

A CRITICAL EVALUATION OF THE LEGAL PRINCIPLES OF ENVIRONMENTAL GOVERNANCE

BY

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Abstract

The principles, theories and concepts of environmental governance are the fulcrum of environmental legislations and policy framework, both in Nigeria and across the globe. Institutions that regulate the environment and other participatory bodies, associations, Non Governmental Organizations (NGOs) and private sectors initiatives are usually galvanized by these principles of environmental governance, aimed at realizing the global environmental objectives towards environmental protection, ecosystem preservation, biodiversity conservation, climate change control and sustainability. These environmental principles, theories and concepts are the pillars that precipitate the implementation of the legal instruments and policy framework of environmental governance, both locally and internationally, while they also serve as tools for sustainable development. The intendment of this paper is to evaluate the various principles of environmental governance and their legal effects, respectively.

Keywords: *Critical Evaluation, Legal Principles and Environmental Governance.*

1.0 Introduction

The principles of environmental law are crucial to environmental governance all over the world, and their usage is quite global. Some of the environmental principles are included in legal instruments, political instruments and objectives, policy frameworks, issue specific multilateral agreements with binding legal force, and also non binding, persuasive documents and instruments. When such principles are contained in multilateral agreements, the scope of such principle is limited to that particular multilateral environmental instrument. However, the principles when not contained also play important role in guiding the interpretation and further development of such agreements, as courts of law, administrative tribunals and international tribunals usually rely on those principles and make reference to them in arriving at their decisions or rulings.

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Environmental principles generally serve to supplement or complement some specific rules. In most circumstance, conventions or treaties containing environmental law provisions may directly acknowledge the role of environmental principles in consolidating environmental governance. The principles play a key role with respect to potential lacunas arising from the use of different and several legal sources.

In event of such circumstance, environmental law principles may help in unifying international environmental law's different sectoral approach, and no doubt, a comprehensive and unified international instrument, clarifying all the principles of environmental law would enhance the effectiveness of environmental governance, and strengthen the implementation of such principles, as hereunder discussed:

1.1 The Precautionary Principle

This principle stipulates that States are required to adopt a precautionary approach when taking decisions or in regard to potential omissions which may harm the environment. Such a duty remains intact irrespective of the absence of scientific certainty as to the existence or extent of such risk.² While the principle as formulated in Principle 15 of the Rio Declaration reflects other critical principles, such as the effective implementation of international environmental law,³ the legal basis of precaution as a principle is a matter of some controversy and debate.⁴

However, the exercise of precaution in this respect is expressed in other foundational instruments of international environmental law,⁵ regional and municipal instruments, ⁶civil society⁷ documentations and decisions of the International Tribunal for the Law of the Sea.⁸ The precautionary principle is contained in Principle 15 of the Rio Declaration which state thus:

² Antonio Cancado Trindade, "Principle 15: precaution", in Vinuales, ed., *The Rio Declaration on Environment and Development*, p. 403.

³ Martina Kunz, "Principle 11: environmental legislation", in Vinuales, ed., *The Rio Declaration on Environment and Development*, pp. 311 and 321. See further A/HRC/37/59, (Framework principle 11) para 33 (c), and (Framework principle 12) paras. 34-35.

⁴ Kunz, "Principle 11: environmental legislation", p. 412.

⁵ WCN, art. 11 (b); Vienna Convention for the Protection of the Ozone Layer (Vienna Ozone Convention), 1990 (1990 London Convention), preamble; CBD, preamble; UNFCCC, art. 3 (3); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, preamble (LRTAP Convention); Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, preamble and ART. 3; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), arts. 10 (6) and 11 (8); Stockholm Convention on Persistent Organic Pollutants (POPs Convention), preamble, arts. 1 and 8 (7) (a).

⁶ TFEU, art. 191 (2); Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), art. 2 (2) (a).

⁷ IUCN Draft Covenant, art. 7; 2015 Oslo Principles on Global Climate Change Obligations (Oslo Principles), paras. 1 (a-b); CIDCE Draft Covenant, arts. 3 (1-2).

⁸ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 77; Activities in the Area, Advisory Opinion, Case No. 17, para. 135.

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Prior to the 1992 Rio Declaration, the Bergen Ministerial Declaration on Sustainable Development⁹ introduced this principle thus:

Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Principle 15 was one of the first global codifications of the precautionary theory.¹⁰ The precautionary principle is essential to protecting the environment (including human health) and is accordingly one of the most commonly encountered concepts of international environmental law. This principle has been accorded a treaty status in a number of international Conventions. Article 3(3) of the 1992 Convention on Climate Change¹¹ made the principle an action-oriented one, by providing that; pursuant to the objective of the Convention and the implementation of its provisions, the parties be guided, *inter-alia*, by the following:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and

⁹ The Bergen Conference and its Proposals for Addressing Climate Change, cited in Justine Thornton and Silas Beckwith. *Environmental Law* 43.

¹⁰ B. Daniel Magraw and Barbara Ruis. "Principles and Concepts of International Environmental Law", p.30. in Lalkurubulasuriya and A. Nicholas Robinson, (eds.). *Training Manual on International Environmental Law*, Available at

<http://www.unep.org/environmentalgovernmentalgovernance/portals/8/documents/training_manual.pdf> accessed July 28 2021.

¹¹ 1992 United Nations Framework Convention on Climate Change. Available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>. Accessed October22, 2020.

adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

Similarly, Article 2(2)(a) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic¹² adopted and incorporated the principle, and stipulates that: the contracting Parties shall apply:

(a) The precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable

grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects.

The precautionary principle requires that if a particular action can be shown to pose a threshold risk of harm, then the proponents of the action must prevent or terminate that activity unless they can prove by a preponderance of the evidence that the activity will not degrade the environment.¹³ The precautionary principle is particularly effective at guiding decision making where little or no evidence exists as to the potential environmental risks of an action.

The precautionary principle is closely related to the principle of pollution prevention; each seeks to avoid environmental harms before they occur. The precautionary principle is also closely related to the principle of sustainable development; each maintains that humankind will confine its actions to those activities that do not cause irreparable damage to the environment. Thus, the precautionary principle provides important common ground between international damage and is a natural starting point for the wider incorporation of such preventive measures into international environmental law.

It is therefore encouraging that the precautionary principle is increasingly being developed as a central tenet of international environmental law, as in Principle 15 of the Rio Declaration. Seemingly, the precautionary principle has been included in a wide number of international environmental declarations and treaties, including the 1982 World Charter for Nature¹⁴ and several other international, regional and municipal instruments.

Besides being a regulatory principle, the courts have made some remarkable pronouncements on the precautionary principle, thereby giving the theory a very strong footing to strengthen the

¹² OSPAR <http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf>a accessed October 28 2020

¹⁴ UNGA, World Charter for Nature, A/37/L.4 and Add.1 at para. 11 (Oct. 28, 1992).

scope of environmental governance. In *Gabcikova* case,¹⁵ Judge Weeramantry in his varied opinion from the Order of the International Court of Justice concluded that:

The law cannot function in the protection of the environment unless a legal principle is involved to meet this evidentiary difficulty, and environmental law has responded with what has come to be described as the precautionary principle – a principle which is gaining increasing support as part of international law of the environment.

1.2 The Polluter Pays Principle

The Polluter Pays Principle is the principle according to which the polluter should bears the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution.¹⁶ For environmental policy purposes the polluter pays principle suggests that it is better to abstain from subsidies, so as not to initiate a ‘race to the bottom’ to relieve polluters from their responsibilities and distort the terms of competition in free trade. In polluter pays principle, authorities are to ensure that both environmental and social costs resulting from development activities are met by the polluter either through the internalization of such costs or responsibility of such costs, or by use of economic instruments.

The polluter pays principle has an economic logic, at the heart there is notion that this allows for the optimal allocation of limited resources. However, the principle may be accepted, the extent to which any polluter does in fact pay for the pollution caused is debatable and will always depend upon¹⁷ the effective enforcement by the relevant regulators. In *R (National Grid Gas Plc) V. Environmental Agency*,¹⁸ the House of Lords held that the costs of remediation should be borne by the person causing the pollution, and not any ‘innocent’ successor in title. In the principle under consideration, States are required not only to take measures against environmental pollution, but also to cooperate on liability regimes. This norm has a firm legal basis as a principle of law deriving from a variety of legal sources, including treaties and regional customs, particularly in Europe.¹⁹ In practice, the principle reduces the regulatory

¹⁵ Case Concerning *Gabcikovo-Nagymaros Project* (Hungary/Slovakia). Available at <<http://www.icjciij.org/docket/index.php?p1=3&p2=3&case=92&code=hs&p3=4>> accessed October 28 2020.

¹⁶ OECD Glossary of Statistical Terms, available at <http://stats.oecd.org/glossary/detail.asp?ID=2074>, accessed July 28 2021. ; Emejuru CT, *Polluter Pays Principle as a Veritable Instruments of Environmental Taxation: Excellence in Governance and Creativity*, Legal Essays in Honour of Governor E.N. Wike 2018 (edited by Okene OVC) p.496-499

¹⁷ David Wooley QC, *Environmental Law*, (Oxford University Press, 2009) p.143.

¹⁸ *Re (National Grid Gas Plc) v. Environmental Agency* (2007) UKHL 30.

¹⁹ Priscilla Schwartz, “Principle 16: the polluter-pays principle”, in Vinuales, ed., *The Rio Declaration on Environment and Development*, pp. 429 and 435.

burden on States in achieving pollution control objectives.²⁰ The polluter pays principle is expressed in Principle 16 of the Rio Declaration, regional instruments²¹ and texts drafted by civil society²²

The policy significance of the polluter pays principle depends on how one defines government's goals in enacting regulations and tax incentives.²³ If the goal is meant for environmental improvement, the polluter pays principle presumably should be an important factor in the policy discussion even in countries that do not recognize the principle as a matter of law. Other policy goals, however, may counterbalance the polluter-pays principle.

The polluter-pays principle is popular with both policy makers and the public.²⁴ It appeals to the basic principles of fairness and justice: people and entities should be held responsible for their actions. Those who cause damage should pay accordingly. Also, forcing entities to bear the cost of their activities is said to enhance economic efficiency.²⁵ It is important to note that in Nigeria as a case study, the government of the Federal Republic of Nigeria has domesticated this principle into the Nigeria's corpus juris.²⁶ The subsidiary law and environmental regulations in the event of environmental pollution resulting from the industrial activities of entrepreneurs spells out in several provisions of the Act the appropriate fines being the cost for polluting the environment²⁷. Regulation 19 of National Environmental (Soil, Erosion and Flood Control) Regulations, 2011 provides thus:

1. Any person who violates any of the provisions of these Regulations commits an offence and shall on conviction be liable to a fine not below One Million Naira (N1,000,000.00) or to imprisonment for a term not exceeding two years or to both such fine and imprisonment and an additional fine of ten thousand Naira (N10,000.00) for everyday the offence subsists.

²⁰ Ibid., p. 429.

²¹ TFEU, art. 191 (2); OSPAR Convention, art. 2 (2) (b).

²² Earth Charter, art. 6 (b); New Delhi Declaration of Principles of International Law Relating to Sustainable Development (New Delhi Declaration), para. 3.1; IUCN Draft Covenant, art. 6.

²³ Larry Kreiser et al, Green Taxation and Environmental Sustainability/Edward Elgar 2012) p. 103.

²⁴ Larry Kreiser et al, Environmental Taxation and Climate Change: Achieving Environmental Sustainability through Fiscal Policy (Edward Elgar 2011) p.69.

²⁵ Mann, I., A Comparative Study of the Polluter Pays Principle and its International Normative Effect on Pollutive Processes, British Virgin Islands: Forbes Hare,30.

²⁶ National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007; Harmful Waste (Special Criminal Provisions, etc) Act, Cap H1, LFN 2004, S. 11 (6).

²⁷ Section 20 (3) and (4) provides for a fine of N200,000.00 and N2,000,000.00 to be paid by individual and corporate body respectively for polluting the air; Section 21 (4) provides for a fine of N2,000,000.00 to be paid by corporate body for releasing substances that will affect the ozone; Section 22 (3) and (4) provides a fine of N50,000.00 and N500,000.00 to be paid by individuals and corporate body respectively for environmental violations relating to noise pollution; Section 23 (3) and (4) provides a fine of N50,000 for both individual and corporate body for environmental violations relating to public water, Section 26 (3) and (4) provides for a fine of N200,000.00 and N1,000,000.00 or individual and corporate body respectively for environmental violations relating to land resources and watershed quality.

2. Any corporate body that violates any of the provisions of these Regulations, shall on conviction, be liable to a fine not below Five Million Naira (N5,000.00) and an additional fine of Fifty Thousand Naira (N50,000.00) for everyday the offence subsists.
3. In addition to sub-regulations (1) and (2) of this regulation the offender shall be responsible for the remediation of the damage to the environment and any affected properties therein.²⁸

Under the Nigerian circumstance, the principle is well domesticated, but the problem is that the applicable penalties against the polluters are not severe enough, neither are they commensurate with the degree of damages occasioned by their default environmental actions²⁹. It is hereby argued that the fines polluters are required to pay for violating the provisions of the law are grossly inadequate. Due to this inadequacy and non severity of the penalties for such defaults, polluters take the law for granted, continue their acts of pollution of the environment and pay the meager fines prescribed by the relevant laws. Notwithstanding, the biggest challenge under this legal regime is that of enforcement or implementation of the law, basically as a result of corruption and weak institutions.

1.3 The Principle of Common but Differentiated Responsibilities and Respective Capabilities

This principle reflects humanity's increasing awareness of the interdependent and global nature of environmental problems. These issues stretch across national boundaries and are shared concerns of humanity. In both the Climate Change Convention and the Biological Diversity Convention, parties have directly acknowledged that the environmental issue at hand is a common concern of humankind. The two basic assumptions implicit in the common concern concept are:

- a) That states should not cause harm with regard to issue of common concern, and
- b) That they share the responsibility for addressing these common concerns.

With regard to the realm of law, the concept appears to contrast somewhat with the fundamental principle of state Sovereignty is indeed largely conceived. The notion of permanent sovereignty over natural resources was recognized in a series of General Assembly Resolutions between 1952 and 1973. Now, the international community has developed the sovereignty concept by

²⁸ Regulation 21 of the National Environmental (Desertification Control and Drought Mitigation) Regulations, 2011; Regulations 56 of the National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries Sector) Regulations, 2011; Regulations 21 of the National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations, 2011; Regulation 7 of the National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011; Regulation 55 of the National Environmental (Domestic and Industrial Plastic, Rubber and Foam Sector) Regulations, 2011; Regulation 19 of the National Environmental (Coastal and Marine Area Protection) Regulations, 2011; Regulation 30 of the National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011; Regulation 30 of the National Environmental (Surface and Groundwater Quality Control) Regulations, 2011; Regulation 67 of the National Environmental (Electrical/Electronic Sector) Regulations, Regulations, 2011; Regulation 67 of the National Environmental (Electrical/Electronic Sector) Regulations, 2011.

²⁹ EIA Section 60 of the Environmental Impact Assessment Act.

introducing the notion that the sovereign right of states to exploit resources exists alongside a responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. This principle was incorporated within the 1972 Stockholm Declaration saying, “states have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction”.³⁰ The principle of common but differentiated responsibility is contained in Principle 7 of the Rio Declaration and provides thus:

States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures that societies place on the global environment and of the technologies and financial resources they command.

The principle of common but differentiated responsibilities and respective capabilities developed from the application of equity in general international law. Traditionally, international law is underpinned by the principle of the sovereign equality of States, which aims at guaranteeing that States have equal rights and obligations. In the Rio Declaration, the principle of common but differentiated responsibilities refers to instances where developed countries have contributed more to the environmental problem at stake and have greater capacity to respond to the environmental challenge. Not all multilateral environmental agreements incorporate the concept of differentiation. Those that do include it ensure the participation of all States. As a technique to achieve this objective, States in different situations are subject to different obligations and enjoy different rights. Multilateral environmental agreements express the principle in different ways, and a general application of the principle is not evident.³¹ Some agreements operate with categories of developed and developing country parties, with substantively stronger obligations for developed and less onerous obligations as well as entitlements to financial, technological or capacity-building support for developing

³⁰ Principles 21 of the Stockholm Declaration

³¹ ITLOS Seabed Disputes Chamber, for example, found that “the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developed or developing”. It concluded that: “The spread of sponsoring States ‘of convenience’ would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of common heritage of mankind”. See Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, paras. 158-159.

country parties and parties with economies in transition.³² Other agreements use self-selection,³³ or address differentiation based on criteria such as financial and technological resources, the capability to engage in cost-effective environmental mitigation action, whether a State is an export or import State,³⁴ whether a State is affected by the issue or several other categories.³⁵ The Paris Agreement states that, in the context of climate change, differentiation is dynamic, not limited to particular parameters and has to be seen in the light of different national circumstances.³⁶

1.4 The Preventive Principle

Although international environmental law remains largely media-specific, it has shown a proclivity for pollution prevention as an environmental protection strategy. For example, the Montreal Protocol³⁷ ultimately contemplates a ban on chlorofluorocarbons, requiring companies to redesign their production systems and products to eliminate ozone-depleting gases. A similar-approach is likely to be followed with respect to reducing global warming emissions in protocols negotiated to control the emissions. These and other efforts at the international level provide substantial support for pollution prevention or designing pollutants, to the greatest extent possible, out of the production process. Future international agreements should recognize the success of these pollution prevention schemes and should adopt, where appropriate, similar formats. Perhaps, however, these future efforts should focus greater attention on providing incentives for pollution prevention than on the command-and-control efforts which is both usual and very common.

The preventive principles are contained in both the Declarations of 1972 and 1992. Principle 13 of the Stockholm Principle stipulate thus:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to

³² Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).

³³ International Civil Aviation Organization resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Global Market-based Measure (MBM) scheme (CORSIA).

³⁴ The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention), or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

³⁵ Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, decision XXVIII/1: Further amendment of the Montreal Protocol, annex I.

³⁶ Christina Voigt and Felipe Ferreira, “Dynamic differentiation”: the principles of CBDR-RC, progression and highest possible ambition in the Paris Agreement”, *Transnational Environmental Law*, vol. 5, No. 2 (October 2016).

³⁷ The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted and opened for signature, Sept. 16, 1987, entered into force Jan. 1, 1989, 26 I.L.M. 1541 (1987) as modified by the Montreal Protocol on Substances that Deplete the Ozone Layer, London 1990, Annexes A,B, UNEP/OzL. Pro.2/3 (1990).

ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

Similarly, principle 17 of the Rio Declaration provides that: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have significant adverse impact on the environment and are subject to a decision of a competent national authority”.

States are required to exercise their sovereignty over natural resources in a manner which ensures that activities within their jurisdiction or control do not significantly damage the environment beyond their territorial boundaries. Since it first appeared in the 1938 *Trail Smelter arbitration*,³⁸ the prevention of transboundary harm has been framed as a principle in foundational instruments of international environmental law,³⁹ United Nations instruments,⁴⁰ regional instruments,⁴¹ texts drafted by civil society⁴² and the decisions of the International law for preventing environmental harm rather than compensating for harm that has already occurred. The prevention principle is well established as a rule of customary international law, supported by relevant practice in many environmental treaties and major codification initiatives.⁴³ In practice, this principle is also related to due diligence obligations, particularly the duty to undertake an environmental impact assessment prior to engaging in activities which pose a potential risk of transboundary harm.

1.5 The Principle of Sustainable Development

Several writers have defined the phrase Sustainable Development but the most acceptable meaning of sustainable development is the one given by Brundtland commission report wherein it defined sustainable development as;

³⁸ Trail Smelter Case (United States, Canada) (1938, 1941), Reports of the International Arbitral Awards, vol. III, p. 1905, et, seq.

³⁹ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Principle 21; World Charter for Nature (WCN), arts. 13, 19 and 21; UNCLOS, art. 194; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), preamble and Art. 2; Convention on Biological Diversity (CBD), Preamble and Art. 3; Rio Declaration on Environment and Development (Rio Declaration), Principles 2, 14, 118 and 19; United Nations Framework Convention on Climate Change (UNFCCC), preamble.

⁴⁰ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, para. 97. See also resolution 62/68, annex.

⁴¹ Treaty on the Functioning of the European Union (TFEU), art. 191; Association of Southeast Asian Nations Agreement on the Conservation of Nature and Natural Resources (ASEAN Agreement), art. 20.

⁴² Earth Charter, Principle 6 (d); IUCN Draft Covenant, Arts. 14 and 41; Centre International de droit compare de l' environment, Draft International Covenant on the Human Right to the Environment (CIDCE Draft Covenant), arts. 4 (2)-(4).

⁴³ Leslie Anne Duvie-Paoli and Jorge E. Vinuales, “Principle 2: Prevention”, in Jorge E. Vinuales, ed., *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015), pp. 107, 120 and 121.

Development that meets need of the present without comprising the ability of future generation to meet their own

needs.... A process of change in which exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potentials to meet human needs and aspirations.⁴⁴

The concept of sustainable development presents a kind of developmental mode different from those of the past in the sense that it has embedded in it environmental consciousness such that it tries to avoid prevent the problems of environmental pollution, degradation, social and ecological damage both on a worldwide and local scale that were caused by previous modes. Hence, it aims at preventing the exhaustion of natural resources, showing respect for the environment as well as striking a balance between the necessities to satisfy present societal needs while ensuring that future generations will have the means to satisfy their own societal needs. This can be achieved through the combination of the elements of environmental governance with fairness and economic efficiency.

In essence, the basic aim of sustainable development is to find a long-lasting balance in the combination of economic, social and environmental aspects of human existence in order to achieve this long-lasting balance, it becomes essential for there to be good governance which will be reflected in the implementation of policies and actions with regard to sustainable development.

Many international environmental law treaties make explicit or implicit references to the essential tenets of sustainable development.⁴⁵ Sustainable development is also referred to in other international agreements, such as trade and investment treaties and WTO agreements.⁴⁶ International courts and tribunals have embraced sustainable development as a source of law and policy when addressing treaty implementation and the interpretation of norms.⁴⁷ This can be seen in judicial instances ranging from the International Court of Justice⁴⁸ to regional courts,

⁴⁴ World Commission on Environment and Development (WCED) 1987, *Our Common Future*; Oxford University Press 43 & 46.

⁴⁵ Minamata Convention on Mercury (2017); Paris Agreement (2015); United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertation, Particularly in Africa (1994); Vienna Convention for the Protection of the Ozone Layer (1988); Montreal Protocol on Substances that Deplete the Ozone Layer (1989).

⁴⁶ Nico Schrijver, "Advancements in the Principles of International Law on Sustainable Development", in Marie-Claire Cordonier Segger and H.E. Judge C.G. Weeramantry, eds., *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992 – 2012* (Routledge, 2017), pp. 98-102.

⁴⁷ Cordonier Segger and Weeramantry, eds., *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992-2012*.

⁴⁸ General list No. 135, in *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I.C.J. Reports 1997; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010; *Whaling in the Arctic (Australia v. Uruguay)*, Judgement I.C.J. Reports 2010: *Whaling in the Arctic (Australia v. Japan: New Zealand intervening)*, Judgement, I.C.J. Reports 2014J.

including those that address related fields, such as the Inter-American Court of Human Rights,⁴⁹ the African Commission on Human and People's Rights,⁵⁰ specialized panels and tribunals such as the International Tribunal for the Law of the Sea⁵¹ and the Dispute Settlement Body of WTO.⁵² Recently, sustainable development has been incorporated into the larger global agenda by the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.⁵³ The Goals can be seen as specific indicators for sustainable development and represent a significant milestone. However, questions remain as to the extent to which the sustainable development principles represent binding or non-binding rules or indeed whether they should constitute a source of law. Some have suggested that this reflects the need for further analysis and a need for the codification of sustainable development principles into a source of law. Others hold that this could undermine the dynamic aspect of sustainable development. Another gap relates to the fact that sustainable development still awaits its effective implementation as a holistic legal concept with regard to addressing the relationship between international environmental law and other fields of international law.⁵⁴

1.6 The Principle of Non-Regression and Progression

The principle of non-regression is relatively new to the field of environmental law, while its underlying idea of disallowing backtracking is well understood in systems that protect human rights and in labour law. The idea that once a human right is recognized, it cannot be restrained, destroyed or repealed, is shared by all major international instruments on human rights.⁵⁵ The corollary to the principle of non-regression is the principle of progression. Non-regression aims at ensuring that environmental protection is not weakened, while progression aims at the improvement of environmental legislation, including by increasing the level of protection, on the basis of the most recent scientific knowledge. The Paris Agreement is explicit in this regard and provides, in article 4, paragraph 3, that each successive nationally determined contribution “will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition”.

⁴⁹ Inter-American Court of Human Rights: *Saramaka People v. Suriname*, Judgement, 28 November 2007; *Yakye Axa Indigenous Community v. Paraguay*, Judgement, 17 June 2005; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgement, 31 August 2001. See also African Commission on Human Rights and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 2176/03/2009.

⁵⁰ African Commission on Human Rights and Peoples' Rights, *Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, 2001.

⁵¹ *Volga Case* (Russian Federation v. Australia), 42 ILM 159 (2003); *MOX Plant* (Ireland v. United Kingdom), Order of 13 November 2001; *Southern Bluefin Tuna (Australia v. Japan)*, Order of 27 August 1999; *M/V Saiga (Saint Vincent and the Grenadines v. Guinea)*, Case No. 1, Order of 21 November, 1997.

⁵² Reports from WTO: China – Measures Related to the Exportation of Various Raw Minerals, WT/DS394/AB/R, WT/DS395/AB/R, 30 January 2012; Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/16, 29 August 2008; United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998.

⁵³ United Nations Sustainable Development Goals (2015).

⁵⁴ Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff, 2009).

⁵⁵ Universal Declaration of Human Rights, art. 30.

1.7 The Principle of Environmental Democracy

The concept of environmental democracy is generally constituted by the principles of access to information, participation in decision-making and access to environmental justice. These elements of public participation have appeared in various domestic contexts since at least the early 1970s, and demonstrate links with certain aspects of international human rights law.⁵⁶ While most global multilateral environmental agreements adopted since the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, in 1992, endorse public access to information and public participation by some means, many of the underlying legal developments have taken place regionally and with remarkably little geographic symmetry.⁵⁷ This constitutes a significant gap in international environmental law.

The specific requirement that States should make environmental information held by public authorities available to the public is expressed in foundational instruments of international environmental law,⁵⁸ United Nations instruments,⁵⁹ regional instruments⁶⁰ and civil society documentations.⁶¹ The specific requirement that States should enable the public to participate in the preparation of the decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment is also expressed in foundational instruments of international environmental law,⁶² regional instruments⁶³ and texts drafted by civil society.⁶⁴ The specific requirement that States should ensure effective and affordable access to administrative and judicial procedures to challenge the acts or omissions of public authorities or private persons that contravene environmental law is expressed in Principle 10 of the Rio Declaration, regional instruments⁶⁵ and texts drafted by civil society.⁶⁶

⁵⁶ Jonas Ebbesson, "Principle 10: public participation", in Vinuales, ed., *The Rio Declaration on Environmental and Development*, p. 287.

⁵⁷ Ibid., p. 293

⁵⁸ WCN, Arts. 18 and 21 (a); Rio Declaration, Principle 10; Paris Agreement, Art. 12.

⁵⁹ Drafted Articles on the Prevention of Transboundary harm from hazardous activities, in "*Yearbook of the International Law Commission, 2001*", art. 13; and resolution 62/68, annex.

⁶⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Art. 1; African Convention on the Conservation of Nature and Natural Resources (African Convention), Arts. XVI (1) (a-b).

⁶¹ Earth Charter, Art. 8 ©; Johannesburg Principles on the Role of Law and Sustainable Development (Johannesburg Principles); New Delhi Declaration, para. 5.2; IUCN Draft Covenant, art. 15 (3); Oslo Principles, preamble; World Declaration on the Environmental Rule of Law (IUCN World Declaration), Art. 1 (d); CIDCE Draft Covenant, Arts. 8 (1)-(3) and 9 (1)-(2).

⁶² WCN, Art. 23; Rio Declaration, Principle 10; Paris Agreement, Art. 12.

⁶³ Aarhus Convention, Arts. 6 (2), 17 and 8; African Convention, Art. XVI (c).

⁶⁴ IUCN Draft Covenant, Art. 15 (4); IUCN World Declaration, Art. 1 (a), Principle 10; CIDCE Draft Covenant, Arts. 10 (1)-(3).

⁶⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13; Aarhus Convention, Art. 9.

⁶⁶ Johannesburg Principles, preamble; IUCN Draft Covenant, art. 15 (5); Oslo Principles, para. 26; IUCN World Declaration, preamble; 2016 UNESCO First Draft of a Preliminary Text of a Declaration on Ethical Principles in Relation to Climate Change, Art. 5 (5).

1.8 The Human Right Principle

The nexus between the enjoyment of basic human rights and environmental quality has long been recognized. However, international treaties have not defined the threshold below which the level of environmental quality must fall before a breach of a person's human rights has occurred. Arguably, that threshold differs depending on the human right in quest.

Currently, it is reported that there are at least 155 States that recognize a human right to a healthy environment in their constitutions and subsidiary legislations.⁶⁷ Additionally, such a right is evoked in non-binding declarations, such as the Stockholm and Rio Declarations. Only a few sector-specific binding international and regional conventions recognize the right to live in a healthy environment.⁶⁸ Existing regional international instruments on this subject do not universally or completely define the scope and content of the right. Regional agreements that recognize the right to a healthy environment generally pertain to human rights law and do not take into account the specificities of environmental issues. Several such agreements do not allow individuals or groups to file individual or public interest claims. While the right to a healthy environment is not explicitly included in the European Convention on Human Rights adopted in 1950, the European Court of Human Rights has used it to afford indirect protection through those rights are included, on the basis of a dynamic interpretation of the Convention.⁶⁹ International environmental law also currently lacks an appropriate legal framework to protect environmental rights defenders.⁷⁰

1.9 The Principle of Cooperation and Partnership

The concept of partnership as it has evolved within international environmental law could be considered to represent the further development of the notion of international cooperation. In the UN Charter, the peoples of the United Nations resolve to combine their efforts to accomplish the stated aims. One of the fundamental purposes of the United Nations is to achieve international cooperation in solving international problems.

Partnership builds on the idea of cooperation, reflecting on increasing understanding of the need to strike operative arrangements between the economic and political factions of the problems. The concept of partnership in the field of international environmental law is developed in the context of sustainable development and reflects the requirements of the

⁶⁷ David R. Boyd, "Catalyst for Change: evaluating forty years of experience in implementing the rights to a healthy Environment", in John H. Knox and Ramin Pejman, eds., *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), pp.17-42.

⁶⁸ African Charter on Human and People's Right, Art. 24; Additional Protocol to the African Charter on Human and Peoples' Rights, Art. 38; Inter-American Convention on protecting the Human Rights of Older Persons, Art/25; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement), Art. 4 (1).

⁶⁹ European Court of Human Rights (ECHR), *Lopez Ostra v. Spain*, Application No. 1678/90, Judgment, 9 December 1994, para. 51. In other cases, the Court has felt that the right to life protected by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms includes the right to be protected against risks resulting from hazardous industrial activities. See ECHR, *Oneryildiz v. Turkey*, Application No. 48939/99, Judgment, 30 November 2004.

⁷⁰ Unlike human rights defenders under resolution 53/144 of 9 December 1998.

common concern and common but differentiated responsibilities concepts, it goes further to require not only the goal of cooperation but in addition, the promotion of effective means by which to achieve that. Specifically, partnership arrangements are manifested within environmental law instruments as a range of innovative, enabling and facilitative mechanisms. Facilitative mechanisms include information exchange, reporting requirements and multilateral consultative processes. It is important to note that the notion of partnership is ultimately grounded in the sustainable development concept, the holistic approach of which dictates a broad focus as stated in the preamble to Agenda 21:

Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystem on which we depend for our well being. However, integration of environment and development concerns and greater attention to them will lead to fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer more prosperous future. No nation can achieve this on its own, but together we can- in global partnership for sustainable development.

In the structure of international environmental governance, States are required to contribute to the conservation, protection and restoration of the integrity of the Earth's ecosystem. This entails an obligation to cooperate in good faith and in a spirit of global partnership towards the fulfillment of this objective. The framing of cooperation as a principle of international environmental law through the adoption of supplementary instruments and norms by conferences of parties serves the progressive development and dynamic evolution of treaty law.⁷¹ The principle has been recognized in foundational instruments of international environmental law,⁷² United Nations instruments,⁷³ texts drafted by civil society⁷⁴ and the World Trade Organization (WTO).⁷⁵

⁷¹ Peter H. Sand, "Principle 27: Cooperation in a spirit of global partnership", in Vinuales, ed., *The Rio Declaration on Environment and Development*, p. 617.

⁷² Stockholm Declaration, principle 24; UNCLOS, art. 197; WCN, Arts. 21 (a) and 22; Vienna Ozone Convention, Art. 2 (2) (a); Agenda 21, chap. 2.1; Rio Declaration, principles 5, 7, 9, 12-14, 24 and 27; UNFCCC, preamble and Art. 3 (5); CBD, Art. 5; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), Arts. 3 (b) and (c); Paris Agreement, Arts. 7 (6)-(7) (a) and 8 (4) (a)-(f).

⁷³ Draft Articles on Prevention of Transboundary harm from Hazardous Activities, Art. 4.

⁷⁴ Oslo Principles, preamble; CIDCE Draft Covenant, Art. 20.

⁷⁵ World Trade Organization, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4, Report of the Appellate Body, 12 October 1998, para. 168.