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Chapter III
International Treaties on Environmental Law in General and Natural Disaster in Particular

There are some unique features about international law which make international environmental law, rather different from the other areas of law. Perhaps the most important of these is the absence of a single international environmental body with the power to make and enforce law effectively. The absence of such a body and of coercive powers to compel states, institutions and individuals to act in ways they would not otherwise choose to, has often resulted in international ‘law’ being regarded as something rather closer to international policy. This view is receding, although the essential feature of international law as something that states may agree to or not both pervades the subject and poses a challenge for the effective regulation of environmental affairs at the international level. Nevertheless, this essential feature of international law arguably means that the gap between law and policy is not as great as one find in individual national law or in European Community law. However, in national level one may find the gap between law and policies.¹

Another key feature of international law worth noting here is that it does not have a direct impact on domestic law or on individuals, unless and until nation volunteers. Treaties need to be given effect to through national legislation, and are concerned with the action of states, not individuals within states. In this sense, international law differs greatly from national law and, to the extent that it confers individual rights.

This chapter describes the development of international environmental law, which has expanded significantly in scope and quantity.

¹ See generally, I.A. Shearer, Starke's International Law, 11th Edn. Butterworths, US, p. 357
since the late 1960s. The focus is on international treaties relating to environmental protection. However, ‘customary’ international law, i.e. that part of international law which applies even without a treaty, on the assumption that states have implicitly agreed to it, is also of some importance. If generally agreed principles of international law are to emerge, this is likely to be through customary law.²

In general, this chapter is restricted to discussing public rather than private international law, that is, the law between states rather than the conflict of legal systems. The latter is, of course, relevant in environmental law, for example, questions concerning the appropriate forum in which to hear pollution-related claims against transnational corporations. Such cases raise the issue of whether different standards can be employed by such corporations/companies working in developing countries³, but are not directly addressed here. However, this chapter directly addresses importance of international law for environmental protection, international law and UK, international law and EC, nation states and global commons, sources of international law with special reference to hard and soft law, judicial decisions and work of international jurists and policy development in international law. Apart from the above, important provisions from Stockholm conference, Brundtland report and Rio conferences are analyzed which are relevant to the topic in question. Further, important international cases and judgments of ICJ and Dispute Settlement Body of WTO are referred to understand the current trend of international environmental jurisprudence. The importance of NGOs in implementing and monitoring environmental policies are also referred. To make the international agreements effective, references are made with respect to international trade and environment. A suggestion for World Environment

² As general source of law, International law too emerges from customs.
³ Which covers similar ground to wider questions about international environmental law and sustainable development.
Organization, as an institutional and legal counterpart to the World Trade Organization has been attempted. Further, future direction in environmental law and policy are referred based on rights and duties. Study of this chapter paves the way in understanding the existing problems with regard to subterranean coal fire that induces to conduct a detailed study on subterranean coal fire in different parts of the world and its impact on global environment. This chapter throws light in obtaining a universal solution to the environmental problem. This study enthuse the researcher to suggest a common minimum acceptable approach.

3.1 Importance of International Law for Environmental Protection

In summary, international law is important for environmental protection, and for the issues covered in the rest of this thesis, in the following central ways:

(a) Transboundary and global problems require international solutions\(^4\), and international legal regulation of some kind will be either necessary or desirable.

(b) International agreements may generate standards which are adopted in national law, or by regional groupings like the European Community.

(c) The international arena is of some importance for the development of principles of environmental law, such as sustainable development or the precautionary principle. Indeed, such principles often develop precisely because of their often non-binding origins.

(d) Because of its nature, recent developments in international law have focused on how an attention to procedures, and on positive inducements to comply rather than negative ‘command and control’ style enforcement mechanisms, can be used to secure compliance. Although borne of

\(^4\) At the very least, bilateral
necessity, there is again much for national and EC law to learn from this experience.

(e) Perhaps negatively, the development of environmental law at all levels may be subject to restrictions originating in international law, for example import restrictions which are deemed to be incompatible with the rules regulating international trade.5

In this context it is important to observe the treatment of international law and policies by developed nations like UK, EC and USA.

3.2 International Law and UK

The relationship between international law and UK has two dimensions. First, the extent to which international law affects rights and duties and policy-making at national level. Secondly, the contribution of the UK to developments in international environmental law and policy.

In UK, international agreements only become part of national law once they are given effect to by Parliament, usually through legislation. Moreover, both the making of treaties6 and their implementation7 are seen by the courts as a matter solely for government: ‘Treaties. . . are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation’.8 This is the case even where the treaty has been ratified, because in the UK ratification is a matter for central government, not Parliament. Following devolution, the power to ratify treaties remains with the UK government, being a matter of foreign affairs. All of this means that international agreements, in general, have what might be called ‘high-level’ rather than ‘low-level’ effect: they

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5 See Supra note 1 and it is important to observe how developed nations like UK, US or EC are taking cognizance of international law and policy in general and also their approach to environmental law and policy in particular.
6 Blackburn v Attorney-General [1971] 1 WLR 1037
7 ex parte Molyneaux [1986] 1 WLR 331
8 Maciaine Watson v Department of Trade and Industry [1989] 3 All ER 523 per Lord Oliver at 545
create obligations that bind the UK in its international relations, rather than obligations of the kind on which individuals can rely. In the UK, international agreements cannot be used as the basis for an action by groups or individuals against the state or a public body (in the way that EC directives may be), nor are they in themselves a source of rights and duties in legal actions between individuals.

Courts will, however, prefer interpretations of statutes which conform with international treaties to which the UK is a party to those which do not, although this does not necessarily mean that in all cases of discretion, there is a presumption in favour of the convention. But where national legislation is introduced to give effect to a treaty or treaty obligation, then the treaty can be used as an aid to interpreting the national law and it is presumed that Parliament did not intend to legislate contrary to the UK’s international commitments. In some cases, the relationship between the treaty and implementing legislation will be spelt out more precisely. For example, the Human Rights Act 1998, which ‘incorporates’ the European Convention on Human Rights, makes it clear that the English courts must take account of previous decisions of the European Court of Human Rights when interpreting the Act. This is important because of the limited steps that the European Court of Human Rights has already taken to interpret the Convention in a creative way to give incidental protection to the environment. Rights under the Convention may also challenge some of the traditional common law rules on environmental protection. This is seen in the recent decision of the European Court of Human Rights in Osman v UK, which challenges the approach of the UK courts to limiting the liability of public bodies in negligence. This approach might be used to argue that there is no effective remedy for some householders in private

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9 R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.
10 (1999) 5 BHRC 293
11 Barrett v London Borough of Enfield [1999] 3 WLR 79; on negligence
law in relation to amenity losses in private nuisance. Developments in international law are often reflected in policy developments at national level. For example, with reference to Sustainable Development, the UK Strategy was a response to Agenda 21, the soft law document agreed at the 1992 UN Conference on Environment and Development\textsuperscript{12}. In other occasions national policy in many areas reflects commitments made at Rio in many areas. These agreements, however, tend to contain general principles which give a considerable degree of latitude to governments in their implementation. The UK government has arguably used this latitude to translate soft international law into soft policy commitments, for example in relation to improving access to environmental justice. Where policy does have a sharper edge, as with town and country planning policy, there is some evidence of emerging policies based on sustainability thinking, although so far these have been limited to discrete areas like minerals planning or out of town shopping centers. General guidance on the aims of the planning system, although now containing some central government policies on planning and sustainability, does not yet reflect a wholesale shift of attitude in this area.\textsuperscript{13}

**Role of UK**

As far as the role of the UK in developing international law is concerned, the record has tended to be patchy at best and it is difficult to identify key environmental treaties where the UK has taken a lead in the negotiations. However, very often it is now the EC as a bloc which negotiates, which makes it difficult to assess the particular stance taken by the UK, although its role often appears to be negative, attempting to weaken the wording of commitments. Where the UK has shown most leadership has tended to be in relation to treaties like the 1946 Whaling

\textsuperscript{12} 'Rio Earth Summit'

\textsuperscript{13} One may find the attitudinal differences between nations.
Convention, an area where the UK no longer has any economic interests. In recent years, however, the attitude of the UK towards the making of international environmental agreements appears to have softened somewhat, although there is often a certain dragging of heels when it comes to the details, such as with radioactive discharges at sea.14

3.3 European Community and International Law

In some cases, treaties may be open to signature by ‘regional economic integration organizations’, a term covering the EC, which has signed all the most recent multilateral environmental agreements. The basic procedure is that the Commission does the negotiation, but the Council signs any treaty: unanimous vote in the Council may be needed if the treaty deals with issues which require unanimity within the EC.15

This should not hide the often hotly contested division of competence between the EC and the Member States as regards external matters. International trade and marine fisheries conservation are areas of exclusive Community competence, which means that it is the Community which negotiates any agreements in these areas16. Beyond these fields there is a considerable amount of scope for disagreement about the proper balance of competence in the environmental field. At a time when there are pulls both towards globalization and devolution, we might any way question what ‘exclusive competence’, either for the EC or for the Member States, actually means.

Where both the EC and the Member States are parties to a treaty, there needs to be some way of coordinating their obligations. A unique example of how this is done is under the 1997 Kyoto Climate Change

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15 such as town and country planning
16 such as the GATT/WTO Agreement
Protocol. Both the UK and the EC are parties to this, which requires specified reductions of emissions. Under Art. 4 of the Protocol, the Member States can 'bubble' their reductions, so that the EC decides which states take heavier and lighter loads depending on things like their state of economic development.

Although EC environmental law is said to flow from developments in international law, specifically the Stockholm Conference, the unique nature of the EC has in some respects made it a testing ground for international environmental cooperation. For example, the balancing of trade and environmental concerns in the EC is often held up as a model for integration. Also, the insertion of environmental policy principles in the EC Treaty\(^1\) means that their legal status can be explored within the EC, but also contributes to the development of similar principles in international environmental law. In this way there is a clear synergy between EC and international law and policy.

### 3.4 Nation States and Global Commons

Because international law is the law of nation states, different considerations apply depending on whether we are concerned with activities:

(a) taking place within a state and affecting only the environment of that state (such as most contamination of land);

(b) having an impact as between states, neighboring or otherwise (e.g. transboundary air pollution, or pollution of an international river by an upstream state); or

(c) which affect the 'global commons' (that is, all natural resources beyond the territory of any individual state).

\(^1\) Now contained in Art. 174(2)
The global commons includes things like the atmosphere and the ozone layer. It also includes the oceans and deep seabed beyond the 200 nautical mile limit of states’ ‘exclusive economic zones’ (although this does not apply to a state’s continental shelf if it goes beyond this limit) and space.

Antarctica, often mentioned in the context of the global commons, is a special case. Some states consider it to be *terra nullius*\(^{18}\), and a number of territorial claims to it have been made. Others, like the US and the former Soviet Union, have reserved the right to make such claims, while for other states (perhaps unsurprisingly, those without interests there) the continent is the common heritage of humankind. The Antarctic treaty regime displays elements of a global commons system, e.g. putting the various territorial claims into abeyance, an international management regime and benefits sharing. But it very clearly privileges the position of those states first involved in the area, and clearly does not regard the continent as part of the ‘common heritage of humankind’. This concept developed, from the 1960s onwards, alongside demands for a new international economic order, and focused on the equitable sharing of benefits arising from the use of resources such as the Moon, the Antarctic and the deep seabed. Perhaps inevitably, such calls have largely gone unheard, and equity considerations are, regrettably, confined largely to such matters as the ‘fair’ sharing of the costs of clean technology.

The global commons should not be confused with resources that might be said to form a global ‘common heritage’. The vast majority of known species, for example, live within or between national borders, which helps explain why the 1992 Biodiversity Convention refers only to the conservation of biodiversity (by definition, a global resource) as a

\(^{18}\) Land belonging to no one, but capable of appropriation.
matter of 'common concern' and makes explicit reference to principles of
national sovereignty over natural resources.

Finally, the idea of nations owing obligations to all members of the
international community (obligations said to be owed 'erga omnes') is es-
pecially relevant to international environmental law. In the first Nuclear
Tests cases\textsuperscript{19}, Australia and New Zealand tried to stop French atmospheric
nuclear testing in the South Pacific. An unsuccessful attempt was made in
the International Court of Justice to argue that they could bring the claim
because France owed a general obligation to all states to be free from
nuclear tests generally or that France was in violation of the, freedom of
the high seas. Nevertheless, there were judges in the minority prepared to
accept that the right to bring an action on behalf of the international
community (an 'actio popularis') might exist, and who linked the right to
bring such an action with the substantive nature of such 'erga omnes'
obligations.

Although a matter of considerable dispute, there are those who
would argue for the right of a state to bring such an action in relation not
just to the global commons, but also to matters of common concern. But as
the example of international trade law shows, the difficulty is for states to
avoid unilaterally imposing national standards beyond their borders, and to
try to identify appropriate rules of international law that might apply. In
treaty law, however, there are no examples of any state being able to
enforce a treaty obligation without having to show it has suffered material
damage from the alleged failure. The non-compliance and dispute-
settlement mechanisms under the 1987 Montreal 'Protocol on Ozone
Depletion is an example.

A frequent justification for environmental regulation is to prevent

damage to areas that are beyond effective individual control. This is a particular problem in international law, especially for the 'global commons'. Of course, there are some examples from international relations where it is always in all countries interested to cooperate: e.g. it makes no sense for one state to 'go it alone' when it comes to running international postal services. However, in environmental regulation there may be one-off situations where individual states have an incentive not to cooperate, even though mutual cooperation would ultimately benefit the state concerned\(^{20}\). This can be seen, for example, in the difficulties in reaching effective agreement about climate change, or over-fishing.

A variant of this argument is Hardin's infamous 'Tragedy of the Commons' thesis\(^{21}\). Hardin's main argument is that common or open access resources will always be prone to over-exploitation. His preferred solution is to 'privatize' common resources wherever possible. Failing this, 'mutual coercion, mutually agreed upon' is required. The former solution can be seen, for example, in the Law of the Sea Convention which extended the Exclusive Economic Zone (EEZ) to 200 nautical miles, effectively 'privatizing' as much as 90% of the known living resources of the seas.\(^{22}\)

As the failure to stem the decline in world fisheries, demonstrates, however, such moves may not be enough in themselves to counter unsustainable resource use and, at a national level, the thesis is subject to various theoretical and empirical criticisms, principally that individuals and groups do not always (or necessarily) act in possessively individualistic ways. Whether states always act as rational individual actors at the international level is also subject to debate, but various factors

\(^{20}\) The so-called 'prisoner's dilemma'

\(^{21}\) (1968) 162 Science, p. 1243

appear to influence the extent to which states come together to reach international agreements. Hardin’s thesis does, however, point to a role for law and legal institutions in providing the necessary framework for states to have confidence that all parties are honouring the agreements into which they enter.\textsuperscript{23}

The global commons is only one area requiring international environmental regulation. Resources shared between states may also be subject to ‘commons’-type problems, as evidenced by the use of the North Sea as little more than an international dumping ground for its riparian states, not least the UK. Shared resources, however, also include things like migratory species, some of which were subject to very early international ‘conservation’ law\textsuperscript{24} and which now receive a measure of protection for less directly economic reasons\textsuperscript{25}. Finally, activities in one state may impact negatively on another state, for example through transboundary pollution\textsuperscript{26} which often takes place in case of natural or man made coal burnings.

What is becoming discernible, however, is the way that the linkages between globalization and continued economic development, and the natural environment on which that development depends, are becoming better understood. Notably, the emergence of global (as opposed to international or transboundary) issues requiring regulation is perhaps the most important development of recent years. These include global issues such as those which affect everyone and which require common solutions.\textsuperscript{27} But they also include the range of concerns about the linkage between the global economy and environmental degradation that lie at the

\textsuperscript{23} See Supra note 21.
\textsuperscript{24} For example, the 1902 Convention for the Protection of Birds Useful to Agriculture.
\textsuperscript{25} 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals.
\textsuperscript{26} \textit{The Gnat is Older than Man}, Princeton University Publication, 1993, chs 2-4.
\textsuperscript{27} Global warming, ozone layer protection, pollutions from burning fossil fuels particularly coal etc.
heart of theories of sustainable development. These include both the ‘environmental shadow’ cast by developed economies on less developed regions, and the relationship between poverty and environmental damage. It is a nice way of saying, “We got ours and we don’t want you to get yours, because you will cause too much pollution.” This is exactly the bone of contention in arriving a solution, in international arena for environmental problems.

3.5 Sources of International Law: ‘Hard Law’

The sources of international law are generally divided into ‘hard’ and ‘soft law’. ‘Hard law’, which takes the various forms, is binding in the sense that any legal rule or principle binds a state only in its relations with other states. It is not necessarily of any relevance in deciding legal disputes between individuals and the state, such as a judicial review action, or as between individuals such as in nuisance law. By way of example, the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic requires states to take ‘all possible steps to prevent and eliminate pollution’ and, in doing so, to apply the polluter pays principle. These provisions matter, if at all, only as between the parties to the Convention. They do not create general obligations of the kind that individuals can rely on. Nor can they be used as the basis for an action against the state or a public body, in the way that EC directives can sometimes be.

The same can be said of any rules of customary international environmental law. If it were decided that the UK was bound by the precautionary principle as customary law, this would not directly assist an individual in bringing a legal argument based on precaution, although it

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29 Recognized by Art. 38 of the ICJ Statute.
30 The ‘OSPAR’ Convention.
might add weight generally to precautionary arguments.

3.5.1 Treaties (Conventions or Agreements)

These are in many ways the pre-eminent form of international law. The basic rules are laid down in the Vienna Convention on the Law of Treaties 1969. The fundamental principle is that states may only be bound with their consent, which is only fully given once the convention has been ratified. The various terms, ‘treaties’, ‘conventions’ and ‘agreements’ all mean the same thing. A ‘Protocol’ also has the same legal force, although it is a sub-agreement to a treaty, generally used to flesh out or amend the treaty.\textsuperscript{31}

Treaties generally come into force a specified number of days after a certain number of states have ratified, although the 1992 Climate Change Convention and 1997 Kyoto Protocol, to give two environmental examples, specify a formula designed to ensure that a core of carbon-emitting developed world states must have ratified. There are several factors which determine how quickly a treaty comes into force, most importantly the strictness and clarity of the obligations under it. Thus, the 1992 Convention on Biological Diversity entered into force within 18 months, in part because of the generality of its provisions. On the other hand, the 1982 United Nations Law of the Sea Convention took 12 years to come into force, largely because details about mining the resources of the deep sea bed were not satisfactorily agreed until the end of this period.

Ratification usually requires the approval of the legislature. This can delay treaties from coming into force, or from binding key states: the lobbying of the genetic and pharmaceutical industries has meant that the US has yet to ratify the Convention on Biological Diversity. But it does

\textsuperscript{31} For example, the 1997 Kyoto Protocol contains the carbon emissions reductions that states committed themselves to agreeing to in the 1992 United Nations Framework Convention on Climate Change and see generally, I.A. Shearer, \textit{Starke’s International Law}, 11\textsuperscript{th} Edn. Butterworths, US, pp. 397 to 434.
mean that treaties will only bind a state once the body responsible for enacting legislation to make the treaty work gives its approval. This is an important consideration in practice where (as in the US) the executive and legislature may be controlled by different groupings. But it may also be relevant where a convention is agreed by a government which then loses power in an election.32

Of course, the success of a treaty will usually depend on whether key states are parties and have ratified: the success of the 1979 Moon Treaty in Safeguarding Environmental Resources is unlikely given that the USA is not a party. There are some treaties, however, which may extend in practice to non-parties.

3.5.2 Custom

Customary international law is created by implicit rather than explicit agreement, and needs both the practice of states and their conviction that what is done is done not because of usage but because of some felt legal obligation. There are problems in ascertaining exactly what a state does, and problems of identifying customs in the wider global community. However, custom does offer the potential for flexibility by its uncertainty, and scope for creative argument to develop principles of customary international environmental law.33

In this sense, flexibility here offers possibilities for the development of principles in a way that vagueness elsewhere cannot, e.g. in more developed areas of law and policy.

Many commentators, for example, assert that a number of the central principles of environmental-law34 are now established international

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32 Art. 253 of Indian Constitution provides for ratifying international conventions and agreements for which India is a signatory and implementing those conventions through national legal system.
33 I. A. Shearer, Starke’s International Law, 11th Edn. Butterworths, US, p. 31
34 Including the precautionary and preventive principles and the polluter pays principle.
customary law, at least for those states that are a party to a sufficient number of the many texts that now make reference to them. On the other hand, the precise scope and content of, for example, the precautionary principles laid down in various treaties and 'soft law' documents is rarely ever duplicated, which leads to the problem of identifying what it is exactly that states can be said to have implicitly agreed to.\(^\text{35}\)

### 3.5.3 Generally Recognized Principles of Law

These are of limited scope, and used where no treaty provision or custom can be utilized. They are mostly used to identify basic principles of procedure on which to decide particular issues, e.g. evidence that is admissible. They should not be confused with the 'principles' of international environmental law which are contained either in treaties or which may be distilled from treaties, or principles inferable from customary international law.

### 3.5.4 Judicial Decisions and the Work of International Jurists

Judicial decisions include not just decisions of the International Court of Justice (ICJ) but also those of regional bodies (e.g. the European Court of Justice) and national courts. Previous decisions of the ICJ are binding only between the parties, and only as to the case under consideration\(^\text{36}\), due to their subsidiary nature. They do not create precedents, although in practice they function in a not too dissimilar way. The dearth of previous case law may help explain why academic writing is often referred to in international law, although this also reflects a closer relationship between legal academics and the ICJ. The work of jurists is often used to support dissenting opinions where relatively new - ground is

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\(^\text{35}\) Indian Supreme Court decisions reflect these sentiments in their decisions pertaining to environmental disputes, M.C. Mehta case series, *M.C. Mehta v Kamalnath etc.*, and See Supra note 28.

\(^\text{36}\) Article 59, ICJ Statute.
being covered. A good example of this is the Nuclear Tests II case,\textsuperscript{37} where academic opinion about the requirements of the sustainable development principle was referred to in the dissenting opinion of Judge Weeramantry.\textsuperscript{38}

### 3.6 Sources of International Law: ‘Soft Law’

It is observed that implementation multilateral treaty, despite close interaction between nations is and continues to be a complex legal process. It cannot be treated merely as a procedural requirement. Most importantly, any implementation process affects the sovereignty of States. Sovereignty, as political concepts rather crucial for implementation. For these reason all multilateral treaties specifically address this issue and provide for definite implementation provisions. The degree of implementation standard might vary, taking into account the subject matter which it seeks to regulate. This obviously leads us to a question – what should be regarded as an effective implementation? Who decides as to under any given circumstance whether a State has implemented a multilateral treaty to which it is a party has been properly implemented or not?\textsuperscript{39}

‘Soft law’ is not binding in form, is often neither clear nor specific in content, and is not readily enforceable in character. Examples include declarations, principles, recommendations and standards.

#### 3.6.1 Declarations

Two key documents in international environmental law are the 1992 Rio Declaration on Environment and Development and its Stockholm predecessor of 1972. Such declarations perform a number of functions: they consolidate and restate what are already rules of customary international law (e.g. national sovereignty over natural resources); they

\textsuperscript{37} New Zealand v France (1995) ICJ Rep 288
\textsuperscript{38} I.A. Shearer, Starke’s International Law, 11\textsuperscript{th} Edn. Butterworths, US, p. 41 and 44
contribute towards moving principles forward to the status of custom; and they reflect the agreed aspirations of the international community. The four Declarations of the North Sea Conferences, which fall into this category, have had a marked impact on EC and UK policy on, for example, the dumping of industrial waste and sewage sludge at sea.40

3.6.2 Principles

In addition to hard, binding obligations (however vaguely expressed), treaties may also contain what are essentially principles. Examples include Article 3 of the 1992 Framework Convention on Climate Change, which sets out a list of principles intended to guide the parties in implementing the treaty. These include principles relating to duties owed to future generations, and to the ‘common but differentiated responsibilities and respective capabilities’ of the parties. The elaboration of specific principles in the treaty itself, as opposed to the preamble, is increasingly common.41

3.6.3 Recommendations

Towards the ‘softer’ end of the spectrum, recommendations may embody the germs of principles or even treaties. Good examples are many Recommendations of the Organization for Economic Cooperation and Development (OECD) which relate directly to the development of environmental policy, e.g. on the Polluter Pays Principle (1974) and on the Use of Economic Instruments in Environmental Policy.42

3.6.4 Standards

International standards can be a useful way to encourage environmentally beneficial changes in behaviour. In practice, drinking

40 Ibid, at p. 45
41 Ibid.
water quality standards in the EC have been much influenced by World Health Organization standards, while the 1995 Food and Agriculture Organization of the United Nations 1995, (FAO) Code of Conduct on Responsible Fishing, for example, contains non-binding provisions intended to prevent the by-catch of non-target species such as marine mammals. There are also some international standards, however, which may be accorded the status of binding law. The EC Regulation on Environmental Management and Auditing Systems, for example, allows for participation through compliance with specified national, European and international standards, such as ISO 14001. Perhaps most importantly, some non-legislative international standards provide the benchmark against which international trade restrictions may be justified, for example the Codex Alimentarius in relation to certain food standards under the WTO agreements.

The key feature of soft law, seen most clearly in relation to principles, is that it contains general norms rather than specific rules: it provides a guide to how disputes might be resolved rather than hard-and-fast rules applying to specific situations. Whether the principle extends beyond the treaty, for example by suggesting a wider commitment to it sufficient to establish a principle of customary international law, will depend on the exact wording and context. An example is Article 3 of the 1992 Biodiversity Convention, which provides that Principle 21 of the Stockholm Declaration concerning certain limitations to national sovereignty over natural resources is the sole principle of the treaty. However, the UK government attached a Declaration stating that it understood that it ‘sets out a guiding principle to be taken into account in the implementation of the Convention’, a clear attempt to limit the
principle to the treaty itself, and then in a non-binding fashion.\textsuperscript{43}

The adoption of soft law over binding treaty law has several potential advantages: domestic treaty ratification processes can be avoided; it provides an autonomous form of law-making for international organizations; it is more easily amended or replaced than treaties; it provides immediate evidence of consensus; and it is easier to reach agreement on its content because of its non-binding character. Soft law instruments may codify existing law; interpret/amplify treaties and other existing legal rules; act as a step in the process of concluding binding agreements; and serve as evidence of the obligations states feel they are under. They are an important part of the repetition and interplay with multilateral treaties and state practice. Too soft, however, and they may be virtually meaningless. Arguably the 1992 Non-Binding Authoritative Statement of Principles on Forests serves only to highlight the absence of any measure of consensus in this area at the time.\textsuperscript{44}

3.7 International Law and Policy Development

The development of international environmental law can be traced back at least to the nineteenth century and the adoption of a number of bilateral treaties concerning fishing stocks. Thereafter, other bilateral and regional treaties were adopted, but tended to cover things like species conservation. Although some bilateral treaties sought to regulate transboundary pollution, on the whole developments in treaty law were, as Sands notes, ‘ad hoc, sporadic and limited in scope’\textsuperscript{45}. Enforcement issues, in particular, received scant attention, and many conventions were little more than ‘sleeping treaties’, existing only on paper because of the absence of any effective institutional and enforcement arrangements. There

\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
was little development of customary international environmental law.

The approach of international law generally to environmental problems is well illustrated by two international arbitrations. In the *Behring Fur Seals Arbitration*\(^4\) the dispute was between the US and Great Britain over alleged over-exploitation of fur seals in areas beyond the three nautical mile limit of US territorial waters. The panel found that the US had no right of ‘protection or property’ in the seals, despite the importance of their conservation for local US citizens and their migration between the high seas and US territory. The argument that the US was acting ‘for the benefit of mankind’, i.e. an ‘*erga omnes*’ or perhaps even ‘common heritage’ argument, was also rejected. However, the outcome of the dispute was a series of provisions, binding on the two parties, to regulate seal fishing in the area, displaying many of the features of modern conservation treaties: closed seasons, limited means of killing or taking etc. But the decision did not bind the other states sealing in the area, who continued unrestricted until a treaty binding all relevant states was agreed in 1911.

The second decision of note was in the *Trail Smelter* arbitration between the US and Canada\(^5\) over sulphur emissions from a factory in Canada which damaged crops, trees and pastures in the US State of Washington. The issue was not the right to exploit natural resources on Canadian territory, but rather whether the manner of doing so was limited because of neighbouring states’ interests. The tribunal held that:

> No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

\(^4\) (1898) 1 Moore’s Int. Arbitration Awards 755,
\(^5\) 3 *RIAA* 1907 (1941)
From these beginnings an extensive body of international treaty law has emerged, together with the more tentative emergence of new norms of customary international environmental law. Three key landmarks, however, deserve special mention.

3.7.1 The Stockholm Conference

The United Nations Conference on the Human Environment\(^\text{48}\) was the first occasion at which the international community of states united to discuss international environmental issues more generally and more coherently. Although no treaty was signed, the conference adopted an Action Plan of 109 Recommendations and a Declaration of 26 Principles. It also adopted a resolution on institutional and financial arrangements that led, amongst other things, to the establishment of the United Nations Environment Programme (UNEP).

For some, the Stockholm Declaration is the foundation of modern international environmental law. Its principles, however, are largely aspirational rather than mandatory – ‘should’ rather than ‘shall’ - and few impose clear duties on states. Nevertheless, the Declaration does include principles relating to the following:

(a) the sovereign right [of States] 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;\(^\text{49}\)

(b) a duty on states to cooperate in the further development of international law regarding liability and compensation for environmental damage caused by activities within national jurisdiction to areas beyond their jurisdic-

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48 Stockholm, 1972
49 (Principle 21)
(c) a requirement (though not a duty) for international co-operation to 'effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States'.

Perhaps more importantly, the Stockholm Conference marked the beginning of a rapid increase in the number of international environmental agreements concluded. It has been said that the development of EC environmental law is the Conference's most tangible outcome.

3.7.2 The Brundtland Report

Although a strictly non-legal text, the report of the World Commission on Environment and Development was pivotal in changing the direction of international environmental law. Its central concern was the increasing globalization of various crises, and the connections between them. As it memorably summarized this: 'They are all one'. The report is a landmark in respect of modern thinking about environmental problems, and gives prominence to the language of sustainable development, defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', however, the report provided little solid guidance on the exact components of what such a duty to future generations might entail.

What was perhaps most important was the attention it gave to the linkages between economic and environmental considerations. Amongst other things it advocated greater use of international financing of environmentally beneficial projects, and arrangements under which the

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50 (Principle 22)
51 (Principle 24)
52 *Our Common Future*, 1987: the 'Brundtland Report'
53 Environmental, developmental, energy, etc.
debts of developing countries might be traded for commitments to conserve their biodiversity, it is not at all clear, however, that the developing world should continue to bear the burden of debts often incurred by former regimes, and although there are some examples of so-called ‘debt-for-nature swaps’, their use has not been extensive.

3.7.3 The Rio Conference

The UN Conference on Environment and Development\(^ {54}\) provided a platform for putting flesh on the bones of sustainable development in international law and to address the concern, noted in the Brundtland report, of the ‘sectoral’ and ‘piecemeal’ nature of international environmental law. Although the legal texts to emerge from Rio, mark an important stage in the development of international environmental law, it can be argued that they fall some way short of providing the radical change in direction some had envisaged. The legal texts to emerge were:

(a) the Rio Declaration;
(b) the Convention on Biological Diversity;
(c) the Framework Convention on Climate Change;
(d) Agenda 21\(^ {55}\), and
(e) in the absence of agreement on a Global Forest Convention a ‘non-legally binding authoritative statement’ of principles in this area.

In terms of the general development of customary international environmental law, however, the Rio Declaration is central. Agreed to by all 176 states attending, it is a key soft law document, and an important text as regards the consolidation of a number of principles of customary international environmental law, including the precautionary approach\(^ {56}\), the polluter pays principle\(^ {57}\) and risk communication\(^ {58}\), as well as the

\(^{54}\) Rio, 1992

\(^{55}\) An 800 page global action plan on development and the environment.

\(^{56}\) (Principle 15)

\(^{57}\) (Principle 16)
development of customary principles concerning, for example, environmental impact assessment and the fostering of public awareness and participation in environmental decision-making.

Although the preamble states that it is reaffirming and building upon the Stockholm Declaration, important principles are conspicuously modified or even weakened. Thus Principle 1 of Stockholm which refers to the ‘fundamental right to . . . an environment of a quality that permits a life of dignity and well-being’ becomes, in Principle 1 of Rio: ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’. Interestingly, the Brundtland Commission had mandated an expert group, from North and South, to elaborate a set of general principles which could be submitted to the UN General Assembly with a view to their forming the basis of a universal declaration. Ultimately, the Commission failed to give its endorsement to this work, which might have underpinned a more ecological ‘Earth Charter’ akin to the Universal Declaration of Human Rights, as advocated by some states.

The effect of the Rio Declaration, therefore, is something of a mixed bag as regards the development of international environmental law and legal principles. Specifically, the double-edged quality of the explicit incorporation of developmental concerns might be seen either as an important accommodation of developing world interests or as allowing generally for ‘business as usual’. Similarly, the lack of development of common heritage concepts might be viewed differently according to

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58 (Principles 18 and 19)
59 (Principle 17)
60 (Principle 10)
61 (Principle 21, Stockholm)
63 (Principles 2 and 3)
whether the focus is the global commons or biodiversity, and depending on whether one adopts a ‘northern’ or ‘southern’ perspective. The failure, in 1997, of the follow-up ‘Rio + 5’ meeting in New York to advance the debate further is perhaps evidence of the many tensions that remain unresolved.

3.7.4 Post-Rio

Developments up to and beyond Rio suggest a maturing of international environmental law, although numerous problems remain. As regards treaty law, many issues continue to be dealt with sectorally, e.g. ozone depletion and biodiversity conservation. Elsewhere, specific processes or products are coming under international regulation, e.g. the trade in hazardous waste under the 1989 Basel Convention, or the recent agreement of a 1998 Protocol on Persistent Organic Pollutants to the 1979 Convention on Long Range Transboundary Air Pollution. A range of different types of agreements are now found, from bilateral, sub-regional and regional agreements to global conventions, and there has been no let-up in the number of agreements reached.

Sadly, sudden shocks rather than creeping crises - Chernobyl or the ‘Ozone Hole’ discovery, rather than global warming forecasts and concerns about biodiversity - tend to help secure agreement. This illustrates the continuing nature of international law as, in general, reactive rather than proactive.

As with developments in the EC, there has been a perceptible shift in recent years from promulgating new agreements to putting effort into making existing agreements more effective and achieving higher levels of compliance.
3.8 Institutional Organizations and Other Actors

A feature of international environmental law is the wide range of bodies involved either in the development of treaties or their enforcement. This is because, unlike international trade law, for example, there is no main or ‘umbrella’ convention governing the area like the General Agreement on Tariffs and Trade (GATT) regulates international trade. Nor is there a body similar to the World Trade Organization (WTO) when it comes to compliance.

The key player in international law remains the individual state. Treaties are often advocated by individual states keen to see regulation in an area of particular importance to them, or conversely opposed by states, usually for economic reasons, and of course there can be no international law without the agreement of states.

A slightly less reactive and piecemeal approach to treaty-making ought to be a responsibility of the United Nations Environment Programme (UNEP), which was established following the Stockholm Conference. Based in Nairobi, UNEP is now the only UN body charged exclusively with international environmental matters, and has played an important role in the development of international environmental law, not least through its promotion of numerous regional seas treaties, the 1985 Vienna ‘Ozone’ Convention -and the 1992 Biodiversity Convention. But in general terms UNEP has been a weak institution, somewhat under-funded and of relatively low visibility.

Although not a specialist environmental body, the International Law Commission (ILC) plays an important role in the drafting of treaties and the development of customary international law and general principles, although its work is not specific to the environmental area.

An institution that deserves special mention is the International
Union for the Conservation of Nature (IUCN), established in 1948, which has a unique mix of governmental and non-governmental members and a quasi-institutional status. The IUCN was an influential force behind the Convention on the International Trade in Endangered Species (CITES) treaty, and the driving force behind the influential 1982 World Charter for Nature, both of which have played an important role in bringing nature conservation to international legal attention. Increasingly, non-governmental organizations (NGOs) representing environmental and other interests are also involved in the negotiating of international agreements. Usually this is at the fringes, although in an interesting development NGOs were formally involved in the negotiation of the 1998 Arhus Convention. Even if they are not involved in negotiations, it is unquestionable that environmental NGOs have played an important role in shaping the general political climate that has spawned increased activity in this area in the last 30 years.

Like negotiation, enforcement is usually handled on a treaty-by-treaty basis, and treaties tend to establish their own ‘executive’ organizations like the CITES Secretariat or the Project on Oil Spill Preparedness and Response (OSPAR) 1992 Commission. Some soft law documents also do this: the UN Commission on Sustainable Development is charged with implementing Agenda 21. This proliferation of organizations (and of treaties) may frustrate attempts to establish policy coherence in this area, as well as making policy and legal integration more difficult.

Environmental NGOs also have an increasingly important role in relation to compliance. Formerly, this tended to be limited to their ‘observer status’ at the meetings of parties to conventions such as CITES and the 1946 Whaling Convention, with some scope for bringing
implementation problems to wider attention. In some cases, their role now extends more directly to enforcement matters. For example, TRAFFIC (an arm of the World Wildlife Fund which monitors wildlife trade) has a formal role in policing the international trade in certain elephant species under the CITES convention. In the *Shrimp/Turtle* case, it was notable that environmental NGOs were allowed to make unsolicited representations to the WTO.

A final point is that the role of bodies with primarily economic motive should not be overlooked. This is seen below in relation to the role of the WTO, and its Committee on Trade and the Environment which is mandated to ‘identify the relationship between trade measures and environmental measures in order to promote sustainable development’ and make appropriate recommendations, but other bodies are also important. The lending policy of the World Bank, for example, is crucial in relation to a wide range of development projects, and the OECD has played a very significant role, e.g. in promoting the use of economic instruments and in advancing the polluter pays principle (the latter being largely promoted in the interests of trade harmonization rather than environmental protection). The integration of environmental objectives into economic and other policy areas is likely to increase the number of bodies which pursue (or ought to pursue) environmental issues, especially if, institutionally, international environmental law remains as fragmented as it is.

### 3.9 Dispute Settlement and Dispute Settlement Bodies

There are a number of reasons why resolving disputes before the International Court of Justice (ICJ) is particularly problematic:

(a) Only states may be parties in cases, although the Court can also be asked to deliver Advisory Opinions by specialist UN agencies (as it was by the UN General Assembly in relation to the Legality of the Threat or Use
of Nuclear weapons where environmental arguments were raised).

(b) Taking a case to the ICJ, even though this can only happen if both states have accepted its jurisdiction, is often viewed as politically unfriendly. Where possible, international diplomacy is usually preferred.

(c) Seeking a diplomatic solution, such as mediation or negotiation, is less risky, since the likelihood of accepting a politically unacceptable decision is much reduced.

(d) Very few disputes are exclusively, or even primarily, legal disputes. To make them so requires the ignoring of dimensions which are irrelevant legally, but crucial politically or otherwise. For the more powerful states, the temptation is not to submit to rules which mean that their advantages are left at the door of the Court and not exploited politically.

All of this means that non-legal routes are generally preferred, but where international disputes need to be resolved formally, they will tend to be settled by arbitration. It is also worth noting here that, increasingly, consultation provisions are built into treaties where other states may be affected by actual or risky activities beyond their boundaries, i.e. a preventive approach to dispute resolution.

Very little resort is made to the ICJ, a UN body consisting of fifteen judges elected by the General Assembly and the Security Council to represent the ‘main forms of civilization and the principal legal systems of the world’ and less than one third of UN members have accepted its compulsory jurisdiction. The ICJ’s case load has not been substantial, amounting to roughly three decisions per year. Although an Environmental Chamber of the ICJ was established in 1993, it has yet to hear any cases, and the full ICJ has only ever heard one environmental ‘case’. Because

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64 35 ILM 809 and 1343 (1996)
65 The Gabcikovo Nagymaros case,
the mechanisms available in international law have been under-utilized in
the environmental sphere, the extent to which they are appropriate for
resolving international environmental disputes remains, perhaps at best,
unclear.

A telling example of the limits of the ICJ’s jurisdiction is the
Fisheries Jurisdiction Case. This was brought after Canada had used
force to stop a Spanish trawler fishing in an area important for Canadian
fisheries interests, but which lay beyond the 200 mile limit of its exclusive
economic zone. In 1994, Canada amended its coastal fisheries law to allow
it to board such vessels if they were violating the law, which ostensibly
aimed to prevent over-fishing. However, aware of the possible
inconsistencies of this national law with the international law of the sea,
two days before its coastal fisheries law was amended Canada effectively
refused to let the ICJ hear cases involving Canadian fisheries conservation
matters like the one at stake. This was sufficient for the ICJ to decide that
it had no right to hear the complaint, even though Canada’s actions were at
best of dubious legality otherwise.

A final point is to note the role of specialist bodies such as the
World Trade Organization, the International Tribunal for the Law of the
Sea, and older bodies like the European Court of Human Rights. This
range of tribunals raises concerns about their ability to decide cases with
an environmental dimension, and the equally important question of which
body is most appropriate to decide any particular dispute. This has
important implications for the development of a coherent international
environmental law. Even so, disputes arise when national, rather than
individual, interests are at stake, and there are few opportunities for

66 (Spain v Canada) 4 December 1998, unreported.
individuals to raise actions in international forum.67

3.10 The Gabcikovo-Nagymaros case

In 1977, Hungary and Czechoslovakia agreed, by treaty, to dam a section of the River Danube to facilitate the development of their economies. This meant that, over a significant stretch of the river, most of the Danube would be diverted into an immense artificial waterway. The treaty contained some very rudimentary provisions to protect the environment. Following concerns about the environmental impact of the project, Hungary abandoned construction work in 1989. In 1991 the Czechoslovak government proceeded to a provisional solution involving construction work entirely on Slovak territory, and in 1992 the Danube was diverted, leading to considerable environmental damage. Hungary then terminated the treaty. The two countries eventually agreed to take their dispute to the ICJ.68

What is most important is the way in which the dispute was dealt with. The central question was whether the situation was sufficiently serious to justify Hungary’s actions. As a matter of the rules on treaties, the Court accepted that concerns about its natural environment could justify this, but then found that the environmental damage was not sufficiently serious or immediate. The ICJ also found that the Czechoslovak action in 1991 was disproportionate; violating the principle that shared watercourses should be utilized ‘equitably’, nor could Hungary lawfully terminate as it had done, since the 1977 Treaty provided, in theory, a means to adjust the obligations of the parties to new conditions.

The Court therefore emphasized the extent to which relations between the two countries continued to be governed primarily through

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67 Although the right to take cases to the European Court of Human Rights is a notable exception.
68 Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) 37 ILM (1998) 162
terms agreed to between the parties rather than norms imposed by the Court. In this sense the decision was a considerable disappointment for those who had hoped for a bolder decision offering guidance, in particular, on how sustainable development principles might be given effect to in international law; the decision was more important for what it did not say than for what it did. They are,

(a) the way in which, as a matter of law, the situation was restricted to a dispute between the two parties (even though the area affected was Europe's last inland delta, and arguably of much wider importance);

(b) how the dispute was restricted to the issues the parties agreed to put before the court; and

(c) how the ICJ made every effort to resolve the case by interpreting the 1977 Treaty, rather than seeing it as an opportunity to develop wider principles which might govern environmental disputes.

On this last point, the separate opinion of Vice-President Weeramantry is notable. He argued that sustainable development is not merely a concept but a recognized principle of customary international law, albeit one which suggests procedural rather than substantive obligations. For him the principle includes a duty of 'continuous' environmental impact assessment, i.e. one which requires continual assessment of environmental impact in the light of modern knowledge, although he does not spell out how this might be given effect to in practice. His separate opinion indicates what some might regard as a welcome, if so far minority, move towards the development of genuine international environmental law principles, and recalls his remarks in New Zealand v France.69

It is regrettable that the Court has not yet availed itself of the

69 (the Nuclear Tests II case) [1995] ICJ Rep 288
opportunity to enquire more fully into... making a contribution to some of
the seminal principles of the evolving corpus of international
environmental law. The Court has too long been silent on these issues and,
in the words of ancient wisdom, one may well ask ‘If not now, when?’.

After having briefly seen the nations’ practices with regard to the
existing international law in general and international environmental law in
particular, it is necessary to study the dispute settlement mechanisms of
International Court of Justice, and International treaty law after the Rio
conference and the issues as to the party, implementation, monitoring,
assistance and the effectiveness of the conventions.

3.11 International Environmental Treaty Law: Post-Rio

As noted above, international law cannot be ‘enforced’ in the same
way as domestic law or even EC law. The limited role for the courts in
resolving international environmental disputes is also clear. This has meant
a focus on other means of securing compliance with international
agreements, especially positive inducements rather than negative
sanctions. It is also important to bear in mind that few states ever have
individual incentives to initiate action for non-compliance. On the other
hand, states are often reluctant to delegate enforcement matters to bodies
like treaty secretariats. The following conclusions may be drawn as to what
makes for a more ‘successful’ treaty. 70

70 See generally. Principle 2 of Rio conference speaks on the bindingness.

Principle 2
States have, in accordance with the Charter of the United Nations and the principles of international law,
the sovereign right to exploit their own resources pursuant to their own environmental and
developmental policies, and the responsibility to ensure that activities within their jurisdiction or control
do not cause damage to the environment of other States or of areas beyond the limits of national
jurisdiction.
3.11.1 Who is a party?

Attention should be paid to which states will be party to any treaty or any agreements made under treaties. A good, and perhaps unique example is the 1979 Bonn Convention on Migratory Species, which provides for agreements open to accession by all states across whose borders species migrate regardless of whether they are parties to the convention. These ‘sub-treaties’ allow states to benefit from positive conservation measures without signing up to the negative restrictions imposed in relation to species which the convention lists as endangered.

3.11.2 Implementation and Monitoring

Increasing attention is now paid to implementation and monitoring provisions, both at an institutional level and in relation to procedures. For example the establishment of an active treaty secretariat, regular meetings of the parties, and sometimes provision for NGO involvement are now common. NGOs have built up considerable adeptness in gathering information about non-compliance with treaties, and passing this on either to secretariats or to other sympathetic states.

More generally, success is likely to correlate with the extent to which information about compliance and non-compliance is collected and disseminated to the actors concerned. This task may be given to a specialist body such as the Subsidiary Body for Implementation established under the Framework Convention on Climate Change. Adverse reports about implementation may in themselves be sufficient to edge a party into compliance. Although information is usually gathered by the parties, there are examples of the possibility of on-site monitoring responsibilities. The 1971 Ramsar Wetlands Convention, e.g., allows for monitoring at the request of the host state authorities, which may prevent

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71 See, e.g. the 1995 Agreement on the Conservation of African-Eurasian Migratory Water Birds
allegations of 'free-riding'. The functions of the Commission established under the 1992 ‘OSPAR’\textsuperscript{72} Convention on the North Sea include requiring the assessment of compliance, and where appropriate enable it to call for necessary compliance measures. Nevertheless, there is still a general problem of ensuring adequate monitoring, even where there are treaty arrangements under which developed countries pay for monitoring in developing countries.

### 3.11.3 Positive Assistance

Effectively designed institutions will also be better able to administer the financial aspects of treaties (financing, technology-transfer etc.) that are increasingly a central aspect of environmental treaties. These began with the London amendments (1990) to the Montreal Protocol to the 1985 Vienna Ozone Treaty, establishing the Global Environment Facility (GEF), which is also used for the 1992 Framework Convention on Climate Change (FCCC) and for the 1992 Biodiversity Convention. Financial aid has been given for the agreed incremental costs of compliance with control measures\textsuperscript{73} and the agreed full costs of compliance with reporting and full incremental costs to secure compliance (FCCC). Multilateral development banks such as the World Bank now acknowledge the need to incorporate environmental considerations into their lending policy. In this context the increasing attention to taking the 'common but differentiated responsibilities' of parties seriously should be noted. An example of this is the 1992 FCCC, under which no new commitments are to be imposed on developing countries. Some would see the 'flexible implementation' provisions of the 1997 Kyoto Protocol\textsuperscript{74} as also falling within this general

\textsuperscript{72} Project on Oil Spill Preparedness and Response 1992
\textsuperscript{73} 1990 London Amendments
\textsuperscript{74} Such as the Clean Development Mechanism, which allows industrialized parties which invest in emissions reduction projects in developing country parties to use accruing reductions to offset a part of their emissions reduction commitments.
principle. Technical assistance and education provisions are also found in some treaties.

3.11.4 Cross-Checking Non-Compliance

One possible approach is to design agreements that reduce the practical possibilities for non-compliance. For example, the requirements in the 1973 International Convention for the Prevention of Pollution from Ships\textsuperscript{75} to install pollution-prevention equipment would have to be violated by several parties (builders, classifiers, insurers) for the rules to be evaded. Similarly, by requiring both import and export permits for species deemed most endangered, the CITES treaty reduces the scope for individual parties to evade their obligations.

3.11.5 Involving Non-State Actors

In light of the considerable difficulties of inter-state actions, increasing attention is being paid to the possibility of enforcement-type measures by non-state actors\textsuperscript{76}. As far as individual and group rights are concerned, however, even the limited mechanisms provided for in EC law have yet to be replicated in international environmental treaty law more generally, although there are signs that non-state bodies will enjoy greater access to international environmental justice in the future.

3.11.6 Comparing Treaties for Effectiveness

Comparison of the Ozone, CITES and Biological Diversity treaties illustrates some general points about reaching effective international environmental agreements. The relative success of the Ozone treaty regime is usually said to be because of the very small number of parties (those states producing ozone-depleting chemicals) from which to get agreement; a scientific consensus over the issue; the fact that no one state could be

\textsuperscript{75} Also known as The MARPOL treaty 1973
\textsuperscript{76} Governmental and non-governmental organizations and individual legal persons.
sure that they might lose if they did not cooperate (as some states might think is the case in relation to global warming); and the relatively low costs involved in addressing the problem (including the non-availability of alternatives). The initial use in 1985 of a framework convention, fleshed out by later protocols, also helped facilitate compliance.\footnote{As it has with the 1992 United Nations Framework Convention on Climate Change, which has allowed the parties to move from ‘soft’ standards to more binding targets for emissions reductions under the 1997 Kyoto Protocol.}

CITES is also widely regarded as one of the more successful treaties. Despite a large membership, the Convention pays close attention to procedural issues, establishing a funded and effective secretariat, and requiring (and in practice, helping) states to establish national management and scientific authorities. And the import-permitting requirement applies even to parties outside the Convention which must comply with this provision on export, providing less incentive for non-participation. By contrast, the 1992 Biological Diversity Convention is something of a disappointment. The vagueness of the language used in many of its central provisions, often qualified with phrases such as ‘as far as possible and as appropriate’, testifies to the considerable difficulties in trying to reconcile North-South tensions between environmental and development goals. Moreover, the Convention is essentially based on the route to biodiversity conservation being through realizing the commercial value of biodiversity (e.g. for pharmaceuticals), which may be optimistic.

It seems likely that, for the short term, the emphasis will be on the implementation of existing treaties and improving compliance, especially with framework conventions like those on climate change and biodiversity, rather than on the negotiation of new treaties. In this context the developing of procedural rights under international law is an important development.
3.12 International Trade and the Environment

A potent mechanism for making international agreements effective is the prospect of trade restrictions being imposed against non-compliant states, and some treaties make provision for such restrictions. However, trade controls are often used by one state against another when the import of goods is banned or restricted, often on ostensibly environmental grounds.

National measures may hinder free international trade in one of two main ways; either by imposing restrictions on the manner in which commodities are produced (process and production methods) or by regulating the quality of the commodities themselves (product standards). Process controls may be concerned with the polluting impact on a neighbouring state, or the way in which a national or global resource is exploited. Thus, restrictions may be enacted to protect the environment of the importing state, the exporting state or the global commons. Regulating the extent to which measures enacted for environmental protection reasons may unlawfully hinder international trade is therefore of central importance to environmental law and to sustainable development.

The regulation of international trade rests primarily with bodies connected to the World Trade Organization (WTO). It is arguable that these bodies (e.g. General Agreement on Tariffs and Trade (GATT) panels and the Appellate Body of the WTO) are effectively becoming international courts of sustainable development, since they are taking the lead in deciding, under the GATT, where the balance between global free trade and environmental protection lies. This has raised understandable concerns amongst environmentalists and others, and is in contrast to the position in the EC, for example, where the European Court of Justice decides both trade and environment cases, and cases combining both
issues. A study of two leading cases, decided before and after the GATT 1994 and the WTO agreement which monitors this area. The preamble to which now qualifies emphasis on the ‘full use of the resources of the world’ with their optimal use. . . in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with the respective needs and concerns at different levels of economic development’.  

Tuna / Dolphin Dispute

The Tuna/Dolphin dispute centered around import restrictions imposed by the US because of concerns about the incidental effect on dolphin populations of Mexican (and other) tuna-fishing methods. The panel upheld the complaint of Mexico that this violated the GATT’s ‘national treatment’ provision which requires that national treatment must be provided to all ‘like products’ in international trade law irrespective of how they are produced. In this case imported and domestic tuna had to be considered as products.

The issue was then whether the US action amounted to a ‘quantitative restriction’, i.e. an obstacle in practice to a level playing field for international trade. This had to be determined in light of various exceptions in GATT agreement. This provides that so long as measures do not unjustly or arbitrarily discriminate between countries where the same conditions apply, or act as a disguised restriction on international trade, contracting parties to the GATT may adopt the following measures.

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78 See generally. The objectives of the WTO Agreement.
79 (1992) 30 ILM 1598
80 Article III of GATT
81 Under Article XI of GATT 1994
82 Article XX
(a) Necessary to protect human, animal, or plant life or health\textsuperscript{83} or which (b) [Relate] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption\textsuperscript{84}.

The panel held that these exceptions only applied to activities within the national jurisdiction of the country adopting the measure. By impacting on activities in international waters, the US action was unlawful. The objective of the GATT - reducing trade restrictions and barriers - would be defeated if the US could dictate conservation measures to Mexico as a condition of Mexican access to US markets. Even if the US could take action beyond its borders, it had not shown that doing so would be necessary. There were other means by which the US might pursue its conservation objectives, e.g. through financial incentives or through negotiating international agreements.\textsuperscript{85} In a further, related dispute issue, brought by the EU against the US\textsuperscript{86}; a GATT panel again found that US action, adopted following the initial dispute against the purpose of the GATT. But it did hold that there could be circumstances where a country could employ trade restrictions to influence environmental policies beyond its jurisdiction where this was necessary to protect a global resource pursuant to an international environmental agreement and where there was a direct causal connection between the measure and the environmental objective pursued.

The \textit{Tuna/Dolphin} disputes raised important questions about the interplay between trade freedom and environmental protection. For example, should it be unlawful unilaterally to block the import of products

\textsuperscript{83} Art. XX(b) of GATT
\textsuperscript{84} Art. XX(g) of GATT
\textsuperscript{85} In 1992 the US, Mexico and eight other nations, responsible for 99% of the tuna catch in the disputed area, signed an international accord to phase out, by 1994, the use of "dolphin-unfriendly" nets.
\textsuperscript{86} (Tuna/Dolphin 11(1994) 33 ILM 839)
because they have been produced through relatively high energy use, contributing to global warming? How does the distinction between product and process restrictions allow for the polluter pays principle to be given effect to? Linking these is the issue of what counts as an 'externality' in international law; should this require proof of actual harm to the importing state, or are global or commons concerns sufficient?

**Shrimp / Turtle Dispute**

Disputes since 1994, illustrated here by the recent view of the WTO Appellate Body in the *Shrimp/Turtle* dispute suggest few radical departures from the basic stance illustrated above. At issue here was the GATT 1994 compatibility of US national measures which required any state exporting shrimp to the US to demonstrate that its harvesting methods did not endanger sea turtles, or were at least regulated and no less damaging to sea turtle conservation than standards actually achieved in the US. *Shrimp/ Turtle* confirms that a two stage test, first elaborated in *US Standards for Reformulated and Conventional Gasoline*, will be used in relation to Article XX of GATT 1994: first, provisional justification if the measure correctly comes within one of the exceptions; secondly, further appraisal of these measures under the introductory clauses of Article XX.

On the first point, the US measures were acceptable under Article XX(g), The view of a previous panel that ‘exhaustible natural resources’ were not to be limited to non-renewable resources such as minerals but extended to any finite resource and therefore covered living resources, was reaffirmed. But it appears that the turtle species in question were ‘exhaustible’ because of their recognized endangered status, not because

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87 *US - Import Prohibition of Certain Shrimp and Shrimp Products* (1999) 38 ILM 121
88 (1996) 35 ILM 603
89 Art XX of GATT agreement, XX(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
action was required to prevent endangering them.\(^90\) Nevertheless, the remaining requirements to come within Article XX(g) were fulfilled: the measure ‘related to conservation’ in light of an assessment of its primary aim, having regard both to its purpose and effect and was sufficiently ‘even-handed’ as between imported and domestic shrimp. Because it satisfied Article XX(g), the Appellate Body did not need to consider also whether it was ‘necessary’ under Article XX(b)\(^91\).

In this sense, the US measures were substantively acceptable. However, the US failed to show that the measures were not an ‘arbitrary or unjustified discrimination between countries where the same conditions prevail’. As to unjustified discrimination, four points were central.

1. In practice the US rules forced importing states to adopt US policy without any flexibility of approach. In short, the US only looked to see whether importing states required the fitting of ‘turtle excluder devices’ (TEDs), as required in the US, rather than authorizing comparable measures. (Using its own inspectors to certify was hardly helpful, and raises the question of whether something closer to ‘mutual recognition’ would have been preferable.)

2. The US also banned the import of shrimp caught by boats using TEDs if they did so in the waters of otherwise non-compliant states.

3. The US had failed to engage the importing states in serious negotiations for an international treaty on sea turtle conservation before imposing trade sanctions. This was in violation of several important statements emphasizing multilateralism.\(^92\)

4. The US had provided different levels of support through technology transfer to different countries, affecting the ability of all states to comply on equal terms.

\(^{90}\) In US - Gasoline, clean air was held to be an exhaustible natural resource.

\(^{91}\) Art XX(b) of GATT, necessary to protect human, animal or plant life or health.

\(^{92}\) Including Principle 12 of the Rio Declaration.
The measures were also ‘arbitrary’ because of their informality, lack of transparency and absence of procedural protections.\(^{93}\)

An important point on *Shrimp/Turtle* is the tension evident between the interests of nation states and a ‘common heritage’ approach. ‘Go it alone’ approaches are strongly rejected, the Appellate Body encouraging the negotiation of multilateral agreements in the interests of opening up international decision-making to those affected. This is consistent with what the WTO calls its preference for a ‘rules-based’ approach to free trade. It also deals rather unconvincingly with the question of jurisdictional limits to nation states’ legitimate interests, doing little more than stating, rather than positively arguing towards, the connection in law between the turtle populations involved and the US.

Currently it is rather uncertain where the balance will be struck between the GATT and multilateral environmental agreements. For example, few would like to see the GATT amended to insert a defense that action was taken pursuant to treaties like CITES, the Basle Convention on Hazardous Wastes or the Montreal Ozone Protocol, all of which provide for enforcement through trade restrictions, although it is unlikely that two parties to such an agreement will raise a dispute over GATT-incompatibility. Nor it clears how the increasing use of packaging and labeling requirements, which throw up their own problems, will be viewed. Future disputes about ‘what are 'like' products’ can be expected: for example, is a tax based on the recycled content of bottles a product or process-based measure? Indeed, although the details of GATT law are important, as Vogel points out the debate reflects a more profound clash of culture and world views between the trade community and

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\(^{93}\)Appeal or review rights were not included.
environmentalists‘.94

This clash is based in part upon competing views of whether security through free trade, or environmental security, is the more fragile. But it is also based on disagreement over the extent to which unilateral action contributes to the progress of international trade relations. Reaching up of international standards or to a deregulatory ‘race to the bottom’, raising difficult questions concerning sustainable development. It should be noted that in Tuna/Dolphin, however, the greatest reduction in dolphin deaths occurred before the import ban, by which time there was no evidence that the dolphin populations affected were endangered. Trade restrictions may serve only to depress the commercial value of natural resources in other states, driving up the number of units95 that must be sold to maintain revenues, and driving down the incentives of national governments to invest in measures96 to conserve the resource.

Lastly, it is worth noting the views of those who argue for the creation of a World Environment Organization as the institutional and legal counterpart to the WTO.97 However, in the words of one proponent of this view, a former Director-General of the WTO, the WTO system has now, post Shrimp/Turtle, demonstrated how - through consensus - we can build a rules-based international trading system where all countries, large and small, developing and developed, can find a place’. If this is true, it does somewhat pose few questions about the role of so called ‘GEO’ (Global Environment Organization), about the remit of the WTO’s Committee on Trade and Environment and about the effective integration of trade and environmental objectives in global management. This

95 Tropical hardwood trees, of endangered species.
96 e.g. anti-poaching measures or habitat conservation.
97 See also the pessimistic advocacy of such a body by Esty, Greening the GATT, Institute for International Economics 1994, pp. 77-83 and 98.
suggestion also seems far removed from a global ombudsman or guardian, charged with responsibility for common resources and able to bring actions against nation states for harm to the international environment. For the immediate future, however, states are likely to prefer the speed and certainty provided by the WTO over dispute resolution under multilateral environmental agreements, which typically lack these features. This has important implications for the development of customary principles of international law, which may become biased towards free trade concerns.

3.13 Future Directions in International Environmental Law and Policy

In addition to greater attention to matters of compliance, it is arguable that a mixture of approaches will colour the future of international environmental law. These are likely to give increasing weight to protecting individual 'environmental' rights. But in some cases an approach emphasizing duties towards the environment may develop, this really means an approach emphasizing the rights of states or international organizations to take actions against individuals for environmental harm. In both cases, increased attention is likely to be paid to individuals and to organizations, rather than the traditional 'state-centric' approach of international law.

3.13.1 Rights-Based Approaches

There have been some attempts to advance an environmental human right, most notably in a report by a UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on the relationship between human rights and the environment. Finding that over sixty national constitutions contained some form of environmental rights protection, the

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report concluded that there had been ‘a shift from environmental law to the right to a healthy and decent environment’, comprising substantive rights to life, health and development. This, it claimed, was rather more than a ‘greening’ of international human rights law, and the report proposed the adoption of Principles of Human Rights and the Environment which would be enforceable by human rights organizations. Following Rio, however, the willingness of the international community to sign up to a rights-based approach may be questioned and the Principles are making no progress in the UN system.

While we have already discussed human rights law in the context of environmental values, it is worth recalling that the European Convention on Human Rights is an international treaty of considerable importance. Although it does not contain explicit mention of the environment, experience of the Convention does suggest a number of possible ways of framing environmental disputes as human rights violations. Some of these may be substantive in character, e.g. the right to life\textsuperscript{100}, which may be violated where, e.g. national authorities fail to advise those affected of certain risks of nuclear contamination, or the right to privacy and home life, which may be violated in cases of severe environmental pollution such as in \textit{Lopez Ostra v Spain}\textsuperscript{101} but which may also give rise to procedural safeguards such as in \textit{Guerra v Italy}\textsuperscript{102}, a successful claim following a failure to be informed of chemical pollution risks.

Procedural rights are also protected under the Convention, e.g. through the right to a fair hearing\textsuperscript{103}, which might be breached where a person affected by the want of an environmental license is unable to

\textsuperscript{100} Article 2, European Convention on Human Rights, similar provision can be seen in Art. 21 under Indian Constitution.

\textsuperscript{101} (1995) 20 EHRR 277

\textsuperscript{102} (1998) 26 EHRR 357

\textsuperscript{103} Article 6(1) of European Convention on Human Rights
challenge this judicially\textsuperscript{104}. However, a ‘victim’ test is used and there may be problems of standing; nor is there a ‘right to nature’ with all that entails for protection of the unowned environment. Proximity problems can also be seen in Balmer-Schafroth v Switzerland\textsuperscript{105}, where the court rejected a claim based on the absence of the right of residents to review or appeal the grant of a power station authorization. The applicants had failed to show that the operation of the power station exposed them to a danger that was not only serious but specific and imminent. The connection between the decision by the government and the right invoked by the applicants was too tenuous and remote to qualify as a ‘civil right’.

It is clear, therefore, that under the ECHR and also under different nation’s constitutional provisions, environmental protection is at best incidental to protecting human rights, rather than human rights protection securing environmental and conservation objectives. Of course, the latter would involve balancing social and environmental interests, and an individual right to sustainable development is bound to be problematic. A less extreme option may be to reinterpret existing rights - such as the right to life creatively. This is the approach taken in the Ksentini Report, and has been taken most notably by the Indian courts.\textsuperscript{106}

3.13.2 Procedural Rights

A definite shift towards establishing and protecting procedural rights in international environmental law is certainly emerging.\textsuperscript{107} Environmental problems are best handled with the participation of all concerned citizens, at the relevant level. Specifically, at national level individuals should have access to publicly-held environmental information and the opportunity to

\textsuperscript{104} Zander v Sweden (1993) 18 EHRR 175
\textsuperscript{105} (1997) 25 EHRR 598
\textsuperscript{106} Anderson, ‘Environmental Protection in India’, in Boyle and Anderson (eds) Human Rights Approaches to Environmental Protection, Clarendon, 1996. Series of Environmental cases decided by the Indian Supreme Court.
\textsuperscript{107} This can be seen in, for example, Principle 10 of the Rio Declaration.
participate in decision-making processes, while states should foster public awareness and participation by making authentic information widely available, and provide effective access to judicial and administrative proceedings. More specific elaboration of procedural rights is contained in the 1998 Arhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. References there to 'the public concerned' includes references to non-governmental organizations promoting environmental protection, which are deemed to have a sufficient interest in environmental decision-making. However, the secrecy surrounding the initial negotiation of the Multilateral Agreement on Investment, considered by many of the harbinger of a 'race to the bottom' in transnational environmental standards, suggests there is a long way to go.

3.13.3 Rights of Future Generations

The Arhus Convention does not make any reference to the rights of future generations. These have been upheld, both substantively and in the right for a group of children to take legal action on their behalf to oppose various logging permits, in the Philippines case of Minors Oposa v Secretary of the Department of the Environment and Natural Resources\(^\text{108}\), a national case. An interesting example of future generational considerations was the rejection, in negotiating the 1997 Kyoto Climate Change Protocol, of 'temporal flexibility', which would have allowed states to 'borrow' carbon credits from future generations at a penalty rate. As noted above, there are signs that the ICJ would prefer to avoid defining 'sustainability', but has so far made little contribution to the development of procedural principles.

\(^{108}\) (1994) 33 ILM 173
3.13.4 Duty-Centered Approaches

A range of duty-centered approaches now exists. In national law, many constitutions include provisions requiring either individuals or the state (or both) to protect the environment. The Spanish Constitution, for example, provides that ‘Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it’, while some texts also require states or citizens to ‘improve’ the environment. More specifically, there have been moves in the Council of Europe to establish a Convention for the Protection of the Environment through Criminal Law. And perhaps the starkest example of legislating for individual responsibility is contained in the 1998 Rome Statute of the International Criminal Court, Article 8 of which provides for an international war crime against the environment.

The above study briefly referred to the existing environmental law, policy, different approaches in implementation and settlement of disputes. The subterranean coal fire is however, not specifically referred in most of the prominent international covenants, treaties or documents. It is submitted that, not that nations are unaware of the effect of natural subterranean coal fire. The effect of burning of fossil fuels is recognized as one among the factors which contributes to environmental pollution. It is rather difficult to provide the accurate data of the emission of pollutants from coal burning in general and subterranean coal fire in particular. Thus, it is found important to study and analyze coal, coal mining, harmful effects of coal burning of various coal producing and exporting countries in general and subterranean coal fire in particular. It is critically studied in Chapter IV.

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110 e.g. Turkish Constitution 1982, Article 56.