



**UNIVERSITY
OF LONDON**



SOAS
University of London

Centre for Development, Environment and Policy

P125

International Environmental Law

Professor Keith Porter, with Mary Jane Porter and Laurence Smith (2014).

This version updates and replaces an earlier version prepared by Ernst Basson and Laurence Smith (2011).

ABOUT THIS MODULE

This module looks at the principles and rules of international law which have as their primary objective the protection of the environment. The module addresses how the international community has recognised and sought to deal with the interdependence of the global environment, from early bilateral arrangements dealing principally with local transboundary pollution to more recent regional and international agreements.

Multilateral approaches to environmental problems have had to attempt to reconcile state sovereignty with the placing of limits on the rights of states and other members of the international community to carry out or permit environmentally damaging activities, as well as the interplay between environmental protection objectives and the economic and developmental needs of states. The need for institutions, laws and agreements that can appropriately and fairly guide the trade-offs that may be needed between economic activity and environmental protection is a recurrent theme and issue in the module. This comes to the fore in relation to a wide range of natural resources, not least when concerned with international agreements that also seek to regulate international trade.

The module outlines the international legal processes through which international environmental issues are addressed, the principles which underlie or guide the action taken, the substance of the principles and rules relating to environmental problems generally, including the principle of sustainable development, and various techniques for implementing these principles and rules. It considers how successfully the international legal instruments and processes under consideration achieve their objectives and how they might be improved.

In summary, in addition to providing a general introduction to the wide and dynamic field of international environmental law, the module seeks to address the key contemporary issues of our planet – climate change and overexploitation of natural resources – their causes, sometimes catastrophic effects and potential legal solutions.

It is important to remember that a single module of this kind can only cover part of a large and sometimes controversial subject area: inevitably it has to be selective. We decided to emphasise the principles and practice of international environmental law, without overloading students with details of case law and precedents. We seek to focus on processes, principles and rules which have global applicability and, in general, reference is not made to legal sources on regional environmental law because this would be overwhelming in volume and diversity. However, significant regional developments in environmental law are referred to in some units, particularly where this provides an illustrative model or other form of precedent. The aim is to capture the salient regional developments in environmental law that inform global practice, without getting lost in the dynamics and detail of domestic environmental law in different states.

This module is aimed at environmental management practitioners – from private business, government departments, international development agencies and non-governmental organisations (NGOs) – who work in the formulation, delivery and management of environmental policies, programmes and projects. You may be involved directly with national and international environmental law in one way or another. Even if not directly involved, you are likely to have contact with lawyers and need to know something of how they work and of the international legal framework

within which you work. The emphasis we have selected does not mean that you can become an expert in international environmental law simply by doing this module alone, although it does aim to provide a solid initial basis for the appreciation of legal principles and practice and to make you an effective member of professional teams.

STRUCTURE OF THE MODULE

Units 1 and 2 explain the legal and institutional framework in which international environmental law has developed and is applied. They consider the process by which international environmental law develops, and the principles which underlie it, including the concept of sustainable development. This part of the module also provides the main tools which you will need in order to understand the development, application and limitations of international environmental law.

Units 3–10 then review some substantive areas of environmental protection and consider what rules and principles of international law have developed to address these. In each case, relevant treaties are examined in some detail. Specifically, Units 3–8 cover the atmosphere, fresh water resources, the seas, conservation of biodiversity, and waste and hazardous substances. Unit 9 considers provisions for environmental impact assessment, sharing of information and public participation. Unit 10 concludes the module by considering how international environmental law affects, and is affected by, the international trade mechanism, and the importance of technology transfer and intellectual property rights. Whilst considering each of these areas in an isolated, serial manner, you should aim to ensure that any links between the different subject areas of international environmental law are noted, and also refer back to the principles and approaches to international law covered in Units 1–2.

An informal introduction to the scope of international environmental law

This module will give you acquire a working knowledge of international environmental law. But what is the environment?

A listing of the components that make up the environment is offered by the 1991 Convention on Environmental Impact Assessment in a Transboundary Context: human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments, and cultural heritage.

Regarding understanding of the environment, at least in the developed and urbanising world, modern detachment from our environment obscures appreciation and understanding. For example, in a survey of American children when asked where milk comes from, the majority replied, the supermarket.

An adult person produces about 225–450 grams of waste a day. That means the earth must absorb at least 600 billion tonnes of human waste per year. We have no collective sense of that volume of material, or how it can be assimilated either usefully or safely. In older societies there was a close bond with our environment. People used to go to the field, or wood, to relieve themselves by depositing their human waste on the soil where microbes would help recycle the nutrients for plants. For example, some ancient societies were strict in their sanitary codes as illustrated by the Mosaic injunction to turn back that which cometh from thee in the soil [Deut. 23:13]. The Chinese, especially, for centuries maintained high levels of soil fertility

by using their wastes. In pre-revolutionary China, a farmer's most valued possession was the contents of his privy. Farm workers were required to use their master's privy while at work, and peasants were known to locate their privies near frequently travelled paths hopeful that passers by would leave deposits. As cities developed in traditional Asian cultures, contractors daily collected and loaded so-called 'night soil' onto boats. This human manure was then taken up river and sold to farmers as a valued source of nutrients for their crops.

Unfortunately, modern urbanisation detaches us from a direct appreciation of the earth. However, since the mid 20th century, two developments have fostered an increasing awareness of our environment. The first is the increasing number and scale of environmental disasters. In the next few decades, the human population is expected to begin approaching 10 billion. Those billions will be seeking food, water and other resources on a planet where humans are already shaping climate and the web of life.

What is International law? An answer is that international law consists of the legal relations between States or countries are governed. I use the word States. That is because historically, international law is regarded as having States as its primary subjects. This reflects the origin of the development of the law of war. War was viewed as being hostilities conducted between nations only. Although a man may shoot another, he is not at war.

What about the nature of that law? When we think of law, we think of a hierarchy of governmental levels, administrative departments and courts with a central government and an overall court with enforcement powers at the top. This is not a paradigm that applies to international law. There is no central international legislative authority or overall judicial court with powers of enforcement. Rather international law may be viewed as being a horizontal legal system operating between equal state partners. That being the case raises the often asked question, is international law really real. Does it actually exist as law? Is it just a matter largely of agreements on paper?

An answer is to give an example with which we are familiar: When you board a plane to fly let us say from one country to another, ask yourself is the international law by which that plane can fly real? In fact you take for granted the laws by which international aviation is governed and fly quite safely to your destination.

As you will learn in later units there are international environmental agreements that deserve mention for their accomplishments. For example, the Convention on Long Range Transboundary Air Pollutant has significantly reduced the loading of nitrous oxides and sulphur dioxide that cause acid rain in North America and Europe. Later the LRTAP also became parent to the Stockholm Treaty on Persistent Organic Pollutants. This treaty can claim the elimination of the production and use of the so-called 'dirty dozen' organic chemicals that were becoming a very serious threat to human and environmental health especially in the polar-regions. The Montreal Protocol of the Vienna Convention for Substances that deplete the ozone layer has dramatically reduced the loss of the ozone layer that otherwise would have been threatening to all life on Earth.

What justifies these laws? The answer is the mega-scale increases in population and economic development. Corresponding to these mega-scale developments is the development of scientific understanding of the environment. The first unit summarises the development of international environmental law in this context,

especially over the last 100 years and even more particularly the last 50 years.

A reason for this historical review is twofold. First of all to give a sense of how recent and rapid is the development of international law. But secondly, it is especially helpful to have a sense of the history of the law in trying to appreciate the law we now have. How did we get here from there?

A cornerstone of international environmental law is the question of sovereignty. Issues of sovereignty relate to the North-South divide. It is sometimes said that the world is divided into two groups of people: 'Those who divide the World into two groups, and those who do not'. International environmental law appears to encourage the former. We will encounter several two-group distinctions such as the developed world versus the undeveloped, or the North-South distinction, those who favour the environment and those who put economic development first. Such dualisms run throughout international environmental law, especially the supposed conflict between economic development and the environment.

State sovereignty is an especially important issue for developing countries as they struggle for self-determination and economic independence. Such countries are likely to regard permanent sovereignty over natural resources as a basic constituent of the right to self-determination. Such differences are exacerbated by so-called legacy problems caused by previous mismanagement of the environment

International environmental law offers a reconciliation of economic and environment goals under the new conceptual framework of sustainable development. This framework was established by the highly influential Brundtland report. In 1987, the World Commission on Environment and Development published its Brundtland Report, named after its Norwegian Chairwoman, Gro Harlem Brundtland as input to the 1992 Rio Conference. This report defined Sustainable Development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'

Some developing countries were suspicious about potential constraints on their economic development. Furthermore, what does sustainability mean? Its definition appears to confer rights on future generations. But what are those rights and how can they apply to people who are not only unborn, they do not exist?

Sir Robert Jennings in his Foreword refers to the scale and urgency of the environmental problems facing the world that represent a question of human survival. A key issue in EIL is the question of the 'carrying capacity' of the Earth. Beginning with Malthus, this old debate has lost persuasive force. Economists argue that the carrying capacity is infinitely expandable. New technologies will continuously improve production and that substitution and inter-regional trade will compensate for scarcities. It might be more prudent however, to think of the canary in the mine. Human beings are the canary for the Earth. We can think of that Earth as a spaceship. Then remember that a spaceship has no sewers!

WHAT YOU WILL LEARN

Module Aims

- To outline the historic development of international environmental law and to identify and describe its basic principles and rules.
- To outline the international legal system within which these principles and rules have developed.
- To consider the role of the concept of sustainable development and its impact on international environmental law in terms of attempts to reconcile developmental and environmental objectives.
- To consider the adequacy of the international legal system to address substantive regional and global environmental concerns and to enable students to assess critically its effectiveness.
- To examine critically the relevance of human rights and procedural rights to the development and implementation of international environmental law.

Module Learning Outcomes

By the end of this module, students should be able to:

- describe and critically appraise the fundamental principles and rules of international environmental law, and the legal and institutional framework in which they have developed and are implemented
- outline and critically review the techniques and problems of implementing and enforcing international environmental law
- critically examine methods which have developed to facilitate global participation in international environmental agreements and to address the relationship between environmental and developmental objectives
- critically review how international environmental law develops and its strengths and limitations.

ASSESSMENT

This module is assessed by:

- an examined assignment (EA) worth 40%
- a written examination worth 60%

Since the EA is an element of the formal examination process, please note the following:

- (a) The EA questions and submission date will be available on the Virtual Learning Environment (VLE).
- (b) The EA is submitted by uploading it to the VLE.
- (c) The EA is marked by the module tutor and moderated by the module convenor. Students will receive a percentage mark and feedback.
- (d) Answers submitted must be entirely the student's own work and not a product of collaboration.
- (e) Plagiarism is a breach of regulations. To ensure compliance with the specific University of London regulations, all students are advised to read the guidelines on referencing the work of other people. For more detailed information, see the FAQ on the VLE.

STUDY MATERIALS

Textbook

There is one **key text** supplied with this module.

- ❖ Sands, P., Peel, J., with Fabra, A. & MacKenzie, R. (2012) *Principles of International Environmental Law*. 3rd edition. Cambridge, Cambridge University Press.

The third edition of this excellent leading textbook provides a comprehensive and critical commentary on international environmental law. It clearly covers all the topics of the module including the history and the wider framework in which international environmental law exists.

For the purposes of the module, you are **not required** to read the entire textbook. For each unit, **readings** are assigned from Sands corresponding to the topic of the unit. Through the readings you will be expected to acquire knowledge of the key declarations, treaties and leading cases. The primary aim is to gain understanding and to develop your ideas rather than to acquire a mastery of all the detail. For some of the detail you may learn enough from a more casual reading of those parts of the textbook.

International environmental law in its multiple aspects, such as the Law of the Sea, or environmental disputes within the world trading system, is a huge and rich subject. Use the module text as a first guide for what to study in depth as opposed to what you may learn from skimming the textbook. You will also be given some guidance for the readings from the textbook for each unit.

Superficially at least, it is easy to have the impression that international environmental law is largely a matter of documents or 'words on paper'. This is far from the reality. Excepting the rare dormant agreement, the law attempts to deal with real issues many of which are vital for human existence. One way to gain a sense of the activities and functions associated with agreements is to open relevant websites. Simply browsing in a website of a treaty such as The Basel Convention (n.d.), can rapidly give a sense of how treaties function. You are especially encouraged to do such browsing particularly if a treaty seems difficult to understand or if some aspect of it seems obscure. For example, when you open the website for the Basel Convention that concerns trade in hazardous wastes, you are immediately linked to the closely related Rotterdam and Stockholm treaties that deal with trade in dangerous chemicals and the elimination of selected toxic chemicals. The immediate point is that the Conference of Parties for each of the three treaties have elected to work together in a trailblazing manner that could be an important example for other otherwise independently functioning environmental treaties. A challenge facing the multiplicity of environmental treaties is how to overcome the 'balkanisation' that they can represent. More generally, looking at the website for a treaty can give a sense of its functioning parts, and its progress and problems, more vividly than a textbook.

References

Each unit contains a full list of all material cited in the text. All references cited in the unit text are listed in the relevant units. However, this is primarily a matter of good academic practice: to show where points made in the text can be substantiated. Students are not expected to consult these references as part of their study of this module.

Regarding the **Treaties, Instruments and Cases** (see table below), you are not expected to study original legal instruments in detail, however, it is of value that you peruse a sample of these. Seek to improve your understanding of key principles and processes from the style, structure, terminology and substantive content of such texts. To this end, a number of important examples have been included in your e-study guide as an additional resource.

Given the volume of material readily available for this subject, students should note that study of the module study guide and the Key Readings set in the textbook are considered sufficient for the purposes of the examination and should manage their study time accordingly.

Finally, try to enjoy your reading of Sands and Peel. It represents an insightful understanding of the vital problems humanity and the World now face. As Sir Robert Jennings states at the end of his Foreword to the textbook: 'After all, this is not just a question of ameliorating the problems of our civilisation but of our survival.'

TREATIES, INSTRUMENTS AND CASES

1893	<i>Bering Sea Fur Seals Fisheries</i> arbitration (Great Britain versus United States) <i>Moore's International Arbitration</i> .
1899	Convention for the Pacific Settlement of International Disputes.
1911	Convention Between the United States of America, the United Kingdom of Great Britain and Ireland, and Russia, for the Preservation and Protection of Fur Seals (Washington).
1929	<i>Territorial Jurisdiction of the International Commission of the River Oder</i> . Permanent Court of International Justice.
1938/ 1941	<i>Trail Smelter</i> arbitration (United States versus Canada).
1949	<i>Corfu Channel</i> case, (United Kingdom versus Albania). International Court of Justice
1957	<i>Lac Lanoux</i> arbitration (France versus Spain).
1969	UN <i>The 1969 Vienna Convention on the Law of Treaties</i> . Vienna 23 May 1969. United Nations.
1971	Convention on Wetlands of International Importance (1971 Ramsar Convention)
1972	UNEP <i>Declaration of the United Nations Conference on the Human Environment, Stockholm 1972</i> . United Nations Environment Programme. <i>WHC Convention Concerning the Protection of the World Cultural and Natural Heritage</i> . (1972 World Heritage Convention).
1973	Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973 CITES).
	International Convention for the Prevention of Pollution by Ships (1973 MARPOL).
1979	UNECE <i>The Geneva Convention on Long-Range Transboundary Air Pollution</i> . United Nations Economic Commission for Europe. (1979 LRTAP)
1982	UN <i>World Charter for Nature</i> . General Assembly, 48th Plenary Meeting 28 October 1982, United Nations, New York. United Nations Convention on the Law of the Sea. [1982 UNCLOS]

- 1985 UNEP *Vienna Convention for the Protection of the Ozone Layer*. United Nations Environment Programme. (**1985 Vienna Convention**)
-
- 1987 UNEP *Goals and Principles of Environmental Impact Assessment*. Preliminary Note, Issued on 16 January 1987, Environmental Impact Assessment (EIA).
-
- UNEP *Montreal Protocol on Substances that Deplete the Ozone Layer*. (**1987 Montreal Protocol**)
-
- 1989 UNEP *Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* (**Basel Convention**).
-
- 1990 UNEP *The London Amendment to the Montreal Protocol agreed by the Second Meeting of the Parties*. United Nations Environment Programme.
-
- 1991 *Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*. (African Union). (**Bamako Convention**)
-
- UNECE *Convention on Environmental Impact Assessment in a Transboundary Context* (**Espoo Convention**).
-
- Tuna/Dolphin cases I & II GATT Panel Decisions*. United States versus Mexico
-
- 1992 UNEP *Rio Declaration on Environment and Development of the United Nations Conference on Environment and Development (UNCED)*.
-
- UNFCCC *The United Nations Framework Convention on Climate Change*.
-
- Convention on Biological Diversity (**Biodiversity Convention**).
-
- UN Agenda 21: Earth's Action Plan (UNCED).
-
- 1994 *Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*.
-
- Agreement Establishing the World Trade Organisation (**1994 Marrakesh Agreement**).
-
- 1995 UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks.
-
- 1996 WTO Environment: Disputes 7. *United States – Standards for Reformulated and Conventional Gasoline*. *Venezuela, Brazil versus US: Gasoline*.
-

1997	UNFCCC Kyoto Protocol to the United Nations Framework Convention on Climate Change. (1997 Kyoto Protocol)
	UN Convention on the Non-Navigational Uses of International Watercourses
	<i>Gabčíkovo-Nagymaros</i> Project International court of Justice
1998	UNECE <i>Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters</i> . (1998 Aarhus Convention)
	UNEP <i>Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade</i> . (1998 Rotterdam Convention)
	<i>Shrimp/Turtle dispute: Import Prohibition of Certain Shrimp and Shrimp Products</i> . United States versus India, Malaysia, Pakistan, and Thailand. WTO Appellate Body.
	<i>Beef Hormones case. EC – Measures Concerning Meat and Meat Products (Hormones)</i> . EC versus United States and Canada. WTO Appellate Body.
2000	Protocol on Biosafety (2000 Cartagena Protocol)
2001	UN International Law Commission's Report. <i>Responsibility of States for Internationally Wrongful Acts</i> .
	Convention on Persistent Organic Pollutants (2001 Stockholm Convention).
2003	UNECE <i>Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev Protocol)</i> .
2004	ILA <i>Berlin Rules on Water Resources</i> . Berlin 21 August 2004.
2006	International Tropical Timber Agreement
	<i>EC-Biotech case. EC – Measures Affecting the Approval and Marketing of Biotech Products</i> , WTO Panel.
2010	Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010 Nagoya Protocol).
2012	<i>Pulp Mills on the River Uruguay case (Argentina v. Uruguay)</i> . International Court of Justice.

MULTIMEDIA

This video is available in your e-study guide.



The module author Professor Keith Porter and Mrs Mary Jane Porter who assisted with the writing of the module, are interviewed by Professor Laurence Smith, of CeDEP, SOAS, University of London. Keith is Adjunct Professor at the Law School, Cornell University and Mary Jane is an alumnus of the MSc in Environmental Management offered by CeDEP, SOAS, and an experienced professional who worked for much of her career with Keith at the New York State Water Resources Institute, Cornell University.

The discussion is wide ranging but includes guidance on how to approach the study of this module. In particular there is guidance aimed at the majority of students who may be studying a law module for the first time. Keith and Mary Jane also reflect on the value and interest to be found in studying law in relation to environmental management and how it helped them in their work on water resources management in New York State.

You can watch this interview at any time, but you may find it most interesting and useful at the commencement of your studies and when planning how to prioritise your time. It's worth watching again when the examinations approach.

There are also audios or videos to accompany each unit in the Multimedia sections of your e-study guide. You will be directed when to listen to them as you progress through the module.

Self-Assessment Questions

Often, you will find a set of **Self-Assessment Questions** at the end of each section within a unit. It is important that you work through all of these. Their purpose is threefold:

- to check your understanding of basic concepts and ideas
- to verify your ability to execute technical procedures in practice
- to develop your skills in interpreting the results of empirical analysis.

Also, you will find additional **Unit Self-Assessment Questions** at the end of each unit, which aim to help you assess your broader understanding of the unit material. Answers to the Self-Assessment Questions are provided in the Answer Booklet.

In-text Questions

? This icon invites you to answer a question for which an answer is provided. Try not to look at the answer immediately; first write down what you think is a reasonable answer to the question before reading on. This is equivalent to lecturers asking a question of their class and using the answers as a springboard for further explanation.

In-text Activities

 This symbol invites you to halt and consider an issue or engage in a practical activity.

Key Terms and Concepts

At the end of each unit you are provided with a list of Key Terms and Concepts introduced in the unit. The first time these appear in the text guide they are ***Bold Italicised***. Some key words are very likely to be used in examination questions, and an explanation of the meaning of relevant key words will nearly always attract credit in your answers.

Acronyms and Abbreviations

As you progress through the module you may need to check unfamiliar acronyms that are used. A full list of these is provided for you at the end of the introduction.

REFERENCE

The Basel Convention (n.d.)

Available from: <http://www.basel.int> [Accessed 27 October 2014]

TUTORIAL SUPPORT

There are two opportunities for receiving support from tutors during your study. These opportunities involve:

- (a) participating in the Virtual Learning Environment (VLE)
- (b) completing the examined assignment (EA).

Virtual Learning Environment (VLE)

The Virtual Learning Environment provides an opportunity for you to interact with both other students and tutors. A discussion forum is provided through which you can post questions regarding any study topic that you have difficulty with, or for which you require further clarification. You can also discuss more general issues on the News forum within the CeDEP Programme Area.

INDICATIVE STUDY CALENDAR

Part/unit	Unit title	Study time (hours)
Unit 1	Background development and sources	10
Unit 2	Global environmental compliance management and state liability	15
Unit 3	Governance and principles of international environmental law	15
Unit 4	Air and atmosphere	15
Unit 5	Freshwater resources	15
Unit 6	The sea and its resources	15
Unit 7	Conservation of biodiversity: forestry, wildlife, fauna, and flora	15
Unit 8	Hazardous waste and toxic chemicals	10
Unit 9	Environmental impact assessment, information and public participation	15
Unit 10	Environment and international trade	10

Examined Assignment Check the VLE for submission deadline	15
---	----

Examination entry	July
Revision and examination preparation	Jul-Sep
End-of-module examination	Late Sep-early Oct

ACRONYMS AND ABBREVIATIONS

AAUs	assigned amount units
AB	Appellate Body
ACTO	Amazon Cooperation Treaty
AOSIS	Alliance of Small Island States
ASEAN	Association of South East Asian Nations
ATS	Antarctic Treaty System
AU	African Union
BAN	Basel Action Network
BAT	best available technique
BGB	Bürgerliches Gesetzbuch (Germany)
BIICL	British Institute of International and Comparative Law
BPMs	best practical means
BSWG	Working Group on Biosafety
BWT	ballast water management
CARU	Comisión Administradora del Río Uruguay
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCAS	Convention for the Conservation of Antarctic Seals
CDM	clean development mechanism
CEDAW	Convention on the Elimination of Discrimination against Women
CER	certified emission reduction
CESCR	Committee on Economic, Social and Cultural Rights
CFCs	chlorofluorocarbons
CIS	clearing house mechanism
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLC	Civil Liability for Oil Pollution
CMS	Convention on Migratory Species
COE	Council of Europe
COMIFAC	Commission des Forêts d'Afrique Centrale
COP	Conference of the Parties
CPB	Cartagena Protocol on Biosafety

CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities
CRC	Chemical Review Committee
CSD	Commission on Sustainable Development
CSIR	Council for Scientific and Industrial Research
CTE	Committee on Trade and Environment
CVM	contingent valuation methodology
DALYs	disability adjusted life years
DES	diethylstilbestrol
DGD	decision guidance document
DSB	dispute settlement body
DSU	dispute settlement understanding
EC	European Commission
ECCP	European Climate Change Programme
ECJ	European Court of Justice
EEC	European Economic Community
EEZ	exclusive economic zone
EFZ	exclusive fishing zone
EIA	environmental impact assessment
ELARD	Earth Link and Advanced Resources Development
EMEP	European Monitoring and Evaluation Programme
EPA	Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
ERU	emission reduction unit
ESM	environmentally sound management
ESOSOC	(United Nations) Economic and Social Council
EU	European Union
EUROTOM	European Atomic Energy Community
EW	exempt wastes
FAO	Food and Agriculture Organization of the United Nations
FDA	Food and Drug Administration
FOC	flags of convenience
FSC	Forest Stewardship Council
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GEF	Global Environmental Facility

GEO	Global Environmental Organization
GESAMP	the joint Group of Experts on the Scientific Aspects of Marine Environmental Protection
GHG	greenhouse gas
GMO	genetically modified organism
GRAS	generally recognised as safe
GSP	generalised system of preferences
HCB	hexachlorobenzene
HCFC	hydrochlorofluorocarbon
HELCOM	Helsinki Commission
HLW	high level waste
IAEA	International Atomic Energy Agency
IAIA	International Association for Impact Assessment
IBRD	International Bank for Reconstruction and Development
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRP	International Commission on Radiological Protection
ICWE	International Conference on Water and the Environment
ICZM	integrated coastal zone management
IDA	International Development Association
IFF	Intergovernmental Forum on Forests
IIL	Institute of International Law
IJC	International Joint Commission
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILW	intermediate level waste
IMO	International Maritime Organization
IPCC	Intergovernmental Panel on Climate Change
IPF	Intergovernmental Panel of Forests
IPPC	International Plant Protection Convention
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
ITTA	International Tropical Timber Agreement

ITTO	International Tropical Timber Organization
IUCN	International Union for Conservation of Nature and Natural Resources (formerly IUPN)
IUPN	International Union for the Protection of Nature
IWC	International Whaling Convention
IWGC	Intergovernmental Working Group on Conservation
JI	joint implementation
LDC	least developed countries
LDS	least developed states
LILW	low and intermediate level waste
LLW	low level waste
LMO	living modified organism
LOST	Law of the Sea Treaty
LRTAP	Long Range Transboundary Air Pollution
MAP	Mediterranean Action Plan
MDG	millennium development goals
MEA	multilateral environmental agreements
MFN	most favoured nation treatment
MIACC	Major Industrial Accidents Council of Canada
MIC	methyl isocyanate
MMPA	Marine Mammals Protection Act
MOP	Meeting of the Parties
MRC	Mekong River Commission
NEA	Nuclear Energy Agency
NGO(s)	non-governmental organisation(s)
NIMBY	not in my back yard
nm	nautical mile
NPT	non-proliferation Treaty
NT	national treatment
OAU	Organization of African Unity
ODS	ozone depleting substances
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the (United Nations) High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe

OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic (O slo and P aris Convention)
PCA	Permanent Court of Arbitration
PCB	polychlorinated biphenyls
PCDD/PCDF	polychlorinated dibenzo- <i>p</i> -dioxin and dibenzofuran
PCIJ	Permanent Court of International Justice
PIC	prior informed consent
POP	persistent organic pollutant
PPM	product production methods
PPP	polluter pays principle
PSM	process safety management
PTBT	Partial Test Ban Treaty
PVPA	Plant Variety Protection Act
RFG	reformulated gasoline
RMU	a removal unit
SADC	Southern African Development Community
SCC	Supreme Court of Canada
SCRS	Standing Committee on Research and Statistics
SEA	strategic environmental assessment
SHPF	severely hazardous pesticide formulation
SOLAS	Safety of Life at Sea
SPS	sanitary and phytosanitary measures
STCW	Standards of Training, Certification and Watchkeeping for Seafarers
TAC	total allowable catch
TBT	technical barriers to trade
TED	turtle excluder device
TFAP	Tropical Forestry Action Plan
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSCA	Toxic Substances Control Act
UCIL	Union Carbide India Limited
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCCD	United Nations Convention on Desertification
UNCCUR	United Nations Conference on the Conservation and Utilisation of Resources

UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCHR	United Nations High Commissioner for Refugees
UNCLOS	United Nations Convention on the Law of the Sea
UNCSD	United Nations Conference on Sustainable Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFF	United Nations Forum on Forests
UNGASS	United Nations General Assembly Special Session
UNHCHR	United Nations Office of the High Commissioner for Human Rights
UPOV	International Union for the Protection of New Varieties of Plants
URFG	unreformulated gasoline
USA	United States of America
VLLW	very low level waste
VOC	volatile organic compound
VSLW	very short-lived waste
WANGO	World Association of Non-Governmental Organizations
WCED	World Commission on Environment and Development
WDPA	World Database on Protected Areas
WFD	Water Framework Directive
WHC	World Heritage Convention
WHO	World Health Organization
WMO	World Meteorological Organization
WNA	World Nuclear Association
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WWF	World Wide Fund for Nature

Unit One: Background, Development and Sources

Unit Information	3
Unit Overview	3
Unit Aims	3
Unit Learning Outcomes	4
Unit Interdependencies	4
Key Reading	5
References	6
Multimedia	9
1.0 Scope of international environmental law	10
Section Overview	10
Section Learning Outcome	10
1.1 Definition	10
1.2 Multidisciplinary nature	11
1.3 Why do we need international environmental law?	11
Section 1 Self Assessment Question	13
2.0 Development of international environmental law	14
Section Overview	14
Section Learning Outcome	14
2.1 Pre-1945 period	14
2.2 1945–1972	15
2.3 The period 1972–1992	19
2.4 The road from Rio: post-1992 and the WSSD	25
Section 2 Self Assessment Questions	27
3.0 Sources of international environmental law	28
Section Overview	28
Section Learning Outcome	28
3.1 International Conventions expressly recognised	30
3.2 International custom accepted as law	32
3.3 General principles of law recognised by civilised nations	34
3.4 Teachings of most qualified publicists	34
Section 3 Self Assessment Question	35

4.0 Global actors with importance for international environmental law	36
Section Overview	36
Section Learning Outcome	36
4.1 The 'governance' of multilateral agreements	36
4.2 The United Nations (UN)	38
4.3 The United Nations Environment Programme (UNEP)	38
4.4 The World Bank	39
4.5 Global Environment Facility	41
4.6 The contribution of NGOs to international environmental law	42
Section 4 Self Assessment Questions	43
Unit Summary	44
Unit Self Assessment Questions	45
Key Terms and Concepts	46

UNIT INFORMATION

Unit Overview

Unit 1 introduces the field of international environmental law as a distinct branch of international law. The purpose is to give a good sense of how international environmental law has evolved. Knowing this historical evolution is a basis for understanding the current progress of that law. Also the unit provides an overview of the multiple actors that play an increasing role in international environmental law. Traditionally, states were regarded as the subjects of international law. In recent decades non-state entities, such as non-governmental organisations and international institutions, have been increasingly recognised as having a role in international law. This unit reviews the role of States and other leading non-State organisations. As Sands aptly describes: in this 'new multi-layered system', international environmental law has three interrelated challenges: first, to ensure that all states are able to participate in the response of the international community to the growing range of environmental challenges which require an international response; second, to strengthen the role of international organisations and their effectiveness, by rationalising and co-ordinating their activities, and endowing them with increased functions; and third, to ensure that the role of non-state actors is properly harnessed, by providing them with sufficient international status to participate effectively in the international legal process and to make the link that governments and international organisations seem to find so difficult: translating global obligations into domestic action and implementation.

In short this unit discusses the multiple organisations that provide the means by which international environmental law is negotiated, adopted, implemented, managed, and monitored.

 There is a recording to accompany Unit 1 in the Multimedia section of your e-study guide. In this the module author Professor Keith Porter introduces the unit and provides an overview of key challenges and issues.

Unit Aims

- To describe international environmental law and its place in international law.
- To introduce the sources of international environmental law in order to find emerging environmental legal norms.
- To provide an overview of the development of international environmental law.
- To identify the paradigm shifts that occurred in the period from the Rio Conference on Environment and Development to the Johannesburg Summit on Sustainable Development. These paradigm shifts give increased priority to economic development within the context of sustainable development. At the same time, there is increased acceptance of non-governmental actors as having a key role in international environmental law.

Unit Learning Outcomes

By the end of this unit, students should be able to describe and critically appreciate:

- the nature of international environmental law, and the increasingly vital purposes it must serve for sustaining the wellbeing of humanity and the Earth itself, and how reconciling economic and environmental goals is a fundamental challenge for the law
- the key phases in the development of international environmental law in response to increasing scientific understanding of environmental problems. It is commonly accepted that the history of international environmental law can be divided into four different periods of development
- the four principal sources of international law as prescribed by Article 38 of the International Court of Justice and the widening scope of international law beyond the narrower terms of that article
- the roles of some non-state actors, including especially the United Nations and its various bodies, in different aspects of international environmental law.

Unit Interdependencies

This unit introduces international environmental law and several key terms and concepts that will be used in later units. The landmark arbitrations, the Pacific Fur Seals case and the Trail Smelter case, mentioned in this unit as key in the development of international environmental law, are described in Units 3 and 4 respectively. The *Trail Smelter* dispute between the United States and Canada is particularly important in establishing the no-harm principle referred to in other units, especially Units 3 and 4.

The Ramsar Convention concerning wetland protection, and Minamata calamity also mentioned in this unit are described in Units 6 and 7 respectively.

The multi-disciplinary character of international environmental law involves economic and scientific issues. Critical economic and scientific aspects of the law are threads running throughout other units in this module. Outcomes of the Stockholm and Rio Conferences in 1972 and 1992 respectively, are also frequently referred to in the following units.

This unit should normally be studied before all other units.

KEY READING

- ❖ Sands, P. & Peel, J. (2012) Chapter 2: History, and Chapter 3: Governance: states, international organisations and non-state actors. In: *Principles of International Environmental Law*. 3rd edition. Cambridge, Cambridge University Press. pp. 22–93.

This first reading in the textbook will provide an introduction to international environmental law, and why and how it has developed. International environmental law is a new branch of international law. It is important to understand its standing as a novel body of law and what are the sources of that standing. This reading will introduce you to basic concepts and ideas. It will also give an overview of landmark events in the evolution of international environmental law, what were the influences and their outcomes. The major outcome has been the emergence of sustainability as a governing issue combined with the on-going efforts to reconcile divergent interests of developed and developing nations.

The reading for this unit is the longest set for any of the units. Also there is substantial information describing various organisations. For the purposes of the module, you will not need a detailed knowledge of many of the organisations. The importance of an organisation for the module is measured by the role it plays in international environmental law. A tip for your first reading from the textbook is to become only preliminarily aware of the various organisations. Then as any specific organisation is mentioned or described as playing a key role in some aspect of international environmental law later as you work through the module, refer back to the specific description of that organisation. Alternatively look up its website on the internet. Referring back in this way will assist your memory and understanding. For example, the UN Security Council is of great importance generally but plays little direct part in international environmental law. On the other hand, you will encounter some organisations that have frequent relevance throughout the module, such as the UN Environment Programme.

REFERENCES

ATS. (1959) *Antarctic Treaty*.

Bailey, T.A. (1935) The North Pacific Sealing Convention of 1911. *Pacific Historical Review*, 4 (1), 1–14.

Bobo12345 (unknown) *Map of Minamata, Illustrating the Chisso Factory and its Effluent Routes*. Cartographer: Bobo12345. Reproduced under Creative Commons Licence: CC-BY-SA-3.0.

Brownlie, I. (2008) *Principles of Public International Law*. 7th edition. Oxford, Oxford University Press.

BWT. (1909) *1909 USA–Canada Boundary Waters Agreement*.

Carson, R. (1962) *Silent Spring*. Mariner Books published 2002. First Published in 1962 by Houghton Mifflin.

GAD. (2009) *Dr Gro Harlem Brundtland*. Photo by GAD. Licensed for use under Creative Commons. CC-BY-SA-3.0.

Available from:

http://commons.wikimedia.org/wiki/File:Gro_Harlem_Brundtland_2009.jpg

[Accessed 24 October 2014]

GEF. (2008) *Instrument for the Establishment of the Restructured Global Environment Facility*. Washington DC, Global Environment Facility.

Huyser, K. (1994) Sustainable development: rhetoric and reform at the World Bank. *Transnational Law and Contemporary Problems*, 4, 253–278.

Meadows, D., Meadows, D., Rander, J. & Behrens III, W.W. (1972) *The Limits to Growth*. Pergamon Press.

OAU. (1968) *African Convention on the Conservation of Nature and Natural Resources*.

Plater, Z.J.B. (1988) Damming the Third World: multilateral development banks, environmental diseconomies, and international reform pressures on the lending process. *Denver Journal of International Law and Policy*, 17 (1), 121–154.

Porter, O. (1961) *Former United States Secretary of Defence, Robert McNamara*. Photo by Oscar Porter. US Department of Defence. This work is in the public domain.

Available from:

<http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11425>

[Accessed 28 October 2014]

Ripinsky, S. & van den Bossche, P. (2007) *NGO Involvement in International Organizations: A Legal Analysis*. London, British Institute of International and Comparative Law (BIICL).

Sands, P. & Peel, J. (2012) *Principles of International Environmental Law*. 3rd edition. Cambridge, Cambridge University Press.

UN. (1938) *Trail Smelter Arbitration (United States versus Canada)*. United Nations (UN).

UN. (1945) *Charter of the United Nations and Statute of the International Court of Justice*. United Nations (UN).

UN. (1948) *Universal Declaration of Human Rights*. United Nations (UN).

UN. (1957) *Lac Lanoux arbitration (France versus Spain)*. United Nations (UN).

UN. (1992) *UN Agenda 21: Earth's Action Plan*. United Nations (UN).

UNEP. (1992a) *Rio Declaration on Environment and Development of the United Nations Conference on Environment and Development (UNCED)*. United Nations Environment Programme (UNEP).

UNEP. (1992b) *Convention on Biological Diversity (Biodiversity Convention)*. United Nations Environment Programme (UNEP).

UNEP. (2007) Interlinkages: governance for sustainability. In: *Global Environment Outlook 4*. United Nations Environment Programme (UNEP), pp. 362–394.

UNEP/GRID-Arendal (2006) *Emissions of Carbon Dioxide, in Africa and Selected OECD Countries*. Cartographer and designer, Hugo Ahlenius. United Nations Statistics Common Database.

Available from: http://www.grida.no/graphicslib/detail/emissions-of-carbon-dioxide-in-africa-and-selected-oecd-countries_1400 [Accessed 24 October 2014]

UNEP/GRID-Arendal (2007) *Common but Differentiated Responsibilities*. Cartographer and designer, Emmanuelle Bournay. United Nations Environment Programme Ozone Secretariat.

Available from: http://www.grida.no/graphicslib/detail/common-but-differentiated-responsibilities_c00f [Accessed 24 October 2014]

UNFCCC. (1992) *The United Nations Framework Convention on Climate Change*.

UNHCHR. (2002) *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*. Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003. (Contained in Document E/C.12/2002/11). Office of the High Commissioner for Human Rights.

Ward, B. & Dubos, R. (1972) *Only One Earth: the Care and Maintenance of a Small Planet*. WW Norton & Co.

WCED. (1987) *Our Common Future. The Brundtland Report*. The World Commission on Environment and Development, Oxford, Oxford University Press.

Available from: <http://www.un-documents.net/wced-ocf.htm>

[Accessed 24 October 2014]

MULTIMEDIA

Porter, K. (2014). *Introduction to Unit 1*. SOAS, University of London. [Audio]. Duration: 10.00 minutes.

This recording is available on your e-study guide.

In this recording the module author Professor Keith Porter introduces the unit and provides an overview of key challenges and issues.

Learners TV (n.d.) *International Environmental Law Course*. [Video Lectures]. Duration between 36 and 110 minutes.

Available from: <http://www.learnerstv.com/lectures.php?course=ltv259&cat=Law>

This is a series of recorded lectures and student seminar presentations from the University of California. This series is quite generic and international in content and several topics are of direct relevance to this module. However, do note the frequent references to context and legislation in the USA. This is a supplementary resource to sample as an alternative medium for your studies, and according to your interests.

Public Broadcasting Service (7 September 2010) *The Most Powerful Environmental Law on the Books*. [Video]. Need to Know, PBS Video. Duration 5:16 minutes.

Available from: <http://video.pbs.org/video/1540827857/>

'Need To Know' talked with David Skelly, Professor of Ecology at Yale University, about the power of the Endangered Species Act and how fear of its consequences has produced some reluctant conservationists. Again a supplementary resource for interest and broadening of your studies.

YouTube (2009) *Mercury Poisoning – The Minamata Story*. [Video]. Duration 3:11 minutes.

Available from: <http://www.youtube.com/watch?v=ihFkyPv1jtU>

A short clip about industrial mercury poisoning at Minamata Bay, Japan. It provides further context to this influential disaster which is cited several times in this module.

1.0 SCOPE OF INTERNATIONAL ENVIRONMENTAL LAW

Section Overview

In the context of international law, international environmental law is an adolescent. If youth is the 'season of hope' then aspirations for international environmental law are high as it responds to the critical challenges facing humanity. Such challenges were famously anticipated and described by Rachel Carson. Her book, *Silent Spring*, published in 1962 helped to set in motion the environmental movement both nationally and internationally. As a body of law we see today, international law can therefore be viewed as being only a half-century in age. As such it is only formatively defined. This section briefly introduces international environmental law, how it has evolved, its definition and character, and the global and regional environmental challenges it is intended to address.

Section Learning Outcome

The learning outcome is an early appreciation of the nature of international environmental law, and the increasingly vital purposes it must serve for sustaining the well-being of humanity and the Earth itself, and how reconciling economic and environmental goals is a fundamental challenge for the law.

1.1 Definition

The formative character of international environmental law reflects ambiguities of definition. This is largely due to its boundaries being indefinite. Disagreements about its definition include declining to be definitive. This view recognises that the protection of the international environment derives its legal underpinnings from institutions of general **international law** (Brownlie, 2008). Sands and Peel (2012), define international environmental law to comprise 'those substantive, procedural and institutional rules of International Law which have as their primary objective the protection of the environment' (Sands & Peel, 2012: p. 13). The ambiguity of definition is even shown in that the term environment itself comprises a multiplicity of aspects and issues that defy neat precision.

The UK Environmental Protection Act of 1990 defines the environment in conventional terms as consisting of all, or any of the following media, namely, the air, water and land. The *Oxford Dictionary* defines the environment as the set of circumstances, or conditions, especially physical conditions, in which a person or community lives, works and develops. There is a tendency for the circumstances comprising the environment to be viewed as encompassing both the natural environment as well as the social human environment. With such inclusiveness international environmental law not only addresses aspects of the natural environment such as pollution, climate change, water use, desertification, and conservation of biodiversity, but also covers the protection of the international cultural heritage of mankind. This breadth is a consequence of international environmental law having fuzzy boundaries. More fundamentally, it reflects that the way human beings work and play is integral to the environment in which they live. Climate change, for example, is closely coupled to energy management and

consumption, which in turn is governed by economics and politics. There are no neat boundaries to international environmental law. This is one of its challenges.

1.2 Multidisciplinary nature

From the breadth of subject areas covered by international environmental law it is apparent that, as a field of law, it is inherently multidisciplinary. Decision-making in international environmental law can be influenced by many considerations including scientific concepts, economic effects, and moral and social imperatives. Increasingly, decision-makers and implementers of the law must balance multiple interests in interpreting and applying international environmental legal norms. The Preamble of the United Nations Framework Convention on Climate Change, for example, recognises that, 'steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas'.

International environmental treaties typically establish legal obligations on the basis of scientific evidence with varying degrees of uncertainty. Thresholds of environmental harm are commonly undetermined or a matter of disagreement. For example, the USA and the European Union (EU) differ on restrictions to international trade of fish products or genetically treated beef products based on environmental and health grounds. The USA considers economic benefits and favours hard scientific evidence to justify such limitations on international trade. Conversely, the EU takes a precautionary position accommodating scientific uncertainties. Accordingly, scientific doubts justified banning the importation of hormone-treated beef from the United States to the EU in the Beef Hormones Case.

1.3 Why do we need international environmental law?

Serious environmental challenges facing individuals, communities, private companies and governments throughout the world are numerous and complex. Three categories of issues may be distinguished. First, there are issues falling within the international commons beyond the jurisdiction of any one state. Such issues include high seas fisheries, deep seabed minerals, the stratospheric ozone layer, and outer space. Second there are shared or transboundary natural resources. These issues include international river basins, migratory species and straddling fish stocks whose life cycle falls within the jurisdiction of more than one state. A legal issue that arises in this category is the equitable allocation of the resource between the states concerned providing for its reasonable utilisation. A third category of issues that can overlap with the other categories is the harm caused by transboundary externalities.

Environmental problems within each of these three categories may represent risks at the global level, or at regional levels.

As will be presented throughout this module, developing and applying the international law relevant to the problems listed faces multiple challenges. These challenges are in the context of the following important issues. Many if not most of the environmental problems are largely the result of past and continuing economic activities of the developed nations. They are heritage problems. This understandably causes resentment when developing countries believe they are being expected to

bear an unfair burden in now assisting in remedying the environmental problems for which they have little or no blame.

On the other hand, many developing countries are achieving advanced economic development where they now contribute significantly themselves to environmental problems. These countries include especially Brazil, Russia, India, and China, the so-called BRIC countries. In consequence, the developed countries, including especially the United States, maintain these countries correspondingly must bear their share of costs of remedies to environmental problems. This however leads to the objection developing countries would now have constraints imposed on their development when the prior industrialisation of developed countries occurred without such constraints. This objection is amplified by developing countries facing an over-riding issue of poverty. Hence understandably, the priority of economic development can trump environmental protection. Such a reality frequently places economic interests in apparent opposition to environmental goals. Reconciling these conflicting forces is a fundamental challenge facing international environmental law.

 Relate the discussion above to your personal experiences, and note down any examples you are aware of. Firstly, do you know of any examples in your region where government failed to implement environmental protection measures required by international environmental agreements because of local protest or objection? Secondly, are you aware of any environmental projects in your region funded by government, donor states or international institutions?

Section 1 Self Assessment Question

Question 1

Why does international environmental law include social considerations such as culture?

2.0 DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

Section Overview

This section outlines how international environmental law has evolved. Although remarkably progressive in its evolution, the law has developed in an ad hoc way without an overall unifying legal regime. It is increasingly fragmented. This is because the legal instruments are a response to separate although not necessarily independent problems as they have become apparent. Rapid growth of scientific understanding of critical environmental issues has motivated in some cases a remarkably quick legal response such as the case of the ozone layer. In other cases such as regarding climate change, the international response has been less resolute.

Section Learning Outcome

The learning outcome should be an appreciation of the key phases in the development of international environmental law in response to increasing scientific understanding of environmental problems. It is commonly accepted that the history of international environmental law can be divided into four different periods of development. Two events in Stockholm and Rio played a crucial role in the development of international environmental law and represent key threshold periods:

- prior to 1945
- after the Second World War in 1945 to the Stockholm Declaration of 1972
- post-Stockholm period to the Rio Declaration in 1992
- post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and to date.

2.1 Pre-1945 period

The youthfulness of international environmental law is clearly shown by the scarcity of relevant legal instruments prior to the Second World War. Only following the Second World War did the disparate bilateral and regional treaties on international environmental issues start to grow into a more coherent body of international law. The first period has its origin in the bilateral treaties on fishing of the 19th century and ended in 1945 with the creation of the United Nations.

It can be argued that the early agreements were motivated largely by competing economic interests to regulate limited resources such as fish. For example, purely economic interests may be viewed as underlying claims to navigation rights on shared river systems. The French Republic proclaimed the principle of free navigation in 1792. Navigation remained a basis for international agreements governing shared uses of international rivers until the early 20th century. By the beginning of the 20th century, international environmental agreements largely concerned three areas: boundary waters, freshwater fisheries, and the conservation of natural resources. A leading example of an agreement concerning boundary waters is the 1909 USA–Canada Boundary Waters Agreement (BWT, 1909). This states that boundary waters and waters flowing across the US–Canadian boundary 'shall not be polluted on either side to the injury of health or property on the other'. The question of apportioning

rights over boundary waters shared by the United States and Mexico also led to conventions. For example, the 1889 convention established the International Boundary and Water Commission to administer boundaries and water rights agreements between the two countries. An agreement in 1906 provided for the equitable distribution of the Rio Grande waters between the USA and Mexico.

With respect to freshwater fisheries, their increasing importance regionally and globally was reflected in many agreements concerning fishing rights and the conservation of fisheries. An early agreement was the Russia–USA, Convention Regulating Navigation, Fishing, Trading and Establishment on the Northwest Coast of America, St Petersburg, 17 April 1824. In 1839, France and Great Britain adopted the Convention for defining the Limits of Exclusive Fishing Rights. Great Britain's economic interest in fisheries was further expressed in the Treaty with the United States Regarding the North Atlantic Fisheries. This was followed by a further agreement between the two countries captured by the Treaty for the Settlement of the Fishery Question on the Atlantic Coast of North America in 1888. Also in Europe, in 1869, the Berne Convention established regulations over fishing in the Rhine between Constance and Basel followed by other agreements. Rumania and Serbia adopted the Bucharest Convention in 1908 concerning fishing in the Danube.

From the beginning of the 20th century there was increasing interest in protecting other natural resources. A landmark convention was the 1911 Fur Seals Convention. As Bailey (1935, p. 1) wrote: 'By the year 1911 the North Pacific fur seal was little more than a reminder of the greed and rapacity of man.' At that time this most beautiful of wild creatures was virtually extinct. This unfortunate loss followed the keystone Pacific fur Seals Arbitration 1883 in which the arbitrators ruled that extra-territorial attempts by the United States to protect the fur seal from pelagic seal hunting on the high seas violated international law. Bailey states it was no 'exaggeration to say that the North Pacific Sealing Convention of 1911 was a major victory in the struggle for the conservation of natural resources, a signal triumph for diplomacy, and a landmark in the history of international cooperation'.

An especially important decision of an international tribunal was the *Trail Smelter* case (United States *versus* Canada). This case is foundational in international environmental law. In 1896, smelting operations began in Trail in British Columbia in Canada. 30 years later, coincidental to an increase in the smelting, two stacks were built to emit waste gases including sulphur dioxide at a height of 409 feet. This increased transboundary emissions and consequent damage in Washington State immediately south of British Columbia. Under an agreement reached in 1935, the Canadian and USA governments agreed to establish a Tribunal. The decision of the Tribunal established a fundamental principle of liability for transboundary harm: A state has a duty to prevent polluting activities that cause evident injury in a neighbouring state.

2.2 1945–1972

General developments

An outcome of revulsion to the Second World War was the creation of the United Nations. President Roosevelt first proposed the name expressed in the 'Declaration by United Nations' in 1942 when 26 nations pledged to fight together against the

Axis Powers. In 1945, representatives of 50 nations met in San Francisco to draft the Charter of the United Nations. All representatives signed the Charter on 26 June 1945 (UN, 1945). By October, a majority of the countries ratified the Charter and the United Nations came into existence on the 24th of that month. This landmark event did not then recognise the issues to which international environmental law apply. However, a closely related issue was explicitly recognised by the UN General Assembly's adoption and proclamation of the Universal Declaration of Human Rights on 10 December 1948 (UN, 1948). In addition, the UN established agencies with functions that concerned environmental matters: for example, the World Health Organization (WHO), the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

In 1949, the UN held the United Nations Conference on the Conservation and Utilization of Resources (UNCCUR) to foster international action to ensure a balanced management and conservation of natural resources. However, the outcome was limited due to a lack of international political will to meet this ambitious objective at that time.

In the late 1950s, a calamity in the small Japanese town of Minamata alarmingly demonstrated possible risks to the environment posed by industry. Over three decades, the Japanese Chisso Corporation had dumped an estimated 26 tons of mercury compounds into Minamata Bay (see 2.2.1). In consequence, an estimated 3000 persons succumbed to poisoning from the mercury. Many died and those that lived suffered appalling degenerative diseases. This disaster was a horrific demonstration of the possible consequences of industrial pollution.

2.2.1 Map of Minamata, illustrating the Chisso factory and its effluent routes



Source: Bobo12345 (unknown)

A modest step towards dealing with pollution in marine waters was also taken in the 1950s. The UK Government convened an International Conference on Pollution of the Sea by Oil in London from 26 April to 12 May 1954, The aim was 'to take action by common agreement to prevent pollution of the sea by oil discharged from ships, and considering that this end may best be achieved by the conclusion of a Convention'. This first of a series of global conventions for the prevention of marine oil pollution came into force on 26 July 1958: The International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). The OILPOL Convention attempted to control the problem of pollution of the seas by crude oil, fuel oil, heavy diesel oil and lubricating oil. Other Conventions regarding marine pollution and conservation were also adopted in 1958 in Geneva: the Convention on Fishing and Conservation of Living Resources of the High Seas; and the Convention on the Continental Shelf to Regulate Jurisdiction to Exploit the Natural Resources of the Continental Shelf.

The Nuclear Arms race in this period greatly heightened public anxieties and focused attention on the threats to life on earth. In 1959, a newly agreed Antarctic Treaty prohibited any nuclear activity on that continent. Twelve nations agreed 'that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord' (ATS, 1959).

African nations also achieved groundbreaking agreement in 1968 by concluding the African Convention on the Conservation of Nature and Natural Resources (OAU, 1968). This agreement innovatively recognised the vital importance of the capital of soil, water, flora, and faunal resources. The several states declared it to be their duty 'to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour'.

Also of crucial importance is the Ramsar Convention on Wetlands of International Importance. Adopted in the Iranian city of Ramsar in 1971, its mission is conservation and 'wise use' of wetlands. A previously abused component of the biosphere, wetlands provide vital hydrological and ecological functions.

In the post-war period, there were two important cases for international environmental law. In 1946, tension between the British government and Albania over the passage of ships in the Corfu Channel culminated in two British warships being seriously damaged by mines in the Channel. Forty-two men were killed and as many injured. To resolve the dispute the two governments submitted the case to the International Court of Justice (ICJ). The ICJ declared in its findings certain and now well-recognised principles including 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.

The second case concerned a dispute between Spain and France over the latter diverting waters that Spain considered damaging to its downstream use of those waters (UN, 1957). This dispute led to an important arbitration. The Lake Lanoux arbitration held that downstream states, such as Spain did not have a right to veto decisions over its use of water made by the upstream state. However, the upstream state did have an obligation to consider the position of the downstream state in reaching its decision. Together with the Trail Smelter case (UN, 1938), this case contributed to the formulation of Principle 21 of the Stockholm Declaration (UNEP, 1972) and Principle 2 of the Rio Declaration (UNEP, 1992a) that recognise the international obligation of states not to allow trans-national pollution from their territory that will affect the rights of other states.

During the 1960s, especially in the developed world, there was increasing awareness of environmental issues at national and international levels that elevated public concerns. In April 1968, an international group established the Club of Rome. Four years later, the Club of Rome published the highly influential *'The Limits to Growth'* (Meadows *et al*, 1972). In 1969, the US Senator Gaylord Nelson was moved to propose a 'national teach-in on the environment'. As a result 'Earth Day' was born on 22 April 1970. In this same period Sweden increasingly objected to acid rain. In 1968, the Swedish ambassador to the UN placed on the agenda of the UN Economic and Social Council (**ECOSOC**) the topic 'the Human Environment'. This led to the UN-convened Conference on the Human Environment (UNCHE).

1972 Stockholm Conference on the human environment

In preparations for the United Nations conference, Maurice F Strong, the Secretary General of the United Nations, commissioned Dr René Dubos to serve as the Chairman of a group of experts charged with preparing an unofficial report. The result was the book *'Only One Earth: The Care and Maintenance of a Small Planet'* by Barbara Ward and René Dubos (1972). This book was a first authoritative attempt to assess environmental concerns in the economic context of development and, as such, anticipated the post-Stockholm report *'Our Common Future'* (WCED, 1987). The conference was held from 5–16 June 1972 in Stockholm and was attended by 113 states and international **non-governmental organisations** (NGOs). This first international environmental conference was of foundational importance.

Major outcomes of UNCHE were the Stockholm Declaration and Action Plan.

Stockholm Declaration of Principles (1972)

The Stockholm Declaration of Principles for the Preservation and Enhancement of Human Development contains 26 non-binding statements of principles for international actions. These represent important principles of international environmental soft law. Although the Declaration affirms that the foremost responsibility for environmental responsibility lies with national and local governments, it also recognises the necessity for international co-operation. 'Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International co-operation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field' (UNEP, 1972).

Principle 21 is an especially important affirmation of international environmental law doctrine and was later incorporated as Principle 2 of the 1992 Rio Declaration:

'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.'

Source: UNEP (1992a)

While thus confirming the position especially important to the developing world that a state has the right to develop its natural resources, it also has a duty not harm other states. Principle 21 therefore explicitly affirms the 'good-neighbour' duty. It balances national sovereign rights with international environmental responsibility.

Principle 21 also implicitly expresses the North South conflict between developing nations asserting sovereignty over development and exploitation of their natural resources, whilst developed nations condition such sovereign rights with the duty to prevent and address the negative environmental impacts caused by such development actions. Principle 21 has sufficiently gained acceptance it is now regarded as a principle of **customary international law**.

As a significant aspiration, under Principle 22:

'States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.'

Deferring to the interests of developing nations, Principle 23 acknowledges differentiated treatment.

'Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.'

A significant outcome of UNCHE was the United Nations Environment Programme (**UNEP**) based in Nairobi, Kenya. UNEP as a global catalyst for protecting the environment, has the mission: 'To provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations.'

2.3 The period 1972–1992

General development

Following UNCHE, increasing awareness and concerns for environmental issues led to a proliferation of international non-governmental organisations as well as international and regional treaties on the environment.

In 1982 the UN General Assembly adopted the World Charter for Nature. The Charter sets out principles of conservation on the basis that nature should be respected. It states that unique areas should have special protection. The charter emphasises that nature conservation should be integrated into social and economic planning. Although it does not have legal force, the Charter has standing due to strong support by developing countries. This contrasts with the Stockholm Declaration that was

mostly supported by developed countries. Despite being admonitory, it has some moral and political force. Also Sands and Peel describe the Charter as being an avowedly ecological instrument in its emphasis on the value of nature as an end in itself. Sands and Peel (2012) conclude that the Charter is 'a standard of ethical conduct' that strongly influenced subsequent treaty law (Sands & Peel, 2012: p. 38).

This period is also characterised by increased emphasis on the interaction between the environment, development, international trade and finance. For example, the GATT established a Group on Environmental Measures and International Trade; the World Bank formed an environmental department due to pressure to integrate environmental and developmental considerations into the processes and decisions regarding its loan-making. On a regional level, the OECD established the Environmental Committee. In 1991, the World Bank, the United Nations Environment Programme (UNEP) and the United Nations Development Programme (**UNDP**) established the Global Environmental Facility (GEF) to provide financial assistance to environmental beneficial programmes.

International non-governmental organisations (NGOs) also steadily gained more influence. Examples of results of NGOs are the moratorium the International Whaling Commission in 1982 placed on commercial whaling; and the decision in 1982 by CITES to ban trade in elephant ivory.

In 1983, the UN General Assembly established the World Commission on Environment and Development (WCED) to provide a critical analysis of the relationship between environmental objectives and development. In 1987, the Commission published the highly influential Brundtland Report, named after its Norwegian Chairwoman, Gro Harlem Brundtland, see 2.3.1. This report defined Sustainable Development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' This seminal document helped prompt the United Nations to convene in 1992 the second global conference on the environment: The United Nations Conference on Environment and Development (UNCED).

2.3.1 Dr Gro Harlem Brundtland



Source: GAD (2009)

1992 Rio Conference

The two-week United Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil from 3–14 June 1992. Participating were 172 states with 108 represented by their Heads of State or Government. There were more than 50 international organisations and 2400 representatives of NGOs. Termed the 'Earth Summit', UNCED represents a major development in international environmental law.

The influential Brundtland report, as input to the Conference, might have guided a more cohesive conceptual framework for international environmental law. The concept of sustainable development unites economic and environmental considerations. However, some developing countries were not persuaded. They were suspicious about potential constraints on their economic development interests, despite shared enthusiasm for the Conference. Organisers of the Conference had hoped it would lead to major environmental treaties. However, the Conference adopted three influential non-binding instruments:

- (a) Rio Declaration on Environment and Development (Rio Declaration)
- (b) Agenda 21
- (c) Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest.

It also opened for signature two important binding conventions:

- (d) Convention on Biological Diversity (Biodiversity Protocol)
- (e) United Nations Framework Convention on Climate Change (UNFCCC, 1992).

[UNFCCC and the Biodiversity Convention are topics that will be covered later].

(a) Rio Declaration

Although the Rio Declaration does not create binding law *per se*, its 27 Principles are a benchmark for the international law of sustainable development. It balances the potentially competing interests of developed and developing nations with respect to environmental and developmental goals and actions (UNEP, 1992a).

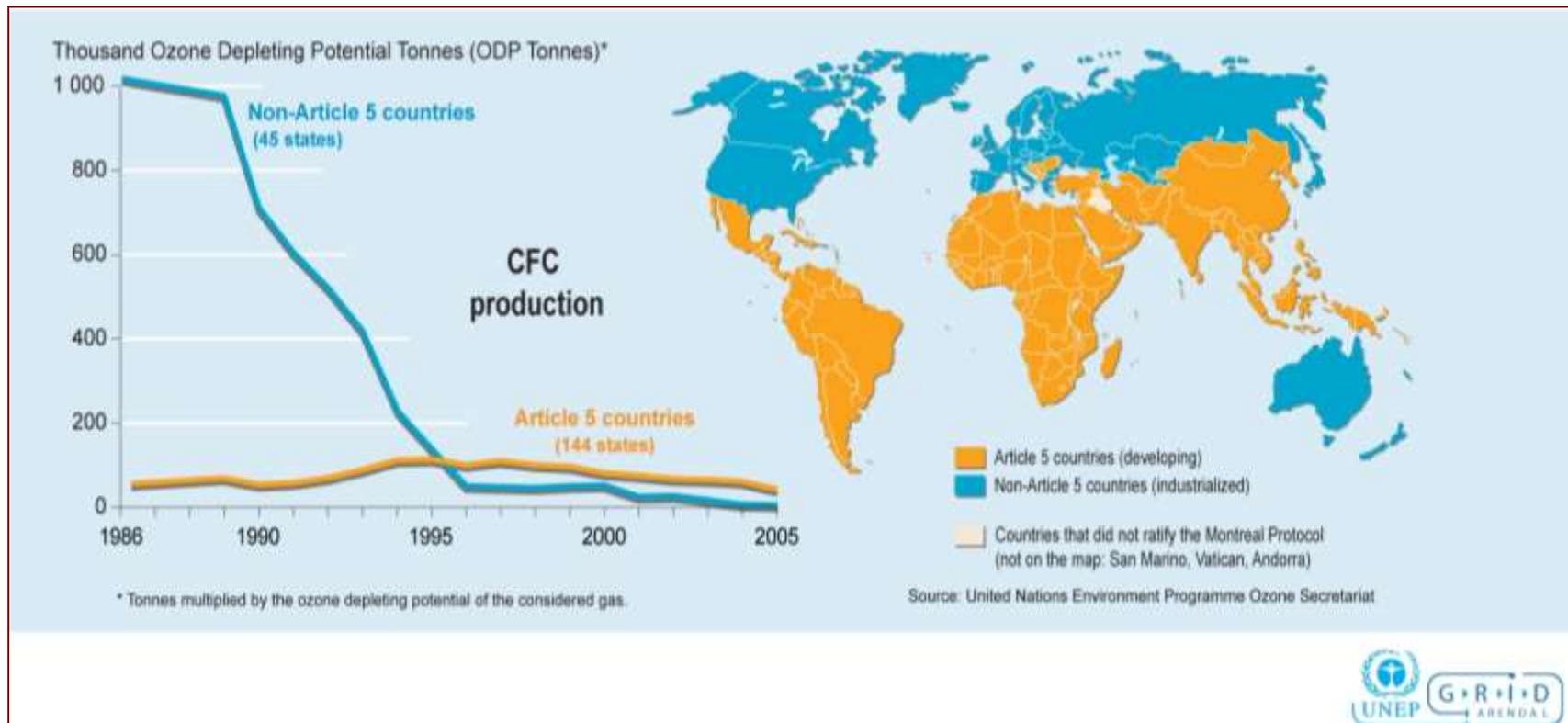
- (a) Principle 2 acknowledges the sovereignty of states to follow their own environmental and developmental policies, while recognising a duty of care to prevent trans-national environmental damage. This Principle reflects the customary international law of Principle 21 of the Stockholm Declaration with the addition of the word 'developmental'.
- (b) Principles 3 and 4 are salient provisions of the Rio Declaration representing a trade-off between developed and developing nations. Principle 3 declares the right to development must equitably meet developmental and environmental needs of future generations. This is a first time that the right to development is generally recognised in a formally adopted international legal instrument over the opposition of the United States of America.
- (c) Principle 4 provides that sustainable development can only be met through the integration of environmental protection as an inherent part of development.

- (d) Principle 6 recognises the special needs of developing and least developed countries that are environmentally most vulnerable and should be accorded special priority.
- (e) Principle 7 recognises the principle of common but differentiated environmental responsibility. Developed countries have a special obligation to promote international sustainable development due to the negative environmental impacts caused by their economies and the greater technological and financial resources they command.
- (f) Principle 15 confirms the ***precautionary principle*** of international environmental law by requiring development planning to avoid adverse effects to the environment. '[F]ull scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'
- (g) Other Principles recognise the provision of and access to environmental information and environmental education, the right of citizens to participate in environmental decision-making, the importance of environmental impact assessments, the relationship between free trade and environmental protection, liability and compensation of victims of pollution etc.

Of particular note is Principle 7 that explicitly affirms: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.' This is a principle of equity in international law. It plainly recognises the disparate views and economic circumstances of developing versus developed countries in the concluding sentence of Principle 7: 'The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

This principle is illustrated by 2.3.2 and 2.3.3 below. In relation to the first, all countries can claim 'climate credits' by their phasing out of ozone depleting substances (ODS) under the Montreal Protocol, and some are beginning to document this contribution. However, Article 5 countries are those listed as developing and these do not have the same goals as industrialised nations.

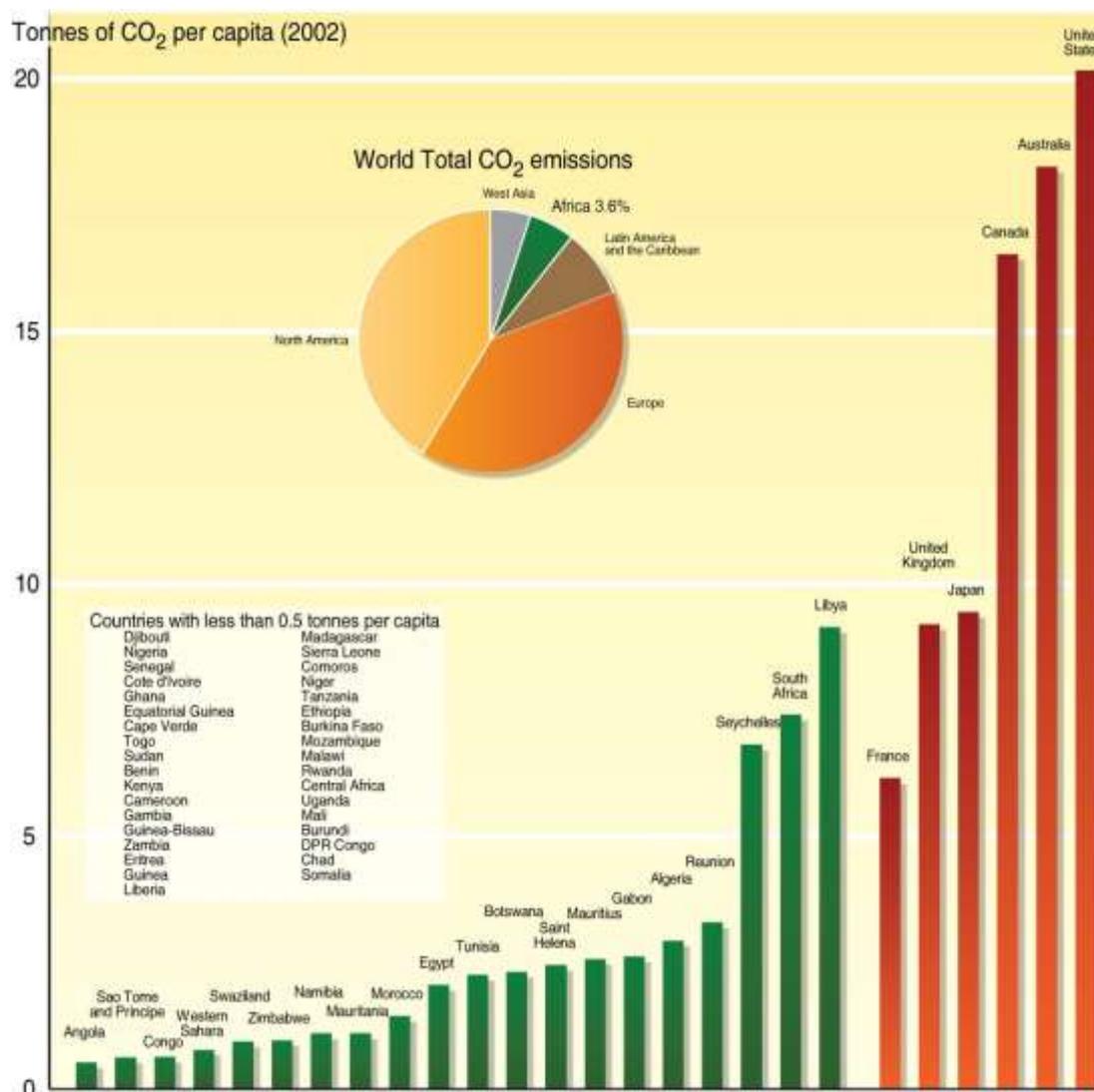
2.3.2 Common but differentiated responsibilities



Source: UNEP/GRID-Arendal (2007)

The figure in 2.3.3 shows that Africa represents only a small fraction, 3.6%, of the total carbon dioxide (CO₂) emissions per year, yet 14% of the world's population lives here. Per capita emissions in Libya, the Seychelles and South Africa compare to the lowest OECD countries with other African countries below this.

2.3.3 Emissions of carbon dioxide, in Africa and selected OECD countries



Source: UNEP/GRID-Arendal (2006)

(b) Agenda 21

As its Preface states, Agenda 21 is a blueprint. It is a non-binding comprehensive plan to promote and achieve sustainable development through the implementation of national strategies, plans, policies, programmes and processes with international support. Section I covers social and economic development and focuses on international co-operation, poverty alleviation, consumption patterns, population, human health, human settlement, integration of the environment and development in decision-making. Section II focuses on conservation and resource management for development and covers atmospheric protection, planning and management of land

resources, deforestation, desertification and drought, sustainable development of fragile environments such as mountains, sustainable agricultural and rural development, biodiversity protection, biotechnology, conservation of the oceans, seas, coastal areas and marine living resources, protection of the quality and supply of freshwater resources, and the management of toxic chemical, hazardous wastes, of solid and sewage wastes and of radioactive wastes. Section III focuses on the strengthening of important interest groups, for example, women, children, indigenous peoples, and NGOs and public participation in decision-making.

It also covers financial resources, technology transfer, institutions and legal instruments and mechanisms. Parts of Agenda 21 reflect emerging rules of customary law, for example, the limitation on storage of radioactive waste near the sea. It reflects an international consensus that could contribute to the development of new customary law.

2.4 The road from Rio: post-1992 and the WSSD

General background

Following the Rio Conference, there were increased environmental activities. The UN General Assembly adopted resolutions on drought and desertification, sustainable development of small island states, follow-up on the Forest Principles, Straddling and Highly Migratory Fish Stocks, and the implementation of all commitments made at the Rio Conference. Various important international environmental treaties were adopted. A notable aspect of the post-Rio period was the extent to which the major multilateral international treaties now recognised environmental protection. For example, the 1994 Charter establishing the World Trade Organization recognised environmental co-operation. Regional economic agreements likewise recognised the environment. There was also acceptance of the need for international co-operation for many issues including those concerning the oceans, inland waters, and the atmosphere. On land, the Convention to Combat Desertification in Countries Experiencing Serious Drought also represented notable international co-operation.

On the other hand, economic interests were also a countering force to the global environmental agenda. Globalisation with its doctrine of free trade, combined with the concerns of poorer nations, tended to compete against environmental objectives.

As the year 2000 approached, Kofi Annan proposed that the General Assembly in the first year of the new century be declared a Millennium Assembly. He further suggested that the agenda include a Millennium Summit. The latter was opened in the UN building in New York in September of 2000. 103 Heads of State and 89 Heads of Government attended. This was the highest level of representation at an international meeting in history. As an outcome, the participants unanimously adopted the Millennium Declaration. The Summit's declaration was the basis for the UN **Secretariat** delineating the Millennium Development Goals (MDG).

Thus the 21st century began with apparent international commitment to an environmental agenda with a duty to ensure environmental sustainability. However, this commitment looked less secure as preparations proceeded for the 10th year review of implementation of Rio commitments, in Johannesburg in 2002.

Johannesburg World Summit

The United Nations World Summit on Sustainable Development (WSSD) was held in September 2002 in Johannesburg, South Africa. It was the biggest global environmental conference yet, attended by more than 30 000 delegates. The title omitted the word environment. Rather, development was the key word. In fact, as shown in its Declaration, a basic focus of the conference was alleviation of poverty.

No Statement of Principles or treaties were adopted. The Johannesburg Declaration on Sustainable Development and the WSSD Implementation Plan contained general targets to achieve UNCED goals through various commitments. After the celebrated success of the Rio Conference, the Johannesburg Conference was inevitably more modest in outcomes. The continuing development of international environmental law since the Rio Conference, and the WSSD, constitutes a shift towards procedural, constitutional and institutional procedures. Monitoring and enforcement, and the introduction of methods to achieve practical implementation became a greater focus. Examples include the use of environmental impact assessments; the wider dissemination of environmental information; increased interaction with trade and financial factors; and the introduction of new methods of regulation that seek sharing economic benefits rather than pure reliance on command and control regulatory schemes. Humanitarian interests have also been increasingly linked to environmental considerations. In its General Comment No. 15, the UN Committee on Economic, Social and Cultural Rights proclaimed that: 'Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity' (UNHCHR, 2002: p. 1). The World Health Organization and other international bodies and charities also advocate for a human right to water, recognising its importance to life and dignity and that the availability of water is fundamental for reducing poverty. Thus a basic environmental issue is firmly linked to social and economic considerations.

 Note down any examples that you know about of the effects of the Rio and WSSD Conferences on environmental protection and management in the state or country in which you reside. Try to identify and list any official programmes that have been launched and legislation that has been adopted to give effect to the commitments that your state/country made at Rio and at the WSSD.

The present phase

The present phase of international environmental law might be regarded as one of consolidation. After a profusion of initiatives over the last few decades responding to multiple environmental issues, the international community appears to be taking its proverbial breath. Unfortunately, that does not mean the environmental problems are taking their breath. Although in some spheres, such as with respect to the ozone layer commendable progress is being made, in others such as with respect to climate change or biodiversity the problems fail to show improvement or are indeed worsening. The later units present the various aspects of the continuing efforts to develop and apply effective legal measures to protect the environment at regional and global levels.

Section 2 Self Assessment Questions

Question 2

Define 'sustainable development'.

Question 3

What most important Principle was enunciated in the Stockholm Declaration and repeated in the Rio Declaration?

Question 4

One key word captures the change in emphasis and direction between the Stockholm and Rio Conferences. What was that word?

3.0 SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW

Section Overview

Absent a central international legislative body, the question what is the basis of international environmental law is not a trivial question. This section describes the sources of international law. The authoritative basis for the sources is Article 38 of the International Court of Justice. Article 38 clearly assumes that the primary actors of international law are sovereign states. However, as modern international environmental law evolves as a component of international law, it increasingly recognises non-state actors as having a legal personality.

Section Learning Outcome

The outcome of this section is awareness of the four principal sources of international law as prescribed by Article 38 of the International Court of Justice, and to be aware of the widening scope of international law beyond the narrower terms of these four primary sources:

'(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

Source: UN (1945)

Introduction

International environmental law is an increasingly critical part of the international legal system. As such it has developed within the body of legal rules and procedures that constitute international law. A fundamental question that underpins law is what are its sources? Sources of law are the bases of its authority. A foundational source in English and American law for example is the Magna Carta. In legal systems based on the **common law**, law comprises decisions made by courts, legislation and constitutional documents. Another principal legal system in the world is **Civil Law**. In civil law systems the authority of the law is based on legislation and codes of law. Leading European examples of such codes of law are the French (Napoleonic) Civil Code and Germany's Bürgerliches Gesetzbuch (BGB). In distinction to international law, these national systems of law are termed **municipal law**.

Compared with national or municipal law, international law lacks two foundational legal entities: an overall legislative body with powers of enforcement, and a centralised judicial system with empowerment authority. The absence of these two sources of authority, which some argue is a requirement of a legal system, poses a

question: Does international law exist? However, the question assumes a simple distinction between national and international law that is, in fact, not so simple. The underlying assumption overlooks the reality that legislatures, national governments, and courts are themselves creatures of the law. Who enforces law when the legislature or the government themselves flout the law? Regardless of the theoretical discussions and disagreements, international law works in actual practice.

Prior to the 20th century, international law functioned even without any formal basis for its rules. International trade, communications and travel all operated with reasonable safety excepting when and where there was war. Peaceful settlement of disputes was conventionally sought through some temporary body set up by agreement of the parties in dispute such as a Claims Commission or an Arbitration tribunal. Terms under which settlement proceeded were determined by mutual agreement of the parties under a *compromis*. A **compromis** is an agreement, between two or more disputing countries, to submit their dispute to an arbitrator, a tribunal or court. An example is the Permanent Court of Arbitration (PCA). This was established under the Hague Convention for the Pacific Settlement of International Disputes of 1899. Its title is a misnomer in that it is not a court but an organisation to facilitate arbitration and other forms of dispute resolution. As such, the PCA cannot formally develop a body of law. It was to provide for a formal development of international law that the idea of a Permanent Court of International Justice (PCIJ) was nurtured and established through the Council of the League of Nations in the early 1920s. This was the precursor to the International Court of Justice established after the Second World War. Under Article 92 of the Charter of the United Nations, the Court of Justice is the principal judicial organ of the UN.

The Permanent Court of International Justice was the first permanent international body with responsibility for general jurisdiction. Its statute contained 68 Articles including Article 38, which authoritatively stated the legal sources the Court would use and apply (UN, 1945). This Article 38 was carried forward into the Charter of the successor, the International Court of Justice as follows:

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Source: UN (1945)

It is important to note that the four categories of sources of law are not set up as a hierarchy. Nor are they entirely exclusive. The wording is identical with the earlier Article 38 except it adds the clause: 'whose function is to decide in accordance with international law such disputes as are submitted to it'. This emphasises the Court will apply international law in its proceedings. However, paragraph 2 was also an addition to the earlier article. *Ex aequo et bono* means in equity and good conscience. In other words, the Court has reserved authority to decide a case in accord with equity and fairness rather than according to the strict letter of the law.

Soft law

So-called 'soft law' is also found in international environmental law. International soft law refers to norms of international law which are not binding *per se*, but which play an important interpretive role in the construction and interpretation of principles and rules of formal international environmental law. A universally respected academic lawyer, Sir Robert Jennings, who was also President of the International Court of Justice, claimed he would not recognise a norm even if he should meet one in the street. Some also claim that the notion of soft law is itself soft. However, soft law as a legal body that is not strictly binding has significance. Thus guidelines, codes of conduct, and declarations are not binding but, nevertheless, may gain some effect and over time merge into hard law. Examples of the principles of international environmental soft law, which will be discussed more in detail later in the course, are the principle of sustainable development, the precautionary principle, and the polluter pays principle. Hard and soft law in international environmental law create a disparate system of global environmental protection. Another instance of 'soft law' may be the case when non-parties to a treaty, who are therefore not legally bound by it, may nevertheless comply with its terms and obligations as if they were a party.

The following provides an overview of the four categories of sources of law as applied by the International Court of Justice.

3.1 International Conventions expressly recognised

Classification of agreements

Listed first in Article 38 are 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting states' (UN, 1945) Some regard treaties as the most important source of international environmental law precisely because it expressly states the consent of the contracting parties to the treaty. A treaty is defined by the 1969 Vienna Convention on the Law of Treaties as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Fundamentally, a treaty is a written agreement between states. Whether a non-state organisation can be a party to a treaty is a contentious question. In 1986, the UN General Assembly convened a conference in Vienna with the purpose of drafting the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations. However, this Convention is not yet in force.

There are different types of treaties such as those that are bilateral or multilateral. A bilateral treaty is an agreement between two states establishing mutual rights and obligations between them. Unless explicitly intended by the two parties, bilateral treaties confer no rights or obligations on other states. A multilateral treaty is an agreement between three or more states. Treaties are also known by alternative names including conventions, agreements, pacts and covenants. Whatever its name, a treaty is a contractual form of agreement between its parties who are bound according to the terms of their agreement. This poses the question, how can a treaty be a source of law beyond the obligations the treaty represents. Although generally a multi-party treaty does not confer obligations upon States that are not a party to the treaty, some treaties have a legal standing and effect beyond the agreement between the parties to the treaty. The former are viewed as law-making treaties.

Procedures governing international agreements

Bilateral treaties concerning an issue of mutual interest to the two states involved are termed 'contract' treaties. A multilateral treaty is typically initiated by a major concern prompting a study by an international institution such as the World Health Organization, the UN International Law Commission or the General Assembly itself. An outcome may be preliminary negotiations leading to an international conference with the aim of drafting a convention. Delegates at the conference must be authorised by their respective countries to act as their representatives. A delegate unauthorised to act on behalf of his or her state participates without legal effect (Article 8, Vienna Convention on the Law of Treaties). Once draft language in the convention is agreed it is opened for signature. Participating states that sign the treaty signify agreement in principle to the document. A state not participating in the signing of the document may later formally accede to it, binding that state in principle to the agreement. For the treaty actually to come into force, the relevant organs of the states must consent to be bound by the treaty through ratification. The treaty comes into force when its specified minimum number of ratifications are formally exchanged or deposited. Some treaties provide states the option of ratifying the treaty with reservations. A state may tend a reservation when it declines to accept a specific obligation or condition in the treaty. The effect is the state accepts the terms of the treaty excluding that specified in the reservation.

Once a treaty is in force, it is presumed that it binds the parties in good faith. The basic principle of law is *pacta sunt servanda*, 'agreements which are neither contrary to law, nor fraudulently entered into, should be adhered to in every manner'. This principle applies to the interpretation of the terms of the treaty in its practice. Article 31 of the Vienna Convention sets out general rules of interpretation.

Adherence to a treaty may be modified under particular circumstances. A treaty may be terminated or affected when a new state succeeds a state party to the treaty wholly or in part. This has been a critical question for some African states after gaining independence. Armed conflict may also terminate or suspend a treaty. Article 60 of the Vienna Convention also provides for when a party to the treaty is in material breach of its terms. Such a breach may be seen as grounds for termination of the treaty by other states. Similarly, a fundamental change from the original circumstances of the treaty may be invoked as grounds for its termination.

Disputes between the parties to the treaty may destabilise adherence to it. For such contingencies, many treaties provide for settling disputes by conciliation or

mediation. More formal legal options are arbitration and adjudication. Arbitration provides for the parties to determine the arbitration procedures including the appointment of arbitrators. Settlements achieved by arbitration are binding. The use of the International Court of Justice for adjudication may be less favoured in practice because it does not allow the discretion to states provided in the other methods of resolving disputes. The ICJ only has jurisdiction over cases brought to it by states. It may be noted that the more recent environmental law treaties favour communication, consultation and co-operation as preferred ways to resolve disputes.

3.2 International custom accepted as law

State practice

One could not have games without rules. Customary international law refers to binding legal rules developed and accepted through continued practice. The test is the extent to which the customary rule of law is observed in the practice of states. Although this may seem fuzzy or imprecise, it provides for flexibility. An example is the emergence and eventual adoption of the exclusive economic zone in the law of the sea. A measure of state practice may be provided by an array of instruments including treaties, declarations, agreements, and other pronouncements. In summary, several factors may be indicative of state practice:

- the number of states that participate in the practice
- national legislation demonstrating acceptance
- decisions of national courts
- positions adopted by ministers; diplomatic representatives and legal opinions of government lawyers
- submissions by states to international courts and tribunals
- diplomatic materials and communications; the *travail préparatoires* of international conferences and negotiations.

No minimum number of states has been specified as required to establish a custom. The International Court of Justice (ICJ) merely requires that acceptance of the practice be a general tendency. Preferably, states that accept the practice should be widely representative, and the practice should be consistently followed.

The length of time a rule has been common practice is also relevant in determining its standing. Some rules of maritime law have been accepted for centuries. However, a short period of time does not necessarily disqualify a rule as potentially being customary. Apart from the difficulty of determining what customary international law is in practice, there is also the necessity to show that compliance with the practice is based on the view that it is mandated by international law. This need for a legal basis to state practice is termed *opinio juris*.

Opinio juris

Opinio juris sive necessitates, usually shortened to **opinio juris** is the belief that a state action or practice is necessarily followed because that state considers it to be a legal requirement. Evidence of the motive to this state practice can be found in various sources such as:

- comments on the acts of international organisations and international meetings
- statements by representatives of states
- conclusion of treaties.

It may be noted that a **belief** in a legal obligation to perform some act is not easily proven objectively. The subjective aspect of *Opinio juris* means that it remains a debated and unsettled concept.

Customary environmental rules

It is possible to identify obligations as customary international environmental law.

- Principle 21 of the Stockholm Declaration.
- Obligation to co-operate on environmental problems regarding shared natural resources.
- Obligation to adopt measures to protect the marine environment from significant damage.
- Obligation to conserve and protect endangered species of flora and fauna.
- Obligation to use international watercourses in an equitable and reasonable manner.
- Obligation not to dump high-level radioactive waste in the marine environment.
- Obligation not to engage in commercial whaling.

 As you work through the units that follow, look for evidence that the examples listed above are good examples of customary international law, and in accord with the principles defined in this section.

3.3 General principles of law recognised by civilised nations

Article 38(1)(c) of the Statute of the ICJ (UN, 1945) refers to the general principles of law recognised by civilised nations, not general principles of international law. However, there is reserve and even objections about inferring international law from municipal law especially if 'Civilised Nations' was intended to mean western nations. A reason for this source of international law is to assist in making decisions where there are legal gaps. This allows an international court to avoid declaring an issue legally unclear, *non liquet*, and thus decline to resolve the dispute in question. Some basic principles of law commonly cited include: The principle of good faith, which is being faithful to a sense of obligation; the bar against a party raising a claim again after it has been settled by judicial decision (*res judicata*); and the bar that precludes taking a position which is contrary to a position already established either by previous admission or action and legally determined as being true (*estoppel*).

3.4 Teachings of most qualified publicists

Article 38(1)(d) of the Statute of the ICJ states that the ICJ will also apply 'the judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. This provision is of less importance than the other sources of law in Article 38. However, eminent scholars and distinguished authorities in international law continue to have some influence conceptually. Arbitration tribunals and other bodies engaged in resolving disputes may cite authors in the deliberations. Distinguished writings thereby contribute as a source of international law.

 Note down any examples that you know about of the implementation of international environmental law through its various sources in the legal system of the state/country in which you reside.

Section 3 Self Assessment Question

Question 5

According to the Statute of the ICJ, what are the four sources of Public International Law?

4.0 GLOBAL ACTORS WITH IMPORTANCE FOR INTERNATIONAL ENVIRONMENTAL LAW

Section Overview

The first sentence of JL Brierly's classic introduction to *The Law of Nations* defines International Law 'as the body of rules and principles of action that are binding upon civilised states in their relations with one another'. This definition assumes that the actors of international law are states. Increasingly, non-state actors are playing an increasingly important role, especially in international environmental law. A bewildering alphabet soup of acronyms has come to represent the rapid multiplication of such actors. For example, of principal importance is the **IUCN**, the International Union for the Conservation of Nature. The Environment Liaison Centre, assisted by the UN Environment Program (UNEP), carried out a survey of 3500 NGOs concerned with the environment which number conveys a sense of their importance. This proliferation of NGOs accompanies the absence of any global legislative or judicial body with enforcement authority for the environment. The closest to such an overall body is the United Nations. With respect to trade, the World Trade Organization (WTO) is the global international organisation that applies rules of trade between nations. Regrettably, there is no corresponding global body with responsibilities for the environment.

Section Learning Outcome

The outcome should be familiarity with some of the leading non-state actors, including especially the United Nations and its various bodies that play an important role in different aspects of international environmental law.

4.1 The 'governance' of multilateral agreements

It is possible to distinguish two levels of governance, intra-MEA and inter-MEA governance.

Intra-MEA governance

A treaty is just not a piece of paper. The agreement it constitutes has to be made operational. This is achieved in various ways. The main negotiating body that drafted the treaty is commonly termed the Conference of Parties (COP). The COP created through and by a treaty generally will continue as the policy and decision-making body for the treaty. The COP that is thereby responsible for the treaty can make decisions, resolutions and recommendations for the continuing implementation of the agreement. In its deliberations the COP may have the assistance of an expert panel. Clearly there also needs to be some type of administrative support. This is normally provided by a so-called Secretariat. The Secretariat assists in co-ordination and implementation and other functions as provided for in the agreement. For example, the UN Framework Convention on Climate Change (1992) establishes a **Conference of the Parties** in Article 7 with the primary objective:

'The Conference of the Parties, as the supreme body of this Convention, ...

shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.'

Source: UNFCCC (1992)

To support and make arrangements for the COP, Article 8 of the Convention establishes a Secretariat for which the first function is:

'To make arrangements for sessions of the Conference of the Parties and its subsidiary bodies established under the Convention and to provide them with services as required.'

Source: UNFCCC (1992)

Article 9(1) of the convention further provides for:

'A subsidiary body for scientific and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely information and advice on scientific and technological matters relating to the Convention. This body shall be open to participation by all Parties and shall be multidisciplinary.'

Source: UNFCCC (1992)

Such are the typical components comprising the governance structures of a treaty: Conference of Parties (COP), a Secretariat, and some type of advisory body or expert panel.

Inter-MEA governance

Since the Stockholm Conference, several hundred Multilateral Environmental Agreements (MEAs) have been negotiated. For example, the International Environmental Agreements database lists over 1000 MEAs. They represent a fragmented and sometimes inconsistent regime. If a state were a party to only a third of this number, the minister responsible for the environment in that state could be in the position of potentially being expected to attend more COP meetings than there are days in the year! Despite, their number, however, remarkably from the point of view of environmental needs there remain gaps and unmet needs. For example, there is no global convention for the protection and sustainable use of forests. This is despite the crucial role of trees with respect to ecology, ecosystem services and climate change.

There are also fundamental procedural deficiencies in the array of MEAs regarding their co-ordination and enforcement. This multi-layered multiplicity represents an ad hoc, somewhat duplicative and even sometimes inconsistent body of agreements. The multiple agreements are generally independent and even lack cross-referencing. No single overall agency is in charge or co-ordinates MEAs or indeed international environmental law. There is no international organisation protecting environmental values equivalent to how GATT or now the WTO ensures free trade principles are

followed internationally. The increasing numbers of governmental and non-governmental actors involved in international environmental law compounds this state of affairs.

The obvious agency to be viewed as a candidate for leadership internationally is the United Nations. However, the UN is not a world government acting as a legislature with powers to make and enforce compliance with its legislated acts.

4.2 The United Nations (UN)

On 24 October 1945, 51 countries established the United Nations. Those original countries, and those that become new members, accept the obligations agreed in the UN Charter. The UN functions through six primary bodies, five of which are based in the UN Headquarters in New York City: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council (Operations currently suspended), and the Secretariat. The sixth body, the International Court of Justice, is located in The Hague in the Netherlands.

In 1945, the experience of a horrendous war greatly conditioned the drafting of the Charter. Peace, friendly co-operative relations, and security were the dominant goals, reflecting its origins during the Second World War. Accordingly, the four purposes of the UN as stipulated in its Charter are:

- (1) to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace
- (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace
- (3) to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- (4) to be a centre for harmonising the actions of nations in the attainment of these common ends.

In these goals, there was no anticipation of responding to environmental problems.

4.3 The United Nations Environment Programme (UNEP)

One important outcome of the Stockholm Conference was its recommendation that the United Nations create a global entity for environmental action and co-ordination within the UN system. In December 1972, the UN General Assembly adopted Resolution 2997 creating the United Nations Environment Programme (UNEP). A Secretariat was created with headquarters in Nairobi, Kenya, to focus environmental actions and co-ordination in the UN system. This Secretariat reports to the UNEP Governing Council composed of representatives from 58 nations elected to four-year

terms by the UN General Assembly. The Council assesses the world's environment, formulates UNEP's priorities, and approves its budget. The budget is provided through a voluntary fund supplemented by trust funds and UN funds.

UNEP's mission is to 'Provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations'. Thus, UNEP seeks to further sustainability. For this purpose, UNEP promotes co-operation and coordination in dealing with international environmental issues. Through monitoring global environmental conditions and compiling and making information available, it fosters understanding of environmental problems as a basis for developing policies and appropriate actions. Upon request, UNEP assists countries in formulating and implementing environmental policies.

4.4 The World Bank

What is now called the World Bank Group operates as an autonomous organisation linked to the United Nations by agreement. Its primary purpose is to assist developing countries in reducing poverty and gaining sustainable economic growth through loans and technical assistance. As did the United Nations, the World Bank had its origins in the Second World War. A primary concern that motivated the idea of a bank was the anticipated necessity to meet prospective financial and economic needs of nations in a post-war world.

In 1941, Henry Morgenthau, the US Treasury Secretary asked his director of monetary research, Harry Dexter White, to draft a memorandum on an inter-Allied stabilisation fund. In 1942, White prepared a draft proposal for an International Stabilization Fund and a Bank for Reconstruction. Intense negotiations between the US and the British government, led by John Maynard Keynes, followed. These negotiations culminated in the **Bretton Woods** meetings in New Hampshire. The creation of the International Monetary Fund and the International Bank for Reconstruction and Development were principal outcomes of this famous event. The latter Bank subsequently became the World Bank. Corresponding to Harry White's original proposal, the Bank had a main purpose of assisting in the reconstruction of Europe and also the aim of assisting less developed nations. Participants in the Bretton Woods meeting agreed upon the Articles of Agreement of the International Bank for Reconstruction and Development in July 1944. The Articles entered into force in December 1944. Two years later, in June 1946, the Bank became operational. In the following year, the USA Secretary of State, George C Marshall announced the European Recovery Program or as better known, the Marshall Plan. By the end of the program over \$12 billion had been made available in aiding Europe's recovery. This scale of funding diminished the role of the World Bank in also aiding Europe. Accordingly, the Bank shifted its attention to its other purpose, assisting developing countries.

In addressing needs of developing countries, the initial focus of the Bank was narrowly on economics. Its procedures and purposes reflected the perspective of developed world. Throughout the second half of the 20th century, there was a growing disconnection, in interests and priorities, between the developed and developing nations. There were increased disagreements concerning development assistance. Dissension was especially evident with respect to environmental

concerns. This is partly because environmental issues arrived on the scene some years after the establishment of the Bank. Then influential writings of Rachel Carson, Barbara Ward, Gro Harlem Brundtland, and others fostered the dialogue that led to the Stockholm Conference of 1972. Prior to these advances, the Bank was heavily committed to large-scale projects such as major dams. These projects in designs and operations were dominated by narrow economic and engineering considerations. Neglecting social and environmental impacts of these generally huge projects attracted increasing criticisms and opposition. Zygmunt JB Plater gives a persuasively critical appraisal of large dams funded by the Bank: 'Damming the third world: multilateral development banks, environmental diseconomies, and international reform pressures on the lending process' (Plater, 1988).

A shift in the Bank's policies occurred under Robert McNamara, the fifth president of the World Bank (see 4.4.1, below). Prior to his appointment to the Bank, McNamara was the 8th United States Secretary of Defence during the height of the Vietnam War. In 1971, McNamara created an Office of Environmental Affairs. However, as Kevin Huyser claims, the Bank's record in addressing the environment did not match its rhetoric (Huyser, 1994).

In 1986, US President Ronald Reagan appointed Barber Conable as the 7th president of the Bank. Conable was a highly respected politician credited with 'greening' the World Bank. Under Conable, the Bank was fundamentally reorganised with the creation of central and regional environmental departments. Two years later, in 1990, the Bank participated in the creation of the Global Environmental Facility.

4.4.1 Robert McNamara, 5th president of the World Bank (pictured in 1961 when he was 8th United States Secretary of Defence)



Source: Porter (1961)

The policies and procedures of the World Bank thus evolved over decades. Initially its top-down management reflected values and convictions of developed nations more than those of the intended beneficiaries. In recent years, the Bank has increasingly recognised social, economic and environmental interests of the developing countries.

This shift accommodates the continuing attempts to bridge the North–South divide.

Currently, the World Bank comprises the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). These two institutions with three others, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes form together the World Bank Group. The current purpose of the IBRD is to reduce poverty in middle-income and poorer countries through loans, guarantees and analytical and advisory services that promote sustainability. Income generated by the Bank provides financial strength enabling it to offer clients favourable terms for borrowing money. The IDA provides concessional financing amounting to \$6–9 billion annually to impoverished countries in the world.

4.5 Global Environment Facility

The Brundtland Report of the World Commission on Environment and Development advocated an additional international fund by suggesting, 'serious consideration should be given to the development of a special international banking programme or facility linked to the World Bank' (WCED, 1987: p. 338). In 1990, France and Germany suggested that the **Global Environment Facility** be set up under the auspices of the World Bank. Accordingly, the Global Environment Facility was established as a pilot programme in the World Bank to provide assistance in protecting the global environment and to promote sustainable development. Although an inter-agency institution, the GEF operates as a distinct body. The GEF Council develops and operates GEF policies and programmes independently of the World Bank and its major Western donors. Initially, it was provided with \$1.0 billion for grants and concessional funding. A particular aim of the grants was amplifying projects so they were of global environmental benefit.

Initially, partners responsible for GEF projects were the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), and the World Bank. During the Rio Conference, the role of the GEF became an issue between developed and developing countries. GEF funding was seen as emphasising global problems of interest to the developed world as opposed to more local and national interests of developing countries. An outcome of the resultant negotiations at the UN Conference was that the GEF should change. The Action Plan of the Conference, Agenda 21 (UN, 1992), the UN Framework Convention on Climate Change (UNFCCC, 1992), and the Convention on Biological Diversity (UNEP, 1992b), all called for the restructuring of the Facility. Accordingly, in a GEF meeting in Switzerland in 1994, participants agreed to restructure the GEF. 73 States then accepted the *Instrument for the Establishment of the Restructured Global Environment Facility* (GEF, 2008). As a result, the GEF is now an independent organisation. This expedites inclusion of developing countries in its decision-making and implementation of projects. The World Bank continues to serve as Trustee of the GEF Trust Fund and provides administrative services.

4.6 The contribution of NGOs to international environmental law

Important actors also in international environmental management are non-governmental organisations or NGOs. What is an NGO? There is no definitive answer. The UN Economic and Social Council defines an NGO as any international organisation not created by intergovernmental agreement (Ripinsky & van den Bossche, 2007: p. 5). As befits the label, the definition is expressed in terms of what an NGO is not. The UN Charter (UN, 1945) explicitly recognises such organisations. Chapter 10: Article 71 concerning the Economic and Social Council states:

'The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.'

Source: UN (1945)

NGOs have become important actors in international law. They engage in a great diversity of international issues, but the environment is a particular focus. The numbers of NGOs have grown astronomically. The Worldwide NGO Directory lists over 16 000. That large number conveys a sense of the diversity of roles. Activities include participation in policy-making, planning, decision-making, implementation, monitoring and participation in dispute resolution. In these activities NGOs may have the advantage of being private. They are not 'from the government'. Therefore, they can gain acceptance not accorded a government agency, or can provide services a government agency otherwise could not provide. They can also confer legitimacy to projects or programmes by virtue of their standing. Alternatively, NGOs can lack appropriate legitimacy. Some NGOs represent special interests. Adding their voice to an already over-burdened debate in international decision-making may impede rather than expedite agreement. Nevertheless, NGOs are invaluable and indispensable regarding the international environment.

The International Law Association (ILA)

The ILA was founded in 1873. Its purposes are 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. The ILA has consultative status as an international NGO. Membership of the Association, at present about 3500, is spread among its Branches throughout the world. Its membership includes lawyers, professionals in academia, government and the judiciary, and non-lawyer experts from the commercial, industrial and financial world, and members representing bodies such as shipping and arbitration. Specifically with respect to international environmental law, the ILA formulated the highly influential 1966 Helsinki Rules on the Uses of Waters of International Rivers and subsequently the 2004 Berlin Rules on International Water Resources.

Section 4 Self Assessment Questions

Question 6

What are three organisational arrangements by which treaties commonly function?

Question 7

Can you name two or more leading international NGOs?

UNIT SUMMARY

This unit first described the character of international environmental law as it responds to and tries to deal with increasingly critical environmental problems. The multifaceted nature of the physical, social and cultural problems that pose growing stresses on our environment compels international environmental law to be encompassing and inherently multidisciplinary. The evolution of international environmental law has been driven by the increase in the number and range of environmental problems over the past century. Its development can be distinguished according to four periods: the period prior to 1945; the period after the Second World War in 1945 to the Stockholm Declaration of 1972; the post-Stockholm period to the Rio Declaration in 1992; the post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and to the present. The latter of these phases is notable for the increasing emphasis on economic and sustainable development. This emphasis especially incorporates the needs of developing nations in terms of their economic development. Remediation of poverty is a special priority, remedies for which are not always consistent with environmental objectives. Economics considerations have thus become a central driving force in the continuing evolution of international environmental law. This evolution recognises the disparate histories, interests, and economic and social capacities of developing versus developed countries. The complexity of the demands which international environmental law is endeavouring to meet compels an understanding of its sources.

This unit described the underlying sources of international environmental law. The sources are accepted as being framed by Article 38 of the Statute of the ICJ. The four basic sources are: international conventions or treaties; international custom; general principles of law; and judicial decisions and teachings of most highly qualified authorities. It was pointed out that these sources assume that states are the legal personalities to whom the law applies.

There is no central environmental organisation comparable, for example, to the World Trade Organization. In consequence, although there has been extraordinary progress in advancing regional and global agreements, the result is an uncoordinated fragmentation. The primary instrument by which international governance is accomplished is the multilateral environmental agreement (MEA). The unit described the governance of individual MEAs and their collective governance. There are several leading institutions and the unit described the United Nations, the World Bank, the UN Environment Programme, the Global Environment Facility, and the increasingly important participation of NGOs in the international environmental legal system. An important development following the Second World War is the increasingly essential role being played by non-actors that are recognised as legitimate actors in international law. These include the United Nations and its various bodies, the World Trade Organization and a growing number of leading NGOs such as the IUCN.

UNIT SELF ASSESSMENT QUESTIONS

Question 1

Define 'international law'.

Question 2

Define 'international environmental law'.

Question 3

Explain the difference between 'hard international environmental law' and 'soft international environmental law'.

Question 4

Summarise the key characteristics of and changes in international environmental law over the following four periods:

- (a) the period prior to 1945
- (b) the period after the Second World War in 1945 to the Stockholm Declaration of 1972
- (c) the post-Stockholm period to the Rio Declaration in 1992
- (d) the post-Rio period to the World Summit on Sustainable Development in Johannesburg in 2002 and since.

Question 5

Since its promotion in the Brundtland Report, the concept of sustainability has had and continues to have a key role in international environmental law. As would be expected, the concept has been subject to increasing critical scrutiny. Summarise the intentions, strengths, and weaknesses of the concept.

Question 6

Outline the elements which might help to determine the legal status of the principle of sustainable development.

KEY TERMS AND CONCEPTS

Bretton Woods Institutions	The International Bank for Reconstruction and Development (IBRD) (now one of five institutions in the World Bank Group) and the International Monetary Fund (IMF). The Bretton Woods Agreements established the institutions in 1944, in the meetings in Bretton Woods, New Hampshire, USA.
civil law	The legal system in most European and South American countries which is based on doctrines and rules developed by legal scholars.
common law	The legal system used in England and most of the United States which relies on prior case law to resolve disputes rather than written codes.
compromis	More completely, a <i>compromis d'arbitrage</i> is the agreement governing the terms of arbitration reached by the parties in a dispute who have voluntarily agreed to submit their differences to arbitration.
Conference of the Parties	A main negotiating body under an international agreement. The COP is the policy-making body that meets periodically to review implementation of the agreement and to adopt decisions, resolutions, or recommendations for continuing implementation.
customary international law	Aspects of international law derived from custom – consistent and repetitive action by nation states over time.
ECOSOC	UN Economic and Social Council. A principal organ of the UN, addressing economic, social, cultural, educational, health, environmental and other related matters.
estoppel	A legal doctrine that prevents a person or agency denying or asserting something that contradicts a matter of fact already established under the law.
Global Environment Facility	Established in 1991, the Global Environment Facility (GEF) provides grant and concessional funds to developing countries for projects and programmes targeting global environmental issues such as climate change, biological diversity, international waters, ozone layer depletion, land degradation and persistent organic pollutants.
international law	Laws that govern the conduct of independent nations in their relationships with one another.
IUCN	The World Conservation Union. A hybrid international organisation composed of governments and non-governmental organisations.
jurisprudence	The theory and philosophy of law.
Meeting of the Parties	This is a body equivalent to the Conference of the Parties. The terminology differs according to agreements. In practice, there is a tendency to use 'Conference of the Parties' for environmental conventions and 'Meeting of the Parties' for the protocols.

municipal law	The national, domestic, or internal law of a nation state as opposed to international law.
non-governmental organisation(s)	Usually referred to as NGO(s); they are community groups, private and not-for-profit organisations. In the UN system, NGOs include business associations. Generally, NGOs are groups not established by governments although they may have government support in their operations.
<i>non liquet</i>	A situation where there is no applicable law, or the law is unclear.
<i>opinio juris</i>	The second element of customary international law that is necessary to establish a legally binding custom. <i>Opinio juris</i> is an obligation that subjectively binds a state to the law in question. (ICJ Statute, Article 38(1)(b)). The subjective aspect of <i>opinio juris</i> means it is an unsettled and debated notion in international law.
precautionary principle	Principle according to which incomplete scientific certainty shall not be a reason for inaction where there is a risk of serious or irreversible harm to the environment or human health. The principle is incorporated in several instruments, including Principle 15 of the 1992 Rio Declaration on Environment and Development.
Secretariat	The body established under an international agreement to arrange and service meetings of the governing body of the agreement, and assist in co-ordinating implementation of the agreement. May also perform other functions as assigned by the agreement and the decisions of the governing body.
UNDP	Created in 1965, the United Nations Development Programme is responsible for co-ordinating UN development-related work.
UNEP	The United Nations Environment Programme was established in 1972 to lead and co-ordinate UN environment-related work.