Lauterpacht Centre for International Law in the University of Cambridge, UK. The eventual Guidelines and accompanying Commentary will be elaborated by the Rapporteurs, guided by the Chair, and reviewed by the Committee Members prior to adoption.

## ANNEX 1

### Key Decisions of International Courts and Tribunals on Matters Related to Sustainable Natural Resource Management from 2002 – 2017

*By Dr Alexandra Harrington Colombian Branch, Professor Freya Baetens Belgian Branch, Professor Marie-Claire Cordonier Segger, Canadian Branch & Dr Ilaria Espa, Italian Branch.*

#### I. Key Decisions in International Courts and Tribunals (State v State)

1. International Centre for Settlement of Investment Disputes
  - i. *AES Corporation and Tau Power BV v Republic of Kazakhstan*
  - ii. *AES Summit Generation Limited and AES-Tisza Eromu Kft v the Republic of Hungary*
  - iii. *Aguaytia Energy LLC v Republic of Peru*
  - iv. *Asian Agricultural Products, Ltd. v Republic of Sri Lanka*
  - v. *Atlantic Triton Company Limited v People’s Revolutionary Republic of Guinea*
  - vi. *Azpetrol International Holdings, BV, Azpetrol Group, BV, and Azpetrol Oil Services Group BV v Republic of Azerbaijan*
  - vii. *Banro American Resources, Inc. and Societe Aurifere du Kivu et du Maniema SARL v Democratic Republic of the Congo*
  - viii. *Bear Creek Mining Corporation v Republic of Peru*
  - ix. *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*
  - x. *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*
  - xi. *Burlington Resources v Ecuador*
  - xii. *Cambodian Power Company v Kingdom of Cambodia*
  - xiii. *Caraveli Cotaruse Transmisora de Energia, SAC v Republic of Peru*
  - xiv. *Chevron Bangladesh Block Twelve Ltd. And Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v People’s Republic of Bangladesh*
  - xv. *Cementownia “Nowa Huta” SA v Republic of Turkey*
  - xvi. *Chevron Corporation and Texaco Corporation v Ecuador*
  - xvii. *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*
  - xviii. *Duke Energy International Peru Investments No. 1 Ltd v Republic of Peru*
  - xix. *EDF International SA, SAUR International SA, and Leon Participaciones Argentinas v Argentine Republic*
  - xx. *El Paso Energy International Company v Argentine Republics*
  - xxi. *Electrabel SA v Republic of Hungary*
  - xxii. *Empresa Electrica del Ecuador v Republic of Ecuador*
  - xxiii. *Europe Cement Investment & Trade SA v Republic of Turkey*
  - xxiv. *EVN AG v the former Yugoslav Republic of Macedonia*
  - xxv. *F-W Oil Interests Inc v the Republic of Trinidad and Tobago*
  - xxvi. *Global Trading Resource Corp. and Globex International, Inc. v Ukraine*
  - xxvii. *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and Others*
  - xxviii. *Iberdola Energia SA v Republic of Guatemala*
  - xxix. *Impreglio SpA v Argentine Republic*
  - xxx. *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL, and SC Multipack SRL v Romania*
  - xxxi. *Ioannis Kardassopoulos v Republic of Georgia*
  - xxxii. *Isolux Corsan Concesiones, SA v Republic of Peru*
  - xxxiii. *JKX Oil & Gas plc, Poltava Gas BV and Poltava Petroleum Company JV v Ukraine*

- xxxiv. *Libananco Holdings Co. Limited v Republic of Turkey*
- xxxv. *Liberian Eastern Timber Corporation v Republic of Liberia*
- xxxvi. *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, LBC v Democratic Republic of Timor-Leste*
- xxxvii. *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*
- xxxviii. *MCI Power Group LC and New Turbine, Inc. v Republic of Ecuador*
- xxxix. *Merrill and Ring Forestry LP v Canada*
  - xl. *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*
  - xli. *Miminco LLC and others v Democratic Republic of Congo*
  - xl.ii. *Murphy Exploration and Production Company International v Republic of Ecuador*
  - xl.iii. *Nations Energy Corporation, Electric Machinery Enterprises Inc and Jaime Jurado v Republic of Panama*
  - xl.ii. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*
  - xl.v. *Pac Rim Cayman LLC v Republic of El Salvador*
  - xl.vi. *Peter A. Allard v Barbados*
  - xl.vii. *Piero Foresti, Laura de Carli & Others v Republic of South Africa*
  - xl.viii. *Plama Consortium Limited v Republic of Bulgaria*
  - xl.ix. *Pluspetrol Peru Corporation and others v Perupetrol S.A.*
    - 1. *PSEG Global, Inc, the North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey*
    - li. *Repsol YPF Ecuador SA v Empresa Estatal Petroleos del Ecuador (Petroecador)*
    - lii. *RMS Production Corporation v Central African Republic*
    - liii. *The Rompetrol Group NV v Romania*
    - liv. *Ron Fuchs v Republic of Georgia*
    - lv. *Saipem SpA v People's Republic of Bangladesh*
    - lvi. *Sociedad Anonima Eduardi Viera v Republica de Chile*
    - lvii. *Societe d'Investigation de Recherche et d'Exploitation Minere v Burkina Faso*
    - lviii. *Suez Sociedad General de Aguas de Barcelona, SA and Vivendi Universal SA v Argentina Republic*
    - lix. *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, SA v the Republic of Panama*
    - lx. *UAB E energija (Lithuania) v Republic of Latvia*
    - lxi. *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v Argentina*
    - lxii. *Vannessa Ventures Ltd. v Bolivarian Republic of Venezuela*
    - lxiii. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*
    - lxiv. *Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*
    - lxv. *Wintershall Aktiengesellschaft v Argentine Republic*
    - lxvi. *Zhinvali Development Ltd. v Republic of Georgia*

## 2. International Court of Justice

- i. *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)*
- ii. *Aerial Herbicide Spraying (Ecuador v Colombia) (2013)*
- iii. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda) (2006)*

- iv. *Case Concerning Maritime Dispute (Peru v Chile) (2014)*
  - v. *Case Concerning the Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (2009)*
  - vi. *Case Concerning the Pulp Mills on the River Uruguay (Argentina v Uruguay) (2010)*
  - vii. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (1997)*
  - viii. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (2011)*
  - ix. *Maritime Delimitation in the Black Sea (Romania v Ukraine) (2009)*
  - x. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean/Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua) (2018)*
  - xi. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Thailand v Cambodia) (2013)*
  - xii. *Territorial and Maritime Dispute (Nicaragua v Colombia) (2012)*
  - xiii. *Whaling in the Antarctic (Australia v Japan) (2014)*
3. International Tribunal for the Law of the Sea
- i. *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*
  - ii. *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)*
  - iii. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean (Ghana v Cote D'Ivoire)*
  - iv. *M/V "Louisa" Case (Saint Vincent and the Grenadines v Kingdom of Spain)*
  - v. *M/V "Virginia G" Case (Panama v Guinea-Bissau)*
  - vi. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*
  - vii. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*
  - viii. *Southern Bluefin Tuna Cases (New Zealand v Japan) (Australia v Japan)*
  - ix. *The "Hoshinmaru" Case (Japan v Russian Federation)*
  - x. *The "Tominmaru" Case (Japan v Russian Federation)*
4. Permanent Court of Arbitration
- i. *Abyei-Sudan*
  - ii. *Arbitration between the Republic of Croatia and the Republic of Slovenia*
  - iii. *Barbados v Trinidad and Tobago*
  - iv. *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*
  - v. *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*
  - vi. *Copper Mesa Mining Corporation (Canada) v Republic of Ecuador*
  - vii. *Eritrea-Ethiopia Boundary Commission*
  - viii. *Guaracachi America, Inc. & Rurelec PLC (United Kingdom) v Plurinational State of Bolivia*
  - ix. *Guyana v Suriname*
  - x. *Indus Waters Kishenganga Arbitration (Pakistan v India)*
  - xi. *Ireland v United Kingdom (OSPAR Arbitration)*
  - xii. *Iron Rhine Arbitration (Belgium v Netherlands)*
  - xiii. *Matter of the Arctic Sunrise Arbitration (Netherlands v Russian Federation)*
  - xiv. *Mesa Power Group LLC (USA) v Government of Canada*
  - xv. *Romak SA (Switzerland) v Republic of Uzbekistan*
  - xvi. *South China Sea Arbitration (Republic of Philippines v People's Republic of China)*
  - xvii. *Windstream Energy LLC v Government of Canada*

5. World Trade Organization Dispute Settlement Body
  - i. *Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches (Chile)*
  - ii. *Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil (Brazil)*
  - iii. *Argentina — Countervailing Duties on Olive Oil, Wheat Gluten and Peaches (European Communities)*
  - iv. *Australia — Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Philippines)*
  - v. *Australia — Certain Measures Affecting the Importation of Fresh Pineapple (Philippines, European Communities)*
  - vi. *Australia — Measures Affecting Importation of Salmon (Canada)*
  - vii. *Belgium — Administration of Measures Establishing Customs Duties for Rice (United States)*
  - viii. *Brazil — Certain Measures Concerning Taxation and Charges (European Union)*
  - ix. *Brazil — Countervailing Duties on Imports of Desiccated Coconut and Coconut Milk Powder from Sri Lanka (Sri Lanka)*
  - x. *Brazil — Measures Affecting Desiccated Coconut (Philippines)*
  - xi. *Brazil — Measures Affecting Imports of Retreaded Tyres (European Communities)*
  - xii. *Canada — Certain Measures Affecting the Renewable Energy Generation Sector (Japan)*
  - xiii. *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (United States)*
  - xiv. *Canada — Measures Affecting Dairy Exports (New Zealand)*
  - xv. *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain (United States)*
  - xvi. *Canada — Provisional Anti-Dumping and Countervailing Duties on Grain Corn from the United States (United States)*
  - xvii. *Chile — Measures affecting the Transit and Importing of Swordfish (European Communities)*
  - xviii. *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Argentina, Guatemala)*
  - xix. *Chile — Provisional Safeguard Measure on Mixtures of Edible Oils (Argentina)*
  - xx. *Chile — Safeguard Measures on Sugar (Colombia)*
  - xxi. *China — Domestic Support for Agricultural Products (United States)*
  - xxii. *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (European Union, Japan, United States)*
  - xxiii. *Costa Rica — Measures Concerning the Importation of Fresh Avocados from Mexico (Mexico)*
  - xxiv. *Croatia — Measures Affecting Imports of Live Animals and Meat Products (Hungary)*
  - xxv. *Czech Republic — Additional Duty on Imports of Pig-Meat from Poland (Poland)*
  - xxvi. *Czech Republic — Measure Affecting Import Duty on Wheat from Hungary (Hungary)*
  - xxvii. *European Communities — Customs Classification of Frozen Boneless Chicken Cuts (Brazil)*
  - xxviii. *European Communities — Definitive Safeguard Measure on Salmon (Chile, Norway)*
  - xxix. *European Communities — Duties on Imports of Grains (United States)*
  - xxx. *European Communities — Duties on Imports of Rice (Thailand)*
  - xxxi. *European Communities — Export Subsidies on Sugar (Australia, Brazil, Thailand)*
  - xxxii. *European Communities — Certain Measures Prohibiting the Importation and Marketing of Seal Products II (Canada)*
  - xxxiii. *European Communities — Export Subsidies on Sugar (Australia)*
  - xxxiv. *European Communities — Measures Affecting the Approval and Marketing of Biotech Products (United States)*
  - xxxv. *European Communities — Measures Affecting the Exportation of Processed Cheese (United States)*
  - xxxvi. *European Communities — Measures Affecting the Tariff Quota for Fresh or Chilled Garlic (Argentina)*

- xxxvii. *European Communities – Measures Affecting Differential and Favourable Treatment of Coffee (Brazil)*
- xxxviii. *European Communities – Measures Affecting Importation of Certain Poultry Products (Brazil)*
- xxxix. *European Communities – Measures Affecting Imports of Wine (Argentina)*
- xl. *European Communities – Measures Affecting Importation of Wood Conifers from Canada (Canada)*
- xli. *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States)*
- xl.ii. *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Ecuador, Guatemala, Honduras, Mexico, United States)*
- xl.iii. *European Communities – Restrictions on Certain Import Duties on Rice (India)*
- xl. iv. *European Communities – Trade Description of Sardines (Peru)*
- xl. v. *European Communities – Trade Description of Scallops (Canada)*
- xl. vi. *European Union – Anti-Dumping Measures on Biodiesel from Argentina (Argentina)*
- xl. vii. *European Union – Measures on Atlanto-Scandian Herring (Denmark)*
- xl. viii. *Hungary – Export Subsidies in Respect of Agricultural Products (Argentina, Australia, Canada, New Zealand, Thailand, United States)*
- xl. ix. *India – Certain Measures Relating to Solar Cells and Solar Modules (United States)*
- l. *India – Measures Concerning the Importation of Certain Agricultural Products (United States)*
- li. *Indonesia – Importation of horticultural products, animals and animal products (New Zealand, United States)*
- lii. *Japan – Measures Affecting Agricultural Products (United States)*
- liii. *Japan – Measures Affecting the Importation of Apples (United States)*
- liv. *Japan – Measures Affecting Imports of Pork (European Communities)*
- lv. *Mexico – Certain Measures Preventing the Importation of Black Beans from Nicaragua (Nicaragua)*
- lvi. *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities (European Communities)*
- lvii. *Mexico – Definitive Anti-Dumping Measures on Beef and Rice (United States)*
- lviii. *Mexico – Measures Affecting Trade in Live Swine (United States)*
- lix. *Mexico – Provisional Countervailing Measures on Olive Oil from the European Communities (European Communities)*
- lx. *Moldova – Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge) (Ukraine)*
- lxi. *Panama – Tariff Classification of Certain Milk Products (Mexico)*
- lxii. *Philippines – Measures Affecting Pork and Poultry (United States)*
- lxiii. *Republic of Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (European Communities)*
- lxiv. *Republic of Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Australia, United States)*
- lxv. *Republic of Korea – Measures Concerning the Testing and Inspection of Agricultural Products (United States)*
- lxvi. *Republic of Korea – Measures Concerning Bottled Water (Canada)*
- lxvii. *Romania – Import Prohibition on Wheat and Wheat Flour (Hungary)*
- lxviii. *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union (European Union)*
- lxix. *Slovak Republic – Measure Affecting Import Duty on Wheat from Hungary (Hungary)*
- lxx. *Slovak Republic – Measures Concerning the Importation of Dairy Products and the Transit of Cattle (Switzerland)*
- lxxi. *Slovak Republic – Safeguard Measure on Imports of Sugar (Poland)*

- lxxii. *Trinidad and Tobago — Anti-Dumping Measures on Pasta from Costa Rica (Costa Rica)*
- lxxiii. *Turkey — Certain Import Procedures for Fresh Fruit (Ecuador)*
- lxxiv. *United States – Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico (Mexico)*
- lxxv. *United States – Anti-Dumping Measures on Fish Fillets from Vietnam (Vietnam)*
- lxxvi. *United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada (Canada)*
- lxxvii. *United States – Certain Measures Concerning Pangasius Seafood Products from Vietnam (Vietnam)*
- lxxviii. *United States – Countervailing Duty Investigation of Imports of Salmon from Chile (Chile)*
- lxxix. *United States — Countervailing Duty Investigation with respect to Live Cattle from Canada (Canada)*
- lxxx. *United States — Determination of the International Trade Commission in Hard Red Spring Wheat from Canada (Canada)*
- lxxxi. *United States – Determinations with Respect to Certain Softwood Lumber from Canada (Canada)*
- lxxxii. *United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products (Brazil)*
- lxxxiii. *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Malaysia, Pakistan, Thailand)*
- lxxxiv. *United States — Provisional Anti-Dumping Measures on Shrimp from Thailand (Thailand)*
- lxxxv. *United States – Measures Affecting Imports of Poultry Products (European Communities)*
- lxxxvi. *United States — Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina (Argentina)*
- lxxxvii. *United States — Measures Affecting the Importation of Fresh Lemons (Argentina)*
- lxxxviii. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Mexico)*
- lxxxix. *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia (Australia)*
- xc. *United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand (New Zealand)*
- xc. *United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products (Canada)*
- xcii. *United States – Subsidies on Upland Cotton (Brazil)*
- xciii. *United States – Tariff Rate Quota for Imports of Groundnuts (Argentina)*
- xciv. *Venezuela, Bolivarian Republic of — Import Licensing Measures on Certain Agricultural Products (United States)*

## **II. Key Decisions in Regional Courts and Tribunals (State v State, State v Other)**

1. African Charter on Human and Peoples Rights system
  - i. *African Commission on Human and Peoples’ Rights v Republic of Kenya*
  - ii. *Antonie Bissangou v Congo*
  - iii. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Enderois Welfare Council v Kenya*
  - iv. *Front for the Liberation of the State of Cabinda v Republic of Angola*
  - v. *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l’Homme v Mauritania*
  - vi. *Kevin Mgwanga Gunme et al v Cameroon*

- vii. *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*
2. Caribbean Court of Justice
    - i. *Fishermen and Friends of the Sea v Environmental Management Authority and Atlantic LNG*
  3. European Court of Human Rights
    - i. *Arsovski v Former Yugoslav Republic of Macedonia*
    - ii. *Bogdel v Lithuania*
    - iii. *Budayeva and others v Russia*
    - iv. *Chabauty v France*
    - v. *Depalle v France*
    - vi. *Di Sarno and others v Italy*
    - vii. *Dubetska and others v. Ukraine*
    - viii. *Dzemyuk v. Ukraine*
    - ix. *Fadeyeva v Russia*
    - x. *Giacomelli v Italy*
    - xi. *Gorraiz Lizarraga and others v Spain*
    - xii. *Grimkovskaya v Ukraine*
    - xiii. *Hardy and Maile v United Kingdom*
    - xiv. *Hatton and others v United Kingdom*
    - xv. *Herrmann v Germany*
    - xvi. *Ivan Atanasov v Bulgaria*
    - xvii. *Jugheli and others v Georgia*
    - xviii. *Karin Andersson and others v Sweden*
    - xix. *Kleyn and others v Netherlands*
    - xx. *Kristiana Ltd v Lithuania*
    - xxi. *Ledyayeva, Dobrokhotova, Zolotareva, and Romashina v Russia*
    - xxii. *L'Erabliere v Belgium*
    - xxiii. *Lopez Ostra v Spain*
    - xxiv. *Mangouras v Spain*
    - xxv. *Matos e Silva and others v Portugal*
    - xxvi. *Okyay and others v Turkey*
    - xxvii. *Oneryildiz v Turkey*
    - xxviii. *Taskin and others v Turkey*
    - xxix. *Tatar v Romania*
    - xxx. *Smaltini*
    - xxxi. *Taskin and others v. Turkey*
    - xxxii. *Tumeliai v Lithuania*
    - xxxiii. *Zander v Sweden*
  4. European Court of Justice
    - i. *Commission v French Republic (2004)*
    - ii. *Commission v Germany (2014)*
    - iii. *Commission v Poland (Forêt de Białowieża) (2018)*
    - iv. *Commission v Poland (2016)*
    - v. *ERG, SpA and others v Italy*
    - vi. *Georgsmarienhutte GmbH v Federal Republic of Germany*
    - vii. *Giordano v Commission*
    - viii. *Grace v Sweetman (Ireland)*

- ix. *IBV, SA v Region wallonne*
- x. *J.D. v Prezes Urzedu Regulacji Energetyki*
- xi. *Karoline Gruber Case*
- xii. *Shirley v Information Commissioner*
- xiii. *Sweetman v An Bord Pleanala*
- xiv. *Umweltanwalt von Karnten v Karntner Landesregierung*
- xv. *Western Sahara Campaign, UK v Commissioners for Her Majesty's Revenue and Customs*

#### 5. Inter-American Human Rights System

- i. *Advisory Opinion (OC-23/17) Medio ambiente y derechos humanos (obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal - interpretación y alcance de los artículos 4.1 y 5.1, en relación con los artículos 1.1 y 2 de la Convención Americana sobre Derechos Humanos)*
- ii. *Comunidad Garifuna de Puenta Piedra y Sus Miembros v Honduras*
- iii. *Comunidad Garifunda Triunfo de la Cruz y Sus Miembro v Honduras*
- iv. *Kalina and Lokono Peoples v Suriname*
- v. *Kichwa Indigenous People of Sarayaku v Ecuador*
- vi. *Los Pueblos Indigenas Kuna de Madungandi y Embera de Bayano y Sus Miembros v Panama*
- vii. *Mayagna (Sumo) Awas Tingi Community v Nicaragua*
- viii. *Moiwana Community v Suriname*
- ix. *Pueblo Indigena Xucuru y Sus Miembros v Brasil*
- x. *Saramaka People v Suriname*
- xi. *Sawhoyamaxa Indigenous Community v Paraguay*
- xii. *Xakmok Kasek Indigenous Community v Paraguay*
- xiii. *Yakye Axa indigenous Community v Paraguay*

#### 6. NAFTA Trade Tribunals

- i. *ADF Group, Inc. v United States of America*
- ii. *Bayview Irrigation District et al v United Mexican States*
- iii. *Canfor Corporation v United States of America*
- iv. *Chemtura Corporation v Government of Canada*
- v. *Corn Products International, Inc. v United Mexican States*
- vi. *Eli Lilly and Company v Government of Canada*
- vii. *Vito G. Gallo v Government of Canada*
- viii. *Gami Investments v United Mexican States*
- ix. *Glamis Gold, Ltd v United States of America*
- x. *Grand River Enterprises Six Nations, Ltd. v United States of America*
- xi. *International Thunderbird Gaming Corporation v United Mexican States*
- xii. *Loewen Group, Inc. and Raymond L. Loewen v United States of America*
- xiii. *Mercer International, Inc. v Government of Canada*
- xiv. *Merrill and Ring Forestry LP v Canada*
- xv. *Mesa Power Group, LLC v Government of Canada*
- xvi. *Methanex Corporation v United States of America*
- xvii. *Pope & Talbot Inc. v Government of Canada*
- xviii. *Softwood Lumber from Canada*
- xix. *William Ralph Clayton, William Richard Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Government of Canada*

### III. Key Decisions of Quasi-judicial and Other International Bodies (States v Others, Claims before International Bodies)

1. World Bank Inspection Panel
  - i. *Afghanistan Sustainable Development of Natural Resources Projects*
  - ii. *Albania Power Sector Generation and Restructuring Project*
  - iii. *Argentina Santa Fe Road Infrastructure Project*
  - iv. *Cambodia Forest Concession Management and Control Pilot Project*
  - v. *Cambodia Land Management and Administration Project*
  - vi. *Chad-Cameroon Petroleum Development and Pipeline Project*
  - vii. *Chile Quilleco Hydropower Project*
  - viii. *China Western Poverty Reduction Poverty*
  - ix. *Colombia Cartagena Water Supply, Sewerage and Environmental Project*
  - x. *Democratic Republic of Congo Transitional Support for Economic Recovery Credit Operation*
  - xi. *Ethiopia Protection of Basic Services Program*
  - xii. *Ghana Second Urban Environment Sanitation Project*
  - xiii. *Ghana/Nigeria West African Gas Pipeline Project*
  - xiv. *Honduras Land Administration Project*
  - xv. *Israel/Jordan/West Bank and Gaza Red Sea – Dead Sea Water Conveyance Study Program*
  - xvi. *Kazakhstan South-West Roads: Western Europe-Western China International Transit Corridor*
  - xvii. *Kenya Electricity Expansion Project*
  - xviii. *Kenya Natural Resource Management Project*
  - xix. *Kenya Water and Sanitation Service Improvement Project*
  - xx. *Lebanon Greater Beirut Water Supply Project*
  - xxi. *Liberia Development Forestry Sector Management Project*
  - xxii. *Mexico Indigenous and Community Biodiversity Project*
  - xxiii. *Nepal Arun III Proposed Hydroelectric Project*
  - xxiv. *Pakistan National Drainage Program Project*
  - xxv. *Panama Land Administration Project*
  - xxvi. *Papua New Guinea Smallholder Agriculture Development Project*
  - xxvii. *Paraguay/Argentina Reform Project for the Water and Telecommunications Sectors*
  - xxviii. *Peru Lima Urban Transport Project*
  - xxix. *Romania Mine Closure and Social Mitigation Project*
  - xxx. *South Africa Eskom Investment Support Project*
  - xxxi. *Tajikistan Energy Loss Reduction Project*
  - xxxii. *Uganda Bujagali Falls Power Projects*
  
2. African Development Bank Accountability Mechanism
  - i. *Bujagali Hydropower Project and Bujagali Internconnection Project (Uganda)*
  - ii. *Construction of a 125 MW coal Sendou power plant in the village of Bargny Minam (Senegal)*
  - iii. *Dakar – Diamniadio Highway Project (Senegal)*
  - iv. *Diversification of the Activities of Modern Mills Project in Mali*
  - v. *Gibe III Hydropower Project (Ethiopia)*
  - vi. *Marrakech – Agadir Motorway (Morocco)*
  - vii. *Medupi Power Project (South Africa)*
  - viii. *Multinational – Road Development and Transport Facilitation Programme within the Manu River Union (Guinea)*
  - ix. *Nuweiba Combined Cycle Power Plan (Egypt)*
  
3. Asian Development Bank Accountability Mechanism

- i. *Cambodia: Rehabilitation of the Railway in Cambodia Project*
- ii. *Indonesia: Integrated Citarum Water Resources Management Investment Program*
- iii. *Kyrgyz Republic: CAREC Transport Corridor 1 Project*
- iv. *Nepal: Decentralized Rural Infrastructure and Livelihood Project*
- v. *Nepal: Melamchi Water Supply Project*
- vi. *Pakistan: National Highway Development Sector Investor Program*
- vii. *Pakistan: Rawalpindi Environmental Improvement Project*
- viii. *Pakistan: Southern Punjab Basic Urban Services Project*
- ix. *People's Republic of China: Fuzhou Environmental Impact Project*
- x. *Philippines: Visayas Base-Load Power Project*
- xi. *Samoa: Promoting Economic Use of Customary Land and Samoa Agribusiness Support Project*
- xii. *Sri Lanka: Southern Transport Development Project*
- xiii. *Tajikistan: Education Sector Reform Project*

#### 4. European Bank for Reconstruction and Development Accountability Mechanism

- i. *Al-Manakher Power Project (Jordan)*
- ii. *BEH Bond Issue and Kozloduy International Decommissioning Support Fund (Bulgaria)*
- iii. *D1 Motorway Phase I (Slovak Republic)*
- iv. *DIF – Lydian (Amulsar Gold Mine) (Armenia)*
- v. *EPS Kolubara Environmental Improvement (Serbia)*
- vi. *Energy Resources Phase II (Mongolia)*
- vii. *Jvari-Khorga Interconnection (Georgia)*
- viii. *Krnovo Wind Farm (Montenegro)*
- ix. *Lukoil Shah Deniz Stage II (Azerbaijan)*
- x. *Oyu Tolgi (Mongolia)*
- xi. *Paravani HPP (Georgia)*
- xii. *Rivne Kyiv High Voltage Line Project (Ukraine)*
- xiii. *Sostanj Thermal Power Plant (Slovenia)*
- xiv. *Tbilisi Railway Bypass Project (Georgia)*

#### 5. Inter-American Development Bank Independent Consultation and Investigation Mechanism

- i. *Argentina Development Programme's Norte Grande Provinces*
- ii. *Brazil Tiete Varzea Program*
- iii. *Chile Alto Maipo Hydroelectric Power Plant*
- iv. *Costa Rica Reventazon Hydroelectric Power Project*
- v. *Marena Renovables Wind Project Review*
- vi. *Panama Canal Expansion Program Review*
- vii. *Peru Rural Land Titling & Registration Project*

#### 6. Human Rights Systems Based Tribunals

- i. Committee on the Elimination of Racial Discrimination
  - 1. *Decision 1 (68) (United States of America)*
- ii. Human Rights Committee
  - 1. *Dahanayakye v Sri Lanka*
  - 2. *Fagerskiold v Sweden*
  - 3. *Haraldsson and Sveinsson v Iceland*
  - 4. *Ilmari Lansman v Finland*

5. *Ivan Kitok v Sweden*
6. *Jouni Lansman et al v Finland*
7. *Poma Poma v Peru*
8. *Scarano Spisso v Venezuela*

## 7. International Energy & Environment Treaty Regimes

### i. Aarhus Convention

1. *Aarhus Convention Compliance Committee Case Concerning Armenia*
2. *Aarhus Convention Compliance Committee Case Concerning the European Union*
3. *Aarhus Convention Compliance Committee Case Concerning France*
4. *Aarhus Convention Compliance Committee Case Concerning Romania*

### ii. Energy Charter Treaty

1. *AES Corporation and Tau Power, BV v Republic of Kazakhstan*
2. *AES Summit Generation Limited and AES-Tisza Eromu Kft v Republic of Hungary*
3. *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*
4. *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*
5. *Azpetrol International Holdings, BV, Azpetrol Group BV and Azpetrol Oil Services Group Limited, BV v Republic of Azerbaijan*
6. *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic*
7. *Charanne and Construction Investments v Spain*
8. *EDF International SA v Republic of Hungary*
9. *Eiser Infrastructure Limited and Energia Solar Luxembourg SARL v Kingdom of Spain*
10. *Electrabel SA v Republic of Hungary*
11. *Energolians TOB v Republic of Moldova*
12. *Europe Cement Investment & Trade SA v Republic of Turkey*
13. *EVN AG v Former Yugoslav Republic of Macedonia*
14. *Hrvatska Elektroprivreda d.d. v Republic of Slovenia*
15. *Hulley Enterprises Limited (Cyprus) v Russian Federation*
16. *Ioannis Kardassopoulos v Republic of Georgia*
17. *Isolux Netherlands, BV v Kingdom of Spain*
18. *JKX Oil & Gas plc, Poltava Gas BV and Poltava Petroleum Company JV v Ukraine*
19. *Libananco Holdings Co Ltd v Republic of Turkey*
20. *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*
21. *Limited Liability Company Amtto v Ukraine*
22. *Mamidoli Jetoil Greek Petroleum Products Societe SA v Republic of Albania*
23. *Nykomb Synergenics Technology Holding AB v Republic of Latvia*
24. *Petrobart Limited v Kyrgyz Republic*
25. *Plama Consortium Limited v Republic of Bulgaria*
26. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*
27. *Veteran Petroleum Limited (Cyprus) v Russian Federation*
28. *Yukos Universal Limited (Isle of Man) v Russian Federation*

### iii. NAAEC

1. *ALCA-Iztapalapa II case*
2. *BC Salmon Farms case*
3. *Environmental Pollution in Hermosillo II case*
4. *Ex Hacienda El Hospital III case*

5. *Iona Wastewater Treatment case*
6. *La Chapala case*
7. *La Primavera Forest case*
8. *Metales y Derivados case*
9. *Migratory Birds case*
10. *Ontario Logging case*
11. *Protection of Polar Bears case*
12. *Pulp and Paper case*
13. *St. Lawrence River Wind Farms case*
14. *Sumisero Canyon II case*
15. *Wetlands in Manzanillo case*