



CLIMATE CHANGE, COMING SOON TO A COURT NEAR YOU

INTERNATIONAL CLIMATE CHANGE LEGAL FRAMEWORKS

DECEMBER 2020

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LEGAL FRAMEWORKS**

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We should include courts in the climate change picture because we have no other option. No substitute exists for the court system. If judges are in charge of deciding all sorts of conflicts about life, death, love, human rights, and national security, it makes no sense to leave climate change outside the courtroom.

—Justice Antonio Herman Benjamin

FOREWORD

CLIMATE CHANGE AND JUDGES

Climate change poses the most urgent existential challenge of our lifetime—not only for humanity’s survival and protection of the planet’s biodiversity, but also for the proper functioning of the Environmental Rule of Law. Our global climate’s accelerating volatility—with its adverse impacts on ecosystems, vast landscapes, and human health and dignity—is transforming how lawyers and judges address Environmental Law’s traditional principles, objectives, instruments, and institutions. From an institutional point of view, the climate crisis fundamentally affects the way we perceive the role of courts in natural resource disputes.



Judges are trained and work in boxes of legal knowledge, practical expertise, and jurisdiction. The “little world” of a judge is one of unavoidable boundaries: political and judicial arenas that fragment ecological spaces instead of respecting them.

Climate change profoundly modifies these ancient premises and rattles judges’ comfort zones. Some perceive the subject matter of climate protection—the atmospheric common good, ecosystem services, and intergenerational values—as extending beyond the jurisdiction of local courts. In fact, judges may feel that climate issues reside outside the sovereign borders of national courts. Particularly in respect to the planet’s climate, the material good—the atmosphere as a whole—is one that just a few decades ago, following the lessons of Roman law, was considered alien to the categories addressed by domestic legislation.

It is also disturbing to judges that, while those who need protection and would benefit from judicial measures taken to address climate change are spread across the world, only a fraction might live within their jurisdiction. The same applies to the causes of climate change—perpetrated in large part by seemingly faraway activities and actors. Even more complicated for the generalist judge is the inability to see, touch, hear, or directly know the subject of the case. Although intangible categories are not unknown in the judicial context, the more this “physicality” is weakened or dissipated, the more ordinary judges begin to think that the conflict should be decided by someone else or somewhere else.

The climate crisis poses even greater judicial complication when we realize that many countries still do not have comprehensive or effective environmental laws. In others, judges may lack jurisdiction over the whole spectrum of environmental matters. Or, worse, when they can exercise authority, judges may lack the independence, knowledge, or integrity to discharge their responsibilities properly. In other words, although the biodiversity and climate change crises are universal, environmental law and adequate access to courts and justice are not. People in developed countries with robust democratic systems take fair and effective environmental adjudication for granted. For a large portion of the world, however, fundamental access to justice cannot be assumed. Sadly, those large areas are frequently home to rich biodiversity hot spots and tropical forests in desperate need of judicial enforcement.

Therefore, we may fairly raise the question: should we expect—and trust—courts to address climate change? Despite the above difficulties, my qualified answer is yes, for at least four pragmatic, legal, ethical, and policy and/or institutional reasons.

First, the pragmatic argument. We should include courts in the climate change picture because we have no other option. No substitute exists for the court system. If judges are in charge of deciding all sorts of conflicts about life, death, love, human rights, and national security, it makes no sense to leave climate change outside the courtroom. This assumption does not mean that we do not recognize the enormous differences between climate and “regular” environmental cases. However, the lack of other or better alternatives makes courts an inevitable choice.

Second, it would not be reasonable to entrust Environmental Law to judges, as we already do globally, without including climate change. At the end of the day, many key parts of nature—biomes, ecosystems, species, and genetic diversity—and the human environment will be directly and perhaps irreversibly affected by climate change. For obvious reasons, the exclusion of climate cases would handicap and ossify environmental jurisdiction, transforming it into a body without its heart and preventing the legal system’s evolution in a world of rapid transformations. Climate change is already affecting and will continue to affect not just Environmental Law. It will also impact most, if not all, legal disciplines that compose the conventional field of judicial intervention—from constitutional to tax and insurance law, from civil and administrative liability to criminal law, and from family to international and civil procedure law. In other words, if climate change is not allowed to enter the courtroom through the front door (Environmental Law), it will undoubtedly invade the judicial sanctum through the back door.

Third, except for a few areas of law (contracts, for example), judges are merely part of the solution for social problems; even then, they are not the only or even the best option. Courts do not replace the constellation of actors and measures in the climate change domain—both national and international. They complement whatever is in place. Some judges may see this role as a second-class type of judicial intervention, one filled with humility (not a widespread characteristic in the profession) as opposed to the ordinary exercise of jurisdiction in which judges have the final and most authoritative word on any complaint brought before them. That misguided but understandable sentiment fails to grasp judges’ role in contemporary society as one that is not uniform for all aspects of human conflicts.

Fourth, the position of judges in climate adaptation is much less daunting than in climate mitigation. Take, for instance, the thousands of cases around the world where judges are already dealing with permits, environmental impact assessments, protected areas, deforestation, water resources, wetlands, and desertification. Is it really defensible to keep addressing those legal issues without taking into account the impacts of climate change? Can a judge decide an objection to a permit for building a hotel resort in the middle of endangered mangroves without considering sea level rise due to climate change? Or adjudicate a case of significant deforestation in a region that is already suffering from growing water stress?

None of these reasons ignore or reduce the relevance of legitimate counterarguments that advocate that climate change policy issues should be fought outside the courtroom. Climate change is not the only or the first highly technologically or economically complex issue facing the courts. Software and DNA cases are common nowadays in many countries. Climate change is no more politically charged than national security, torture, discrimination, abortion, immigration, corruption, same-sex marriage, or election disputes. Even war and peace are not entirely beyond the judicial realm.

It is also worthwhile mentioning that, in light of general or specific legislation dealing with the subject, including constitutional provisions, judges do not make climate change law. They apply (within the limits of the separation of powers) norms discussed and approved by legislative bodies or enacted by administrative authorities. Under these circumstances, it is not *judicial lawmaking*, but rather *judicial law implementation*. Once clear and detailed policies—that go much further than vague, conditional and noncommittal statements of public intentions—are legislated, they become legal policies that can and should be enforced by judges. Otherwise, what would be the purpose of legislating? Therefore we should here make a distinction between *activist environmental judges* and *activist environmental legislation* (or legislators).

Thus, with a qualified yes, I respond to the initial question I have posed. It is qualified because it comes with one major and several secondary requirements, especially if we want to have judges involved in responding to the climate change crisis adequately. Let me focus on the primary requirement only. In general, judges are still not fully aware of the existential threat that the climate crisis poses to humanity as a whole and every person on the planet, in every jurisdiction. Judges tend to ignore that environmental law regimes they use in their daily practice already include contact points that allow for easy connection to the climate change dimension. In other instances, new and specialized laws have been passed, but remain unknown to or insufficiently understood by judges and therefore endure as untouched laws in the books. Finally, bound by their training and jurisdictions, judges are prone to feel isolated as professionals—a state of mind that discourages innovation and the kind of learning from each other that greater interaction and communication could bring. From the judges' perspective, the most effective medicine for this complex set of attributes and attitudes, which impair their ability to confidently manage climate change litigation, is *judicial education*.

And judicial education has been precisely the road chosen by the Asian Development Bank (ADB) in its work with judges from this immense and diverse part of the world. It has been a most successful journey, one that developed a judicial community around Environmental Law. The present reports are testimony to such an initiative and a component of the broader series of successful ADB endeavors in the Environmental Rule of Law universe. As the first publication of its kind with a focus on judges, this report series will greatly benefit those who already know the subject. It will also particularly serve the many for whom climate change is (until now) a remote area of law.

On behalf of the *Global Judicial Institute on the Environment*, I offer my effusive congratulations to ADB's extraordinary team and the distinguished coauthors of this innovative report series.



ANTONIO HERMAN BENJAMIN

Justice, National High Court of Brazil

Lead founding member of the Global Judicial Institute on the Environment

6 November 2020



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Climate change is a global challenge. While the emphasis on the Paris Agreement is on nationally determined contributions, to be enforced by national legal measures, the problems are common to all, and we all have much to learn from each other.

—Lord Robert Carnwath

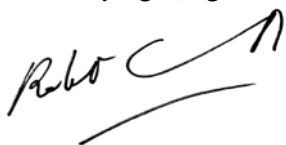
FOREWORD

I am delighted to welcome this important series of reports on climate litigation and legal frameworks.

It was in 2002 that the Global Judges' Symposium in Johannesburg affirmed the vital role of an independent judiciary and judicial processes in interpreting and enforcing environmental laws, and called for a UNEP-led programme of judicial training and exchange of information on environmental law. Since then, as member of the UNEP judicial advisory group, I have taken part in numerous judicial conferences on environmental law in different parts of the world. Since 2010, the Asian Development Bank has taken a lead in encouraging judicial interchange and training through its Law and Policy Reform Programme, including a series of judicial conferences in the Asia and Pacific region, in which I have been honoured to participate. The cases collected in this study are testament to the richness of the contribution of judges from that part of the world.

Climate change is a global challenge. While the emphasis on the Paris Agreement is on nationally determined contributions, to be enforced by national legal measures, the problems are common to all, and we all have much to learn from each other. Two of the most significant climate change cases in recent years—the *Urgenda* case in Holland and the *Leghari* case in Pakistan—came from countries with widely differing legal systems. But the principle they established is universal—that effective action on climate change is a human right and fundamental constitutional responsibility of governments everywhere. As was said in 1993 by the Philippines' Supreme Court in the famous *Oposa* case, rights to a balanced and healthful ecology are “basic rights” which “predate all governments and constitutions” and “need not be written in the Constitution for they are assumed to exist from the inception of humankind.”^a

I congratulate the Asian Development Bank team responsible for these remarkable reports. I have no doubt that they will be of immense value to all those involved in giving legal force to the Paris commitments, whether as judges, legislators, or legal professionals.



LORD ROBERT CARNWATH

Commander of the Royal Victorian Order (CVO)
Former Justice of the Supreme Court of the United Kingdom
April 2020



^a *Oposa v. Factoran*, G.R. No. 101083, 30 July 1993.



This report chronicles green and climate jurisprudence that emerged over the years and is a testament to ADB's tireless effort over a decade in building a judicial coalition.

— Justice Syed Mansoor Ali Shah

FOREWORD

*"I don't want you to be hopeful. I want you to panic...
and act as if the house was on fire."*

—Greta Thunberg

Unbridled human desire, supported by unsustainable development over centuries, has disrupted the rhythm of nature. Defiling of the local environment slowly snowballed into a threat for the entire planet as carbon emissions sullied the atmosphere. Humanity's disruption of Earth's system is climate change.



Any remedial response to this global challenge can only be through the collective coordination of humankind. Nationalism needs to give way to global cooperation and solidarity. While nations of the world try to coalesce to combat this challenge, politics and powerful vested interests continue to hamper such a consensus. Nations have been unable to implement their international commitments to meet this most serious existential threat. Dissatisfied citizenry of the world has been compelled to consider other options to combat this challenge. Some of them have knocked at the doors of the courts of justice to fight climate change by making their governments answerable and accountable and by seeking climate justice.

Courts, unlike other limbs of government, are not elected and have no constituencies or voters or political agendas to tow. They are not swayed by politics or other vested or corporate interests, but are guided by ethos of justice and fair play. They function within the frame of constitutionalism and the rule of law. This gives the courts of the world a common language to communicate. It is, therefore, easy to build a global judicial consensus on climate justice. The Asian Development Bank (ADB) realized this and put together a judicial environmental coalition in Asia and the Pacific in 2010. Since then, "green" judges in Asia and the Pacific have met and shared ideas in a series of roundtables and knowledge-sharing events. This unique congress of judges from different jurisdictions debated and dialogued to evolve innovative and avant-garde judicial techniques to safeguard the environment. These judges put these ideas to work and produced far-reaching jurisprudence that has touched the soul of the planet.

Several judiciaries from Asia have a rich tradition in public interest litigation and enforcement of constitutional human rights and, therefore, did not take long to absorb environmentalism in its fold. The jurisprudence that evolved showcased a new judicial technique of forming judicial commissions comprising environmental scientists, experts, and members of the civil society to sit face to face with the government and evolve sustainable solutions. The overarching environmental judicial approach of this period remained inquisitorial and consensus-based.

These judges were ready with their jurisprudence and sharpened tool kit when climate change walked into their courtroom. Climate litigation brought with it a host of new issues that slowly overshadowed the erstwhile environmental litigation. Climate change cut across sectors which were not earlier part of

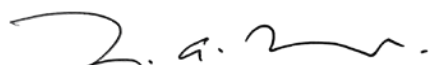
the environmental checklist. Climate litigation has to embrace multiple new dimensions like Health Security, Food Security, Energy Security, Water Security, Human Displacement, Human Trafficking, and Disasters Management. Climate Justice covers agriculture, health, food, building approvals, industrial licenses, technology, infrastructural work, human resource, human and climate trafficking, disaster preparedness, health, etc.

Most countries from Asia and the Pacific do not significantly contribute to climate change but suffer at the hands of it. Adaptation, as opposed to mitigation, has a totally different judicial response. Climate change, therefore, has a much broader meaning for the judiciaries of Asia and the Pacific. Adaptation entails issues that, facially, might not appear to be climate related but, upon deeper probe, show a causal link with climate change. The jurisprudence on climate justice emerging from the developed economies is more focused on mitigation and review of governmental decisions to curb emissions. On the whole, jurisprudence evolved by the courts has played a key role in fashioning climate governance and effectively combating climate change.

This report chronicles green and climate jurisprudence that emerged over the years and is a testament to ADB's tireless effort over a decade in building a judicial coalition. The Asian Judges Network on Environment helped the judges meet, discuss, and share ideas, which contributed to developing judicial inventiveness that emerged from Asia and the Pacific. The report is an invaluable exposé of judicial innovation and a valuable source for judiciaries around the world.

As I close this foreword, the coronavirus disease (COVID-19) pandemic has stalled the wheels of human activity and has caged humans with self-isolation and global lockdown. Weeks into it, I see blues skies out of my window, greener pastures, clean air, less noise, singing of the birds, and a general sense of relief on the face of nature. I guess the lesson for humankind is to back up and learn to coexist with nature. A new world is taking shape as I write this. A world that requires us to shed our old ways and move to a new normal. This report and the rich jurisprudence it puts out on display will help us fight and defy going back to the pre-corona world of greed, avarice, mindless consumerism, and unchecked carbon emissions.

I wish this report a huge success.



SYED MANSOOR ALI SHAH

Justice

Supreme Court of Pakistan

Islamabad

20 April 2020



Photo by Samir Jung Thapa/ADB.



“

ADB is committed to supporting the global climate agenda, including by developing the capacity of judicial systems within Asia and the Pacific to play their vital role.

—Thomas M. Clark

PREFACE

Judges are vital development partners for institutions promoting a sustainable and inclusive future, with an indispensable role to play in climate governance in Asia and the Pacific. This work is for them.

The Office of the General Counsel within the Asian Development Bank (ADB) started judicial capacity development on environmental law in 2010 as part of its Law and Policy Reform Program. ADB chose to work with judges for three principal reasons. First, judges form a distinct, independent, and critical branch of government; yet, development partners frequently overlook the benefits of judicial capacity building. Second, judges play a significant role in advancing the rule of law and as guardians of justice in Asia and the Pacific. Third, despite these critical responsibilities, judges need greater resources and opportunities for professional development, information sharing, and judicial networking.

Initially, ADB's program focused on judicial trainings on environmental protection issues, more narrowly, without inclusion of climate mitigation and adaptation. Then, over the past decade, global awareness of climate change and of the need for concerted action to address it surged. Countries expanded their domestic legal and policy frameworks to address climate impacts, and came together in global fora to coordinate this response, most notably by signing the Paris Agreement in 2015. Driven by the need to protect themselves, their children, and their environment from climate change, people turned more to litigation to address climate change, under a variety of theories. With these shifts, ADB expanded the focus of its judicial capacity building program to incorporate climate change and sustainable development.

In our work with judiciaries over the last 10 years, ADB has seen the extraordinary potential of judicial capacity building, along with the huge gaps that remain to be filled.

- Issuing judgments advancing environmental protection can see judges labeled “anti-development.” This label isolates and demotivates judges and can hamper them from addressing the serious legal and constitutional issues that may be implicated by climate change. For such judges, we created the Asian Judges Network on Environment (AJNE), a platform to connect judges and legal professionals, facilitate the sharing of knowledge and legal developments on a regional and global level, and boost motivation. ADB also launched annual conferences on environmental and climate law to share best practices. We complemented that work with assisting on targeted national judicial reforms in almost all host countries.
- During the annual judicial conferences, Asian and Pacific judges debated and developed the concepts of environmental and climate justice for the region. These sessions helped develop shared judicial language and frameworks to assess climate issues, and gave impetus to the development of seminal jurisprudence across the region. Despite these successes in the region, broader global audiences are often not aware of the phenomenal work that Asia and Pacific judiciaries do for lack of international reporting.



The Law and Policy Reform Program realized that ADB could, with these reports, both provide practical support to judges facing complex climate litigation as well as showcase climate jurisprudence from Asia and the Pacific to a broader audience.

In service of these overarching objectives, this report series seeks to (i) share environmental and climate jurisprudence from Asia and the Pacific, contributing to global knowledge on regional climate law and litigation; (ii) provide a comprehensive benchbook and tool kit for judges, especially those from Asia and the Pacific, to facilitate decision-making in this ever-evolving field of law; (iii) capture the results of ADB's judicial capacity development work—the legacy of ADB's work to date; and finally, (iv) acknowledge the prodigious work done by the judiciaries of Asia and the Pacific—ADB applauds their dedication and progress.

ADB was pleased to collaborate with the Sabin Center for Climate Change Law on this project. Michael Burger, Ama Francis, and the team at Sabin provided extraordinary support for ADB, contributing authoritatively on climate litigation around the world in Report Two, supplementing ADB's own research, and drafting the national legal frameworks report.

With pleasure, I acknowledge and introduce ADB's young and extraordinarily smart team of researchers and authors. Seventeen researchers gathered laws and cases from the 32 countries covered by these reports. Gregorio Rafael P. Bueta and Francesse Joy J. Cordon-Navarro contributed to and assisted with reviewing the reports. Maria Cecilia T. Sicangco wrote the report on international climate change legal frameworks and assisted with reviewing and editing these reports.

Many thanks to Irum Ahsan who led this initiative. Irum headed the Law and Policy Reform team between 2017 and 2020, under the guidance of ADB's former Deputy General Counsel Ramit Nagpal. Her energy, drive, and creativity have created a flagship program for ADB. I thank Briony Eales, who steered this initiative tirelessly over the last 3 years, working with researchers and authors, and juggling work with a young child. She worked with the researchers; wrote about climate science, climate litigation, and climate laws; and created a synthesized and cohesive series of reports.

The team diligently works on strengthening the rule of law, a key driver for robust and sustainable economic development. This will be vital work over the coming years. The global efforts to mitigate climate change and address its harmful impacts must only intensify in the near future, especially in Asia and the Pacific. The region is too large, diverse, and globally significant not to be at the center of these efforts. ADB is committed to supporting the global climate agenda, including by developing the capacity of judicial systems within Asia and the Pacific to play their vital role.

We look forward to our continued work with the region's judiciaries to strengthen climate justice and the rule of law.



THOMAS M. CLARK

General Counsel
Office of the General Counsel
Asian Development Bank

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ABBREVIATIONS

| | |
|----------------|---|
| ADB | Asian Development Bank |
| ASCC | ASEAN Sociocultural Community Blueprint |
| ASEAN | Association of Southeast Asian Nations |
| CBDR-RC | common but differentiated responsibilities and respective capabilities |
| CDM | Clean Development Mechanism |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CER | certified emission reduction |
| CLRTAP | Convention on Long-Range Transboundary Air Pollution |
| CMA | COP serving as the meeting of the Parties to the Paris Agreement |
| COP | Conference of the Parties |
| CRC | Convention on the Rights of the Child |
| DMC | developing member country |
| EAS | East Asia Summit |
| EC | European Community |
| ECE | Economic Commission for Europe |
| ECT | Energy Charter Treaty |
| EIT | economies in transition |
| EPFI | Equator Principles Financial Institutions |
| GCF | Green Climate Fund |
| GCR | Global Compact on Refugees |
| GCSOR | Global Compact for Safe, Orderly and Regular Migration |
| GHG | greenhouse gas |
| GJIE | Global Judicial Institute on the Environment |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPPS | International Convention for the Prevention of Pollution from Ships and the 1978 Protocol |

| | |
|--------------------------|---|
| ICSU | International Science Council (WMO) |
| IPCC | Intergovernmental Panel on Climate Change |
| L&D Mechanism | Warsaw International Mechanism for Loss and Damage |
| LCA | Long-term Cooperative Action |
| LULUCF | land use, land-use change and forestry |
| NDC | nationally determined contribution |
| OECD | Organisation for Economic Co-operation and Development |
| PICT | Pacific Island Countries and Territories |
| REDD+ | reduction of deforestation and degradation |
| RMU | removal unit |
| SAARC | South Asian Association for Regional Cooperation |
| SDG | Sustainable Development Goal |
| SWCC | Second World Climate Conference |
| TEC | Technology Executive Committee |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCCD | United Nations Convention to Combat Desertification |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environment Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNFCCC | United Nations Framework Convention on Climate Change |
| UNGA | United Nations General Assembly |
| UNGP | United Nations Guiding Principles on Business and Human Rights |
| VCPOL | Vienna Convention for the Protection of the Ozone Layer |
| WMO | World Meteorological Organization |
| WWW | World Weather Watch |

Sea abundance. Fisherfolk across the Pacific rely on their local fish stocks for nutrition and livelihood (photo by Raul del Rosario/ADB).





EXECUTIVE SUMMARY

Climate Change: A Clarion Call for Judges

It is 2020 and the world is at a crossroads on climate change.

The Paris Agreement aims to limit global warming to 1.5°C–2°C above preindustrial temperatures. Current international climate responses will not meet these targets. Thus, urgent and widespread action is indispensable. Recent Intergovernmental Panel on Climate Change reports showed a significant difference in the degree of impact between 1.5°C and 2°C of warming. Indeed, the 1.5°C goal is the safest for most of Asia and the Pacific.

And then the coronavirus disease (COVID-19) pandemic entered the equation, shutting down economies and claiming almost 1,163,459 lives by 28 October 2020. Its devastating impacts leave the world struggling to rebuild. After COVID-19, the world must choose the path toward a safer, inclusive, dignified, and resilient future.

Frustrated by government inaction and threatened by climate change impacts on their lives and human rights, global citizens are taking the fight for climate justice to the courts. Climate litigation is demanding that judges play a role in climate governance.

Asian courts have issued groundbreaking climate decisions. Their approaches diversify the global discourse on climate jurisprudence and are worth sharing. For other judges in Asia and the Pacific, climate change is coming soon to your courts.

The Asian Development Bank (ADB) has worked with courts in Asia and the Pacific for over 10 years to build networks and support judges with environmental and now climate change decision-making. This report series captures the wisdom gained over the last 10 years and provides resources for judges, decision-makers, and lawyers involved in climate litigation.

Why These Reports?

Climate Change, Coming Soon to a Court Near You is a series of four reports on climate law, policy, and litigation. Climate litigation is growing in Asia and the Pacific, so judges and quasi-judicial decision-makers must have access to climate law resources.

Cases from high-income countries dominate global literature about climate litigation. These countries have different mindsets, legal and policy frameworks, and climate change challenges. Although judges from Asia and the Pacific have much to gain from reading this literature, they also need perspectives and approaches closer to home from peers working with similar challenges.

Most Asia and the Pacific countries have low emissions and are incredibly susceptible to climate change. The region therefore focuses on climate adaptation and resilience—activities supported by ecosystem resilience and biodiversity.

Unfortunately, weak environmental governance is common in Asia and the Pacific, creating cascading effects in this era of climate change. Frail ecosystems and biodiversity offer communities less protection from the impacts of climate change, e.g., healthy mangrove forests protect humans and other species from storm surges. Ecosystems are also more easily damaged by climate change. Unchecked environmental degradation leaves indigenous, agrarian, and island communities even more vulnerable to death, homelessness, and displacement. Judiciaries in the region benefit from understanding the role of ecosystem protection, biodiversity, and sustainable development in boosting local climate resilience. Hence, these reports outline links between environmental protection, biodiversity, and climate change.

Prioritizing environmental protection and low-emission development is challenging in Asia and the Pacific, a region dominated by low to lower middle-income countries with development objectives. Judges who do that are often labeled “anti-development,” isolating them from their peers. Judges need access to resources and networks that boost their knowledge, and to information that proves that balanced and appropriate environmental and climate protection makes business sense and aligns with national climate commitments.

Judicial knowledge about climate change, legal frameworks, and relevant legal principles are fundamental to a strong rule of law. Many core principles in climate law stem from environmental law, a field that a few judges in Asia and the Pacific have studied or practiced.

Resource limitations, ad hoc publication of laws, and language barriers in Asia and the Pacific also make it difficult for judges to maintain current knowledge about climate law, climate science, and local climate change impacts, diminishing judicial effectiveness. These reports seek to overcome some of these barriers by synthesizing climate information and achievements and weaving a regional perspective into the global discourse on climate law.

Report Series Structure

Within this series are four reports:

- **Report Series Purpose and Introduction to Climate Science:** a brief introduction to climate change and climate science
- **Climate Litigation in Asia and the Pacific and Beyond:** a comparative analysis of climate litigation in Asia and the Pacific and the rest of the world
- **National Climate Change Legal Frameworks in Asia and the Pacific:** analyses of the national climate change policy and legal frameworks in ADB developing member countries in South Asia, Southeast Asia, and the Pacific and the People's Republic of China, with tables to highlight constitutional provisions relevant to climate change and a discussion of trends in climate law
- **International Climate Change Legal Frameworks:** a ready reference to key international climate change instruments and soft law, with tables showing treaty commitments by country

ADB has specifically designed these reports for judges, quasi-judicial decision-makers, lawyers from Asia and the Pacific, and those interested in Asian and Pacific climate law.

Key Takeaways

Litigation

Climate litigation is growing—in Asia and the Pacific and around the world. Most climate lawsuits in Asia target government respondents, seeking climate action or challenging decisions with climate impacts. The number of cases against governments based on treaty obligations, particularly the Paris Agreement, is increasing, and so is litigation against private entities.

Litigation preferences reflect domestic legal frameworks, with litigants looking for appropriate hooks to support their claims. Of the countries surveyed in this report, 25% have adopted framework climate legislation—economy-wide framework climate change law. The other states use climate policies and existing laws to achieve their goals. Unclear or incomplete legal and policy frameworks combined with weak enforcement frequently lead litigants to sue for violations of constitutional rights.

Petitioners in Asia favor constitutional litigation because it (i) has been used successfully in environmental litigation, (ii) allows direct access to superior courts, (iii) provides a legal basis for a claim where the existing legal and policy framework is incomplete, and (iv) is easier for petitioners to demonstrate standing where a constitutional right has been breached. The preference for rights-based litigation

reflects a global trend. Roughly one-third of all climate litigation outside the United States hinges on fundamental, human, and constitutional rights.

Most lawsuits target climate mitigation—the reduction of greenhouse gas emissions. However, litigation seeking climate change adaptation is growing and frequently emerges as a silent issue in Asian environmental lawsuits. In various cases, neither the parties nor the court identified climate change as an issue, but the case outcomes had co-benefits for climate resilience and, therefore, adaptation. These reports treat such cases as climate cases.

Climate litigation in Pacific courts remains rare, which does not reflect the existential nature of the climate threat in the Pacific.

Pacific islanders are more likely to rely on customary dispute resolution to resolve local conflicts, reducing the likelihood of litigation. Pacific nations know that their contribution to climate change is negligible. Lawsuits against national governments are also counterproductive if the state has limited resources to respond. Therefore, Pacific islanders are more likely to pursue human rights petitions in United Nations bodies or engage in transnational litigation, e.g., the climate migration cases filed in Australia and New Zealand.

Women, children, indigenous communities, and older adults—people who are particularly vulnerable to climate change—have also been active in domestic and international climate litigation.

National Legal and Policy Frameworks

Legal and policy frameworks are growing in Asia and the Pacific as governments plan for low-emission and resilient growth and ramp up climate responses in line with the Paris Agreement.

National legal and policy frameworks help drive global climate action. The period preceding the Paris Agreement (2009–2015) saw the most intense adoption of domestic laws and policies globally. This factor underscores the relationship between bolstering national climate action and driving forward the global agenda. Only collaborative, widespread, and urgent local responses can limit climate change, requiring quality national legal and policy frameworks backed up by well-informed judiciaries supporting implementation.

Legal and policy commitments need strengthening across the region. Most procedures for environmental impact assessments do not expressly require consideration of climate change. Laws requiring proponents to account for climate effects on a project and incorporate climate durability into its design are rare, undermining climate-resilient development. A few laws cover climate change and oceans.

Climate impacts, the Paris Agreement, technology, and markets will shape domestic climate laws and policies, as governments seek to keep up with changes.

Courts in Asia and the Pacific are shaping national legal and policy frameworks with their decisions. Further, given the existential crisis presented by climate change, courts have been willing to assess whether national laws and policies meet international climate commitments.

International Legal and Policy Frameworks

COVID-19 put much of 2020 on hold, including meetings central to the Paris Agreement implementation. The 26th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change was postponed until 2021, delaying agreement on a carbon trading mechanism, common time frames for reporting under the agreement, and ramping up climate finance and technology transfers.

The Paris Agreement is mainly silent on oceans and aviation. However, the adoption of domestic laws and policies in the 6 years leading up to the Paris Agreement showed the power of national legal frameworks to shape global action.

Judges Can Contribute to Better Climate Outcomes

Judges' role in government makes them gatekeepers, even climate emergency managers. Judges are central to

- holding governments accountable for meeting policy commitments and complying with legal obligations on climate change, the environment, and sustainable development, and thereby shaping legal and policy frameworks;
- admitting relevant and credible scientific evidence for climate change in courtrooms and making judicial findings of fact about climate change, which can elevate the national discourse on climate change (indeed, courts have successfully incorporated international scientific consensus, synthesized by the Intergovernmental Panel on Climate Change, into domestic legal common ground, ensuring that advancements in climate science filter into local law); and
- balancing outcomes and protecting citizens' fundamental, constitutional, and other legal rights, frequently closing the gaps through which people and ecosystems fall.

These functions demonstrate that judges have a vital role in climate governance in Asia and the Pacific. Supporting judges to respond to climate litigation contributes to better quality climate governance.

Moving Forward

Today's judges are being asked to decide on the burning issue of our generation—climate change. It is a challenge that threatens to eclipse all others in modern history.

As Albert Einstein once said, “We cannot solve our problems with the same thinking we used when we created them.” Significant judicial advancements have often rested on the shoulders of jurists who were willing to apply new consciousness and imagination to existing principles to resolve society's pressing problems. We need new perspectives to create climate justice. Justice will only be fair if it considers diverse perspectives and rights—those of women, children, elders, indigenous peoples, the differently abled, and future generations, as well as those of the traditional power structures.

These reports are for those who must adjudicate climate litigation in Asia and the Pacific. ADB lauds the advancements that Asia and the Pacific judiciaries have made in environmental and climate justice and sustainable development. The authors hope that this jurisprudence brings diversity and a fresh perspective to the global discourse on climate law.

As for climate justice, more work is needed. Emissions continue to rise, and global commitments do not yet have the world on track to limit global warming to well below 2°C above preindustrial temperatures. Gaps persist in climate change legal and policy frameworks, allowing action to stagnate. To promote climate justice in Asia and the Pacific, judges can assess these gaps. They can ask, do these frameworks support the overarching 1.5°C–2°C temperature goal under the Paris Agreement?

These reports encourage judiciaries to equip themselves with knowledge about climate science and law because litigation demands that judges take part in reckoning climate justice. The future rests heavily on each of us. Those able to make powerful decisions must choose action. This work is in the service of judges and decision-makers. We hope it lights the way, a little.



Photo by Lester Ledesma/ADB.



Building climate resilience. Village girls in Nepal play on a dam that is part of an erosion control structure in the village, to slow down flash floods. Extreme rainfall, which translates into massive floods, is a climate change impact felt throughout Asia and the Pacific. The region is home to the most number of climate-vulnerable people in the world (photo by Gerhard Jörén/ADB).



PART ONE

INTRODUCTION

Domestic adjudication has increasingly driven climate change governance in the last decade. Courts in Asia,¹ Europe,² the Americas,³ Africa,⁴ and the Pacific⁵ have had to contend with how climate change intersects with constitutional, commercial, administrative, civil, international, environmental, and human rights law. Strategic litigation, especially cases aiming to cut emissions, has also been used to link domestic action with collective global targets.

This report forms part of a series of reports on climate law and policy for judges in Asia and the Pacific. Judges play a crucial role in protecting the rule of law, helping their nations achieve climate resilience, and advancing human and constitutional rights. Familiarity with global comparative jurisprudence and international and national legal frameworks helps judges in the adjudication process—making this information a crucial element of the judicial tool kit on climate change.⁶

Report One of this series provides information about climate science and lays out the introduction to the report series. Report Two focuses on global climate jurisprudence, specifically comparing between the judicial approaches in Asia and the Pacific and the rest of the world. Report Three discusses national legal frameworks.

This report (Report Four) presents an overview with a regional perspective of the international legal framework governing climate change law and policy. National courts use international concepts and instruments in their judgments. The report seeks to build the capacity of judges in Asia and the Pacific to effectively reference relevant treaties and principles when adjudicating climate change cases. It covers 31 countries in Asia and the Pacific (Table 1.1).

¹ See, e.g., *Leghari v. Federation of Pakistan*, PLD 2018 Lahore 364.

² See, e.g., *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation*, Case No. 19/00135, ECLI:NL:HR:2019:2007, Supreme Court of the Netherlands, 20 December 2019 ([translation](#)).

³ See, e.g., *Demanda Generaciones Futuras v. Minambiente (Future Generations v. Ministry of the Environment and Others)*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Abril 5, 2018, M.P. L. Villabona, Expediente: 11001-22-03-000-2018-00319-01 (Colomb.) ([unofficial translation](#)).

⁴ See, e.g., *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and others*, High Court of South Africa, Case no. 65662/16 (Mar. 8, 2017).

⁵ See, e.g., *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

⁶ Legal citations vary by jurisdiction. As this document is written for judges and legal practitioners in Asia and the Pacific, the authors preserve national case citation differences, wherever feasible.

Table 1.1: Regions and Countries Covered by the Report

| South Asia | Southeast Asia | Pacific |
|-------------|----------------------------------|--------------------------------|
| Afghanistan | Cambodia | Cook Islands |
| Bangladesh | Indonesia | Federated States of Micronesia |
| Bhutan | Lao People's Democratic Republic | Fiji |
| India | Malaysia | Kiribati |
| Maldives | Myanmar | Marshall Islands |
| Nepal | Philippines | Nauru |
| Pakistan | Singapore | Palau |
| Sri Lanka | Thailand | Papua New Guinea |
| | Viet Nam | Samoa |
| | | Solomon Islands |
| | | Timor-Leste |
| | | Tonga |
| | | Tuvalu |
| | | Vanuatu |

Source: Authors.

While the report does not lay out a detailed commentary of each international instrument, it provides basic information on

- (i) what the relevant legal frameworks articulate;
- (ii) which countries have signed, ratified, accepted, or acceded to treaty-based instruments;
- (iii) what principles of international law outside the conventional regime are binding on states, either as generally accepted principles or as rules of customary law;⁷ and
- (iv) what instruments, while not legally binding, inform state practice and the progressive development of law.

The report follows the structure in Table 1.2. It describes each international instrument and, when appropriate, the circumstances of its adoption. It covers the following topics: (i) international climate law framework (in the strict sense);

⁷ Article 38(1) of the [Statute of the International Court of Justice](#) enumerates the three sources of international law: "(1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidence of a general practice accepted as law; and (3) the general principles of law recognized by civilized nations; [...]" International custom (item 2), in turn, has two elements: (1) state practice, and (2) *opinio juris sive necessitatis*, or the state's belief that a particular action was carried out due to a legal obligation. See [North Sea Continental Shelf Cases \(Germany v. Denmark and Germany v. The Netherlands\)](#), Judgment, ICJ Reports 1969. p. 3.

(ii) related global multilateral environmental instruments; (iii) regional instruments from South Asia, Southeast Asia, and the Pacific; and (iv) human rights-based instruments that are not strictly climate-focused, but have been interpreted to include the rights impacted by climate change. The report also highlights when an instrument principle may simultaneously be regarded as a customary norm or a general principle of law, thus binding states independent of the instrument.

Table 1.2: International Instruments Covered by the Report

| | |
|---|---|
| International climate change legal framework | <ul style="list-style-type: none"> ■ Pre-United Nations Framework Convention on Climate Change Work (1992) <ul style="list-style-type: none"> • United Nations General Assembly (UNGA) Resolution 1721 (XVI) • The Stockholm Declaration (see details in Part Three Section II.A.) • First World Climate Conference • Convention on Long-Range Transboundary Air Pollution (see details in Part Three Section I.E.) • United Nations Convention on the Law of the Sea (see details in Part Three Section I.F.) • Brundtland Commission Report (“Our Common Future”) • Vienna Convention for the Protection of the Ozone Layer (see details in Part Three Section I.G.) • Montreal Protocol on Substances that Deplete the Ozone Layer (see details in Part Three Section I.G.) • Toronto Conference Declaration • UNGA Resolution No. 43/53 (“Protection of global climate for present and future generations of mankind”) • Noordwijk Ministerial Conference on Atmospheric Pollution and Climate Change Declaration • Second World Climate Conference Declaration • UNGA Resolution No. 45/212 (“Protection of global climate for present and future generations of mankind”) • Instruments from the United Nations Conference on Environment and Development <ul style="list-style-type: none"> – Agenda 21 – Rio Declaration on Environment and Development (see details in Part Three Section II.B.) – Statement of Forest Principles – United Nations Framework Convention on Climate Change (see details in Part Two Section II.) – Convention on Biological Diversity (see details in Part Three Section I.K.) ■ United Nations Framework Convention on Climate Change ■ Kyoto Protocol ■ Cancun Agreements ■ Doha Amendment ■ Paris Agreement |
|---|---|

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Table 1.2 *continued*

| | |
|---|--|
| Multilateral environmental legal instruments | <ul style="list-style-type: none"> ■ Hard Law <ul style="list-style-type: none"> • Convention on Wetlands of International Importance Especially as Waterfowl Habitat • Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and Its 1996 Protocol • Convention Concerning the Protection of the World Cultural and Natural Heritage • International Convention for the Prevention of Pollution from Ships and the 1978 Protocol • Convention on Long-Range Transboundary Air Pollution • United Nations Convention on the Law of the Sea • Vienna Convention for the Protection of the Ozone Layer, 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and 2016 Amendment to the Montreal Protocol (Kigali Amendment) • Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal • Convention on Environmental Impact Assessment in a Transboundary Context • Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects • United Nations Convention on Biological Diversity, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, and the Nagoya Protocol • United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa ■ Soft Law <ul style="list-style-type: none"> • Stockholm Declaration • Rio Declaration on Environment and Development • Sendai Framework for Disaster Risk Reduction (2015–2030) • 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda • Draft Global Pact for the Environment • Global Compact for Safe, Orderly and Regular Migration • Global Compact on Refugees |
|---|--|

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Table 1.2 *continued*

| | |
|--|--|
| Regional environmental and climate change instruments | <ul style="list-style-type: none"> ■ South Asia <ul style="list-style-type: none"> • Malé Declaration on the Human Dimension of Global Climate Change • South Asian Association for Regional Cooperation Convention on Cooperation on Environment ■ Southeast Asia <ul style="list-style-type: none"> • Association of Southeast Asian Nations Agreement on Transboundary Haze Pollution • Singapore Declaration on Climate Change, Energy, and the Environment • ASEAN Human Rights Declaration • Action Plan on Joint Response to Climate Change • ASEAN Sociocultural Community Blueprint 2025 ■ Pacific <ul style="list-style-type: none"> • Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and Related Protocols • Pacific Islands Framework for Action on Climate Change 2006–2015 • Framework for the Resilient Development of the Pacific • Boe Declaration on Regional Security |
| Rights-based Instruments | <ul style="list-style-type: none"> ■ Hard Law <ul style="list-style-type: none"> • Convention Relating to the Status of Refugees • International Covenant on Civil and Political Rights • International Covenant on Economic, Social and Cultural Rights • Convention on the Elimination of All Forms of Discrimination against Women • Convention on the Rights of the Child ■ Soft Law <ul style="list-style-type: none"> • Universal Declaration of Human Rights • United Nations Declaration on the Rights of Indigenous Peoples • United Nations Guiding Principles on Business and Human Rights • Equator Principles • International Law Association Declaration of Legal Principles Relating to Climate Change • Oslo Principles on Climate Change Obligations • World Declaration on the Environmental Rule of Law • Charter of the Global Judicial Institute for the Environment • Principles on the Climate Obligations of Enterprises • Climate Action 100+ Initiative |

ASEAN = Association of Southeast Asian Nations.

Source: Authors.

The report also seeks to link substantive international climate change law with general principles of international law, which may affect how domestic courts integrate these concepts in climate change decisions. It discusses, for instance, the following:

- What are the consequences if the state has signed and ratified a treaty, but has not incorporated the treaty in municipal law?
- If the state has signed but not ratified a treaty, is it still legally bound in some way?
- In the two scenarios above, may the judge still reference the treaty as legal basis for his or her decision?
- May the judge legitimately cite a principle of law outside of the treaty regime to support his or her decision, including instances when the principle is also articulated in a treaty that the state has not signed at all?

Each section provides tabular summaries of treaty status in relation to the states covered in this report. The comparative information on treaty obligations provided in this report can benefit the judges, and is useful for them to understand which treaties their states have signed and/or ratified. Along with the key takeaways from this report, the tabular summaries would help them ascertain (i) which international instruments may be used in domestic adjudication (e.g., which human rights treaty bolsters a citizen's rights-based climate claim against the state), and (ii) the legal ramifications of the treaty as it relates specifically to their state.



Photo by Abir Abdullah/ADB.



Forest conservation. Villagers from the K'ho ethnic minority patrol a pine forest near the Da Nhim commune in Viet Nam. This is part of the Payment for Forest Environment Services (PFES) rendered for the national park authorities. Forests play an essential role in mitigating climate change by capturing carbon dioxide emitted into the atmosphere (photo by Lester Ledesma/ADB).



PART TWO

INTERNATIONAL CLIMATE CHANGE LEGAL FRAMEWORK

I. Pre-United Nations Framework Convention on Climate Change Work

In 1961, the United Nations General Assembly (UNGA) passed **Resolution 1721 (XVI)**, which led to the creation of the World Meteorological Organization (WMO) World Weather Watch (WMO-WWW) and the WMO-International Science Council (ICSU) Global Atmospheric Research Programme. UNGA Resolution 1721 recommended that UN member states, the WMO, and other appropriate specialized agencies undertake a study of measures “[t]o advance the state of atmospheric science and technology so as to provide greater knowledge of basic physical forces affecting climate and the possibility of large-scale weather modification.”¹

Subsequently, the **UN Conference on the Human Environment**, the first global environmental conference, was held in Stockholm, Sweden in 1972. It culminated in the Declaration of the United Nations Conference on the Human Environment (**the Stockholm Declaration**) (see Part Three Section II.A. of this report).²

Seven years later, the **First World Climate Conference** was held in Geneva, Switzerland in 1979. The Conference Declaration identified “climatic variability and change” as an urgent challenge, and called on nations “to foresee and to prevent potential man-made changes in climate that might be adverse to the well-being of humanity.”³ It thus called for the establishment of the World Climate Programme, which was set up later in the year under the cosponsorship of WMO, ICSU, and the United Nations Environment Programme (UNEP). The **Convention on Long-Range Transboundary Air Pollution (CLRTAP)**, adopted and opened

¹ [General Assembly Resolution 1721 \(XVI\)](#), International Co-Operation in the Peaceful Uses of Outer Space, A/RES/1721(XVI)[B] (20 December 1961).

² United Nations. 1973. [Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972](#). A/CONF.48/14/Rev.1. New York. pp. 3–5.

³ World Meteorological Organization. 1979. [Proceedings of the World Climate Conference—A Conference of Experts on Climate and Mankind, Geneva, 12–23 February 1979](#). WMO-No. 537. Geneva. pp. 709–716.

for signature also in 1979, is the first international legally binding instrument on climate (see Part Three Section I.E.).⁴

In December 1982, the **United Nations Convention on the Law of the Sea** (UNCLOS) was opened for signature (see Part Three Section I.F.).

In 1983, the UNGA passed Resolution 38/161, *Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond*, which established the **Brundtland Commission** (formerly known as the World Commission on Environment and Development). The commission aimed to unite states in pursuing sustainable development in a manner that protects and enhances the environment. The commission report, *Our Common Future*, published in 1987, discussed:

- sustainable development in the context of equity and common interest;
- the persisting dilemma of fossil fuels and the potential of renewable energy; and
- the need for “negotiating new global and regional conventions or arrangements aimed at promoting cooperation and coordination in the field of environment and development (including, for example, new conventions and agreements on climate change...)”.⁵

In March 1985, the **Vienna Convention for the Protection of the Ozone Layer** (VCPOL) was adopted and opened for signature (see Part Three Section I.G.). In August 1987, the **Montreal Protocol on Substances that Deplete the Ozone Layer** (a protocol to the VCPOL) was adopted and opened for signature (see Part Three Section I.G.).

In June 1988, more than 300 scientists, policymakers, and corporate and environmental leaders from 46 countries and organizations attended the **Toronto Conference** (officially entitled International Conference of the Changing Atmosphere: Implications for Global Security). The final Conference Declaration was a strongly worded statement that described the existing atmospheric situation as a human-induced “unintended, uncontrolled, globally pervasive experiment whose ultimate consequences [on global security, world economy, and the natural environment] could be second only to a global nuclear war.”⁶ It further defined “climate warming...and changed frequencies of climatic extremes” as an urgent problem, which would become “progressively more serious, more difficult to reverse, and more costly to address” (footnote 6). The declaration recommended

- that states establish a “comprehensive global convention as a framework for protocols on the protection of the atmosphere” (footnote 6);

⁴ P. Jackson. 2007. [From Stockholm to Kyoto: A Brief History of Climate Change](#). *UN Chronicle*. XLIV (2).

⁵ United Nations, General Assembly, [Report of the World Commission on Environment and Development: Note by the Secretary-General](#), A/42/427 (4 August 1987).

⁶ WMO/OMM. 1990. *The Changing Atmosphere: Implications for Global Security*. Statement from international meeting sponsored by Government of Canada. Toronto. 27–30 June 1988 (Reprinted in 5 AM1. U. J. INT’L L. & POL’y 515).

- the creation of a “World Atmosphere Fund financed in part by a levy on the fossil fuel consumption of industrialized countries” (footnote 6); and
- a “reduction in CO₂ emissions by approximately 20% of 1988 levels by the year 2005 as an initial goal” (the ‘Toronto target’) (footnote 6).

In the same year, the WMO and UNEP established the **Intergovernmental Panel on Climate Change** (IPCC). The UNGA subsequently endorsed the creation of the IPCC.⁷ The IPCC is an intergovernmental body within the UN framework. It assesses literature on “human-induced climate change, its potential impacts and options for adaptation and mitigation.”⁸ It also produces reports that feed into the global climate discourse, including negotiations within the United Nations Framework Convention on Climate Change (UNFCCC) framework. The IPCC’s First Assessment Report (1990) that had confirmed the threat of climate change was instrumental in negotiations for, and the eventual language of, the UNFCCC.⁹ Similarly, the Fifth Assessment Report, finalized in 2014, was crucial in the run-up to the 2015 Paris Agreement.¹⁰

Malta introduced climate change into UNGA proceedings in September 1988, in its pursuit to include the item “Conservation of Climate as Part of the Common Heritage of Mankind” in the agenda.¹¹ This initiative was broadly supported and, in December 1988, the UNGA passed **Resolution 43/53 “Protection of Global Climate for Present and Future Generations of Mankind”** (footnote 7). The resolution endorsed the establishment of the IPCC and characterized climate change as a “priority issue.” It also

- acknowledged that human activities could contribute to changes in global climate patterns, threatening present and future generations;
- noted the emerging evidence indicating that increased concentrations of greenhouse gases (GHGs) in the atmosphere could lead to global warming, the consequences of which “could be disastrous for mankind if timely steps are not taken at all levels;” and
- recognized that a global framework that takes into account the vital interest of “all mankind” is required to address climate change, as it affects humanity as a whole.

⁷ [General Assembly Resolution 43/53, Protection of Global Climate for Present and Future Generations of Mankind, A/RES/43/53](#) (6 December 1988).

⁸ IPCC. [Principles Governing IPCC Work](#). Art. 2.

⁹ IPCC. 1992. *Climate Change: The IPCC 1990 and 1992 Assessments–IPCC First Assessment Report Overview and Policymaker Summaries and 1992 IPCC Supplement*. Geneva.

¹⁰ C.F. Schleussner et al. 2016. Science and Policy Characteristics of the Paris Agreement Temperature Goal. *Nature Climate Change*. 6 (9). p. 827.

¹¹ D. Bodansky. 1993. The United Nations Framework Convention on Climate Change: A Commentary. *Yale Journal of International Law*. 18 (2). Footnote 86 of the article states, “Letter from Dr. Alexander Borg-Olivier, Ambassador and Permanent Representative of Malta to the United Nations, to Javier Perez de Cuellar, U.N. Secretary-General (Sept. 9, 1988) (on file with author). The characterization of climate as “the common heritage of mankind” echoed Malta’s 1967 introduction of the “heritage of mankind” concept to describe deep seabed mineral resources.”

However, Malta's initial formulation of climate as "common heritage of mankind" did not make it into the resolution. Some states were concerned that this characterization (used beforehand in the context of deep seabed mineral resources and the moon) was inappropriate in the context of climate (footnote 11). The resolution thus described the climate as the "common concern of mankind" (footnote 11).

In November 1989, the **Noordwijk Ministerial Conference on Atmospheric Pollution and Climate Change** was held in the Netherlands. Representatives of 67 developed and developing countries (split almost equally) (footnote 11), 11 international organizations, and the Commission of the European Community (EC) attended the conference.¹² Significantly, the Noordwijk Declaration recognized the need to (i) increase carbon sinks, and (ii) while ensuring stable development of the world economy, stabilize carbon dioxide emissions and emissions of other GHGs not covered by the Montreal Protocol. The latter provision was understood to be on an "as soon as possible" basis for industrialized nations, but the declaration did not specify a timetable.¹³

The Noordwijk Declaration also acknowledged several core principles relevant to a climate treaty, such as "the concept of climate change as a common concern of humankind, the common but differentiated responsibilities of states, the sovereign right of states to manage their own natural resources, and the necessity of sustainable development" (footnote 12). In particular, the Noordwijk Declaration was sensitive to the North-South divide, and included provisions pursued by developing countries. These provisions related to the "principle of sovereignty, the need for international cooperation and resolution of the external debt problem, the responsibility of industrialized countries to take the lead in initiating action to combat climate change, and the need for financial and technical assistance, in part through the mobilization of additional resources."¹⁴

Not all of the developed countries agreed to concrete commitments on emission targets (footnote 12). Still, the Noordwijk Declaration represents an initial step toward recognition of such targets (footnote 12). The EC Member States were among those that agreed to concrete targets, and the EC referenced the Noordwijk deliberations when it set its policy targets on climate change in 1990.¹⁵

¹² United Nations Framework Convention on Climate Change (UNFCCC). [The Noordwijk Ministerial Declaration on Climate Change \(Fact Sheet\)](#).

¹³ The Noordwijk Declaration states, "The Conference recognizes the need to stabilize, while ensuring stable development of the world economy, CO₂ emissions and emissions of other greenhouse gases not controlled by the Montreal Protocol. Industrialized nations agree that such stabilization should be achieved by them as soon as possible, at levels to be considered by the IPCC and the Second World Climate Conference of November 1990. In the view of many industrialized nations, such stabilization of CO₂ emissions should be achieved as a first step at the latest by the year 2000."

¹⁴ Footnote 11, referencing Noordwijk Declaration, paras. 6, 7, 11, 26.

¹⁵ Footnote 12, citing communication from the EC Commission to the Council on community policy targets on the greenhouse issue, 16 March 1990 (Document SEC[90] final).

In October–November 1990, the **Second World Climate Conference** (SWCC) was held in Geneva, Switzerland. The SWCC had “6 days of scientific and technical presentations and discussions involving 747 participants from 116 countries, and 2 days of ministerial sessions attended by 908 participants from 137 countries.”¹⁶ Similar to the Noordwijk Declaration, the SWCC Declaration emphasized the need to stabilize GHG emissions, but failed to provide specifics, such as levels and timelines. It further called for a global treaty on climate change.

The UNGA passed **Resolution 45/212 “Protection of Global Climate for Present and Future Generations of Mankind”** on 21 December 1990.¹⁷ It established a single intergovernmental negotiating process under the auspices of the General Assembly for the preparation of a framework convention on climate change. It also created the Intergovernmental Negotiating Committee to lead the negotiation process and complete the framework convention and related agreements prior to the UN Conference on Environment and Development in June 1992. The resolution likewise established a special voluntary fund to ensure that developing countries are able to participate fully in the negotiating process.

The **UN Conference on Environment and Development** (also known as the Earth Summit or the Rio Summit) was held in Rio de Janeiro, Brazil, in June 1992. Representatives of 178 governments attended the Earth Summit and adopted three major non-binding instruments and two legally binding conventions, which were then opened for signature.¹⁸

■ *Non-binding Instruments and Declarations*

- (i) **Agenda 21** is a comprehensive plan of action on sustainable development.¹⁹ It is premised on “the need to take a balanced and integrated approach to environment and development questions”²⁰ on the basis of international, subregional, national, and local cooperation (i.e., global partnership for sustainable development).²¹ Agenda 21 discusses climate change and climate variability in the context of conservation and management of resources (e.g., protection of the atmosphere; combating deforestation; protection of oceans, seas, and marine resources; improving the scientific basis for decision-making; contingency plans for both natural and human-induced disasters; and

¹⁶ J.W. Zillman. 2009. *A History of Climate Activities*. *Bulletin of the World Meteorological Organization*. 58 (3).

¹⁷ *General Assembly Resolution 45/212, Protection of Global Climate for Present and Future Generations of Mankind*, A/RES/45/212 (21 December 1990).

¹⁸ United Nations Department of Economic and Social Affairs, Division for Sustainable Development Goals. *Agenda 21*.

¹⁹ United Nations. 1993. *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*. A/CONF.151/26/Rev.1 (Vol. I). New York. pp. 9–479. (Agenda 21 is Annex II of Resolution 1.)

²⁰ Footnote 19, Preamble, Art. 1.2.

²¹ Footnote 19, Preamble, Art. 1.1.

addressing the disproportional effects of climate change on vulnerable countries such as small island developing states).

- (ii) The **Rio Declaration on Environment and Development** consists of 27 principles that define the rights and obligations of states with respect to environment and development issues (see Part Three Section II.B.).²²
- (iii) The **Statement of Forest Principles**,²³ a set of principles for the sustainable management of forests, is the first global consensus reached on forests.²⁴ It recommends that (i) states assess the impact of their development activities on their forest resources, and (ii) all aspects of environmental protection and social and economic development as they relate to forests and forest lands should be integrated and comprehensive.²⁵ At the same time, it affirms that states have a right to develop forests according to their socioeconomic needs, in keeping with national sustainable development policies.²⁶

■ *Legally Binding Conventions*

- (i) The **United Nations Framework Convention on Climate Change** (UNFCCC) had 197 parties as of October 2020.²⁷ It entered into force on 21 March 1994.²⁸ It is considered to be one of the few conventions with universal, or near universal, membership (see Part Two Section II.).
- (ii) The principal aims of the **Convention on Biological Diversity**²⁹ are conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits from utilization of genetic resources.³⁰ The convention has 196 parties, and entered into force on 29 December 1993 (see Part Three Section I.K.).

Both conventions were opened for signature at the Rio Summit.

²² Footnote 19, pp. 3–8. The Rio Declaration on Environment and Development is Annex I of Resolution 1.

²³ Footnote 19, pp. 480–485. The Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (commonly known as the Statement of Forest Principles) is Annex III of Resolution 1.

²⁴ Footnote 23, Preamble (d).

²⁵ Footnote 23, Art. 3(c).

²⁶ Footnote 23, Art. 2(a).

²⁷ [United Nations Framework Convention on Climate Change](#), New York, 9 May 1992, *United Nations Treaty Series*, Vol. 1771, No. 30822, p. 107.

²⁸ United Nations Treaty Collection. [UNFCCC \(Information Page\)](#).

²⁹ [Convention on Biological Diversity](#), Rio de Janeiro, 5 June 1992, *United Nations Treaty Series*, Vol. 1760, No. 30619, p. 79.

³⁰ Footnote 29, Art. 1.

II. 1992 United Nations Framework Convention on Climate Change

The UNFCCC is a framework treaty for intergovernmental efforts to address climate change. It aims to curb the average global temperature increase and its impacts which, by the time the treaty was adopted, were already inevitable.³¹

The framework is divided into four parts:

- (i) The preliminary section, stating the definitions, objectives, and fundamental principles of the convention.
- (ii) General and specific commitments of developed and developing countries in relation to the sources and sinks of GHGs; scientific cooperation, public information, and education; financial resources and technology transfer; adoption of national policies and corresponding measures to address climate change; and the use of best available scientific information, as well as relevant technical, social, and economic information.
- (iii) Institutional arrangements to facilitate and monitor implementation of the convention.
- (iv) Procedural provisions regarding annexes, entry into force, reservations, ratification, accession, protocols, and interim arrangements.³²

A. Preamble, Objectives, and Principles

The UNFCCC addresses all GHG emissions that were not covered by the 1987 Montreal Protocol. Article 2 states that the ultimate objective of the UNFCCC is to stabilize GHG concentrations in the atmosphere “at a level that would prevent dangerous [human-induced]³³ anthropogenic interference with the climate system.”³⁴ The use of the word “dangerous” connotes some level of judgment, which the UNFCCC clarifies must be based on relevant scientific, technical, and economic considerations, and continually reevaluated in the light of new findings.³⁵ The IPCC’s periodic reports play an important role in this assessment. In addition, the “level” referenced in Article 2 is to be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.³⁶

The preamble references several international environmental law principles, such as the characterization of climate as the “common concern of mankind,”³⁷

³¹ UNFCCC. [History of the Convention](#).

³² Footnote 11, p. 492.

³³ UNFCCC defines climate change in Art. 1(2), as “a change of climate which is attributed *directly or indirectly to human activity* that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” (italics supplied)

³⁴ Footnote 27, p. 9.

³⁵ Footnote 27, Preamble, para. 16.

³⁶ Footnote 27, Art. 2.

³⁷ Echoing UN General Assembly Resolution 43/53. Footnote 7.

the sovereign right of states to exploit their own resources pursuant to their own environmental and developmental policies,³⁸ the responsibility of states to avoid transboundary environmental harm,³⁹ and the principle of intergenerational equity.⁴⁰ It also contextualizes the differentiated response measures expected of developed and developing countries, noting that “standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries,”⁴¹ and that the energy consumption of developing countries “will need to grow” “to achieve sustainable social and economic development.”⁴² Furthermore, the preamble invokes the “no regrets” principle—i.e., that various actions responding to climate change challenges can be rationalized economically in and of themselves (separate from climate considerations),⁴³ and can also help in solving other environmental problems.⁴⁴

Under international law, the location of a provision in a treaty determines its character and norm-generating capacity. The preamble provides the context for interpreting a treaty, but does not itself create binding rights and duties on parties.⁴⁵ In contrast, if the provision is located in the operational part of the treaty, it may create rights and obligations depending on the language used.⁴⁶

This explains why some of the principles set forth in Article 3 of the UNFCCC explicitly reaffirm several preambular provisions. For example, the first principle clearly mirrors the concept that the climate should be protected for the benefit of present and future generations, the principle of equity, and the principle of common

³⁸ See also Principle 2 of the Rio Declaration, footnote 22, which states, “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 [...]”

³⁹ Footnote 38. The relevant section of Principle 2 states, “States have, in accordance with the Charter of the United Nations and the principles of international law, [...] 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.”

⁴⁰ Footnote 27, Preamble, para. 23: “Determined to protect the climate system for present and future generations [...]”. This is restated under Art. 3 [Principles] (1): “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

⁴¹ Footnote 27, Preamble, para. 10. This is a restatement of Principle 11 of the Rio Declaration.

⁴² Footnote 27, Preamble, para. 22. The paragraph also references energy efficiency: “Recognizing that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow *taking into account the possibilities for achieving greater energy efficiency and for controlling greenhouse gas emissions in general*, including through the application of new technologies on terms which make such an application economically and socially beneficial.” (italics supplied)

⁴³ Footnote 11, p. 499.

⁴⁴ Footnote 27, Preamble, para. 17.

⁴⁵ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 18232, p. 331. Art. 31(2).

⁴⁶ L. Rajamani. 2016. The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations. *Journal of Environmental Law*. 28 (2). pp. 337–358.

but differentiated responsibilities and respective capabilities (CBDR-RC).⁴⁷ Furthermore, the second principle gives “full consideration” to the specific needs and special circumstances of developing countries, especially those that are particularly vulnerable to the adverse effects of climate change, and countries that would have to bear a disproportionate or abnormal burden under the UNFCCC.⁴⁸

On the other hand, the remaining three principles, while not expressly referred to in the preamble, build upon it. The precautionary principle—that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing precautionary measures—is embodied in the third principle.⁴⁹ The fourth principle recognizes that development and climate change are intertwined. While states parties have a right to, and should, promote sustainable development, the UNFCCC recognizes that economic development is essential for adopting measures to address climate change.⁵⁰ The fifth principle expounds on the relationship between climate change and international trade—that measures taken to combat climate change should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.⁵¹

Despite the efforts of developing countries to champion other principles, academic and climate law expert Daniel Bodansky (footnote 11) notes that some of these principles did not make it to the final text of the UNFCCC. These include the principles that (i) states have an equal right to ocean sinks; (ii) the GHG emissions of developing countries “must” grow; (iii) no environmental conditions should be imposed on aid; and (iv) developed countries have the “main responsibility” for addressing climate change, since their overconsumption and excess emissions are its primary causes.⁵² Other related principles on liability and compensation, corollary to the “main responsibility” principle, also did not make it to the UNFCCC (footnote 52).

B. General and Specific Commitments

The CBDR-RC concept is fundamental to understanding the UNFCCC. It acknowledges that while states have a shared obligation to address climate change, developed countries have historically contributed most to the problem and have more resources to remedy it.⁵³ They should thus take the lead in combating climate change and its adverse effects.⁵⁴

⁴⁷ Footnote 27, Art. 3(1).

⁴⁸ Footnote 27, Art. 3(2).

⁴⁹ Footnote 27, Art. 3(3).

⁵⁰ Footnote 27, Art. 3(4).

⁵¹ Footnote 27, Art. 3(5).

⁵² Footnote 11, p. 502. Professor Bodansky is an expert in international climate change law and policy, as well as environmental law. He is Regents’ Professor of Law in the Sandra Day O’Connor College of Law (Arizona State University) and Senior Adviser at the Center for Climate and Energy Solutions.

⁵³ UNFCCC Secretariat. 2003. *Caring for Climate: A Guide to the Climate Change Convention and the Kyoto Protocol*. Bonn. p. 6.

⁵⁴ Footnote 27, Art. 3(1).

Consequently, for purposes of specific commitments, the UNFCCC divides states parties into three categories:

- **Annex I Parties** consist of (i) industrialized countries that were Organisation for Economic Co-operation and Development (OECD) members in 1992, and (ii) countries with economies in transition (the EIT Parties) (i.e., the former Eastern bloc consisting of the Russian Federation, the Baltic states, and several Central and Eastern European states).⁵⁵ They have a specific commitment to adopt national policies and take corresponding measures on the mitigation of climate change,⁵⁶ with the aim of returning GHG emissions at 1990 levels by the year 2000.⁵⁷ The UNFCCC nevertheless grants EIT Parties “a certain degree of flexibility,”⁵⁸ which some states have used to set a year other than 1990 as the base year (footnote 55). Nevertheless, negotiations between developed and developing countries resulted in softer language with respect to emission targets and the applicable timeline (e.g., “with the *aim of returning*” to 1990 emissions levels).⁵⁹ There is, therefore, no express commitment to reduce emissions by a certain date.⁶⁰ Annex I Parties are also obliged to provide more frequent and more detailed national reports on their GHG emissions.⁶¹
- **Annex II Parties** consist of the OECD subset of Annex I Parties. They have a specific commitment to provide financial resources to enable developing countries to undertake emissions reduction activities, and to help them adapt to the adverse effects of climate change.⁶²
- The rest of the states parties are, for simplicity, categorized as **Non-Annex I Parties**. They do not have any specific commitments under the UNFCCC. While most are developing countries, the UNFCCC specifically recognizes certain categories of countries as being particularly vulnerable to the adverse impacts of climate change, such as small island countries and countries with arid areas.⁶³ Others are more economically vulnerable to climate change response measures, such as those with economies that are highly dependent on fossil fuels.⁶⁴ The UNFCCC gives “full consideration” to their specific needs and concerns, emphasizing activities such as investment, insurance, and technology transfer.⁶⁵

⁵⁵ Footnote 53, p. 5.

⁵⁶ Footnote 27, Art. 4(2)(a).

⁵⁷ Footnote 27, Art. 4(2)(b).

⁵⁸ Footnote 27, Art. 4(6).

⁵⁹ Footnote 57 (italics supplied). Cf. “stabilize.” Professor Bodansky notes that “return” unlike “stabilize” does not necessarily have “an ongoing temporal dimension.” (Footnote 11, p. 515.)

⁶⁰ P.J. Sands and I. Millar. 2011. [Climate, International Protection](#). In *Max Planck Encyclopedias of International Law [MPIL]*. Oxford Public International Law.

⁶¹ Footnote 27, Art. 4(2)(b).

⁶² Footnote 27, Art. 4(3) and 4(4).

⁶³ Footnote 27, Art. 4(8).

⁶⁴ Footnote 27. See also Art. 4(10).

⁶⁵ Footnote 27, Art. 4(8).

All parties (i.e., Annex I and Non-Annex I Parties) are bound by UNFCCC's general commitments. These commitments are qualitative in nature. They oblige parties to (i) establish national inventories of their GHG emissions; (ii) prepare and implement programs on adaptation, mitigation, environment friendly technologies, sustainable management of carbon sinks, climate research, and education and public awareness on climate change; and (iii) provide reports on steps taken to implement the convention.⁶⁶

The parties to the UNFCCC meet annually at the Conference of the Parties (COP) to regularly monitor implementation of the convention, discuss the way forward in addressing climate change, and negotiate new commitments. The COP is the supreme decision-making body of the UNFCCC.⁶⁷

III. 1997 Kyoto Protocol

The 1997 Kyoto Protocol to the UNFCCC was adopted in response to the lack of legally binding emission reduction targets and timelines in the UNFCCC. It shares the UNFCCC's objective and is likewise based on the principle of common but differentiated responsibilities.

The protocol, adopted and opened for signature on 11 December 1997, entered into force on 16 February 2005. It had 192 parties as of October 2020.⁶⁸

The heart of the Kyoto Protocol lies in Article 3, whereby UNFCCC Annex I Parties committed to specific, quantified, and binding emissions limitation and reduction commitments (contained in the Protocol's Annex B). These commitments were to be achieved by the end of the first commitment period (2008–2012), “with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels.”⁶⁹ The process by which the parties arrived at the Annex B commitment targets was contentious and difficult (footnote 60). In the end, the parties agreed to differentiated targets for Annex I countries (e.g., 8% reduction in the first commitment period for the European Union and its member states, 7% reduction for the United States, 6% reduction for Japan and Canada) (footnote 60). Commitments for subsequent periods are to be set by amendments to Annex B.⁷⁰

⁶⁶ Footnote 27, Arts. 4(1), 5, 6, and 12(1).

⁶⁷ Footnote 27, Art. 7.

⁶⁸ Including the European Union. All UN member states are parties to the Kyoto Protocol except Andorra, Canada (withdrew in 2012), South Sudan, and the United States (US) (signed but has not ratified the Protocol). See United Nations Treaty Collection. [Kyoto Protocol to the United Nations Framework Convention on Climate Change \(Information Page\)](#). In June 2001, President George W. Bush decided to withdraw US support from the Kyoto Protocol, which he described as “fatally flawed in fundamental ways.” See Office of the Press Secretary. [President Bush Discusses Global Climate Change](#).

⁶⁹ [Kyoto Protocol to the United Nations Framework Convention on Climate Change](#), Kyoto, 11 December 1997, *United Nations Treaty Series*, Vol. 2303, No. 30822, p. 162. Art. 3(1).

⁷⁰ Footnote 69, Art. 3(9).

The Kyoto Protocol envisions the attainment of these emission limitation and reduction commitments through a two-pronged approach: (i) by national actions, policies, and measures; and (ii) through international market mechanisms.

Examples of national policies and measures given by the Kyoto Protocol include enhancing energy efficiency, promoting renewable energy and sustainable agriculture, removing subsidies and other market distortions, reducing transport sector emissions, and recovering methane emissions through waste management.⁷¹

For international market mechanisms, the protocol established three flexible mechanisms:

- Article 6 of the protocol allows “**joint implementation.**” Annex I Parties may implement projects that reduce emissions, or increase removals using sinks, in the territories of other Annex I countries, and to credit the resulting “emission reduction units” against their own emission targets.⁷² Joint implementation projects must provide a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur.⁷³ Further, these projects should be supplemental to domestic actions.⁷⁴ “In practice, joint implementation projects are most likely to take place in EIT countries, where there is generally more scope for cutting emissions at a lower cost.”⁷⁵
- Article 12 of the protocol defines the **clean development mechanism**, whereby Annex I Parties may gain certified emission reductions (CERs) by implementing or funding sustainable development project activities that reduce emissions (or enhance sinks through afforestation or reforestation)⁷⁶ by non-Annex I Parties.⁷⁷ These CERs could then be credited toward compliance with the Annex I Party’s emission commitments under Article 3 of the protocol. Projects under the clean development mechanism must lead to real, measurable, and long-term climate benefits in the form of emission reductions or removals that are additional to any that would have occurred without the project.⁷⁸ They have the additional purpose of assisting Non-Annex I Parties (typically developing countries) in achieving sustainable development and contributing to the ultimate objective of the UNFCCC.⁷⁹
- Article 17 of the protocol permits Annex B Parties to achieve their emission targets through **emissions trading**. It involves the sale and purchase of emission reduction credits (assigned amount units) between

⁷¹ Footnote 69, Art. 2(1)(a).

⁷² Footnote 53, p. 19. See also UNFCCC. [Issues in the Negotiating Process. Kyoto Protocol Mechanisms: “Joint Implementation”, the Clean Development Mechanism and Emissions Trading.](#)

⁷³ Footnote 69, Art. 6(1)(b).

⁷⁴ Footnote 69, Art. 6(1)(d).

⁷⁵ Footnote 53, p. 19.

⁷⁶ See UNFCCC. 2009. [Fact Sheet: The Need for Mitigation](#). November. p. 4.

⁷⁷ Footnote 53, p. 21.

⁷⁸ Footnote 69, Art. 12(5).

⁷⁹ Footnote 69, Art. 12(2).

Annex B Parties,⁸⁰ in cases where (i) it would be more cost-effective for the purchasing party to do so rather than to undertake the reduction domestically,⁸¹ and (ii) the selling party's actual emission level is lower than its quota under Annex B of the Kyoto Protocol. Other trading units aside from assigned amount units come in the form of removal units (RMUs, based on land use, land-use change and forestry [LULUCF] activities such as reforestation), emission reduction units generated by joint implementation projects, and CERs generated from a clean development mechanism project activity.⁸² However, Article 17 of the protocol emphasizes that any such trading shall be supplemental to domestic actions to meet quantified emission limitation and reduction commitments. In addition, to avoid overselling of units and consequently fail to meet their emission reduction targets, all Annex B Parties have to maintain a commitment period reserve. This reserve is defined as 90% of the party's assigned amount under Annex B, or five times the amount of emissions reported in its most recent emissions inventory (for the 5 years of the commitment period), whichever figure is lower.⁸³

Article 10 of the Kyoto Protocol states general commitments that are applicable to both Annex I and Non-Annex I Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances.⁸⁴ These general commitments mirror those in the UNFCCC, including

- improving the quality of emissions data;
- establishing national mitigation and adaptation programs;
- promoting environment friendly technology transfer;
- cooperating in scientific and technical research;
- promoting systematic observation systems and development of data archives to reduce uncertainties related to the climate system, the adverse impacts of climate change, and the economic and social consequences of various response strategies; and
- supporting education, training, public awareness, and capacity building.⁸⁵

⁸⁰ Footnote 69, Art. 17.

⁸¹ P.J. Sands et al. 2012. *Principles of International Environmental Law*. 3rd ed. Cambridge, UK: Cambridge University Press.

⁸² UNFCCC. [Mechanisms under the Kyoto Protocol: Emissions Trading](#).

⁸³ Conference of the Parties, UNFCCC, [Report of the Conference of the Parties on the Second Part of Its Sixth Session, Held at Bonn from 16 to 27 July 2001](#), FCCC/CP/2001/5 (25 September 2001). See specifically Decision 5/CP.6 ('The Bonn Agreements on the implementation of the Buenos Aires Plan of Action'), Annex [VI(4)].

⁸⁴ Footnote 69, Art. 10(1).

⁸⁵ Footnote 53, p. 16.

IV. 2010 Cancun Agreements

The 2010 United Nations Climate Change Conference (officially the 16th Session of the COP, or COP 16) was held in Cancun, Mexico, from 29 November to 10 December 2010. It resulted in the Cancun Agreements (one under the Kyoto Protocol track)⁸⁶ and one under the Ad Hoc Working Group on Long-term Cooperative Action (or LCA track).⁸⁷ The agreements contained key actions toward addressing climate change through a hybrid international and domestic approach. At the same time, the core decisions of the agreements aimed to assist developing countries in protecting themselves against climate change impacts while simultaneously pursuing sustainable development.

A. Decisions under the Kyoto Protocol Track

The preamble of the agreements under the Kyoto Protocol track clearly stated that Annex I Parties as a group should reduce emissions within the range of 25%–40% below 1990 levels by 2020 to avert the worst impacts of climate change. The agreements took note of the quantified economy-wide reduction targets of Annex I countries that are parties to the Kyoto Protocol,⁸⁸ and urged them to raise the level of ambition of the emission reductions they are to achieve.⁸⁹

The agreements also confirmed that the three flexible mechanisms created under the Kyoto Protocol (i.e., emissions trading, the Clean Development Mechanism [CDM], and Joint Implementation) shall continue to be available for meeting Annex I targets. They also expanded eligible CDM projects to include carbon dioxide capture and storage in geological formation,⁹⁰ and allowed the use of “standardized baselines” for CDM purposes.⁹¹ “Standardized baselines” are established to facilitate the calculation of emission reduction and removal.⁹² Their use was permitted because they are seen to reduce transaction costs; enhance transparency, objectivity, and predictability; facilitate access to the CDM; and

⁸⁶ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Sixth Session, Held in Cancun from 29 November to 10 December 2010–Addendum–Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Sixth Session*, FCCC/KP/CMP/2010/12/Add.1 (15 March 2011).

⁸⁷ Conference of the Parties, UNFCCC, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010–Addendum–Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session*, FCCC/CP/2010/7/Add.1 (15 March 2011), Decision 1/CP.16 (“The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention”).

⁸⁸ Footnote 86, Decision 1/CMP.6, para. 3.

⁸⁹ Footnote 86, Decision 1/CMP.6, para. 4.

⁹⁰ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Sixth Session, Held in Cancun from 29 November to 10 December 2010–Addendum–Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Sixth Session*, FCCC/KP/CMP/2010/12/Add.2 (15 March 2011). See Decision 7/CMP.6.

⁹¹ Footnote 90, Decision 3/CMP.6.

⁹² Footnote 91, para. 44.

scale up the abatement of GHG emissions, while ensuring environmental integrity.⁹³ They are to be used at the discretion of the host countries' designated national authorities.⁹⁴

Lastly, the agreements under the Kyoto Protocol track established a review and monitoring process for forest management reference levels under LULUCF provisions.

B. Decisions under the Long-term Cooperative Action Track

The LCA Agreements were anchored on the premise that warming of the climate system is unequivocal.⁹⁵ They also recognized that most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations, as assessed by the IPCC in its Fourth Assessment Report (footnote 95). The agreements' key steps were therefore in the context of the long-term goal to hold the increase in global average temperature below 2°C above preindustrial levels.⁹⁶ They called on the parties to take urgent action to meet this long-term goal, consistent with science (footnote 96), and on the basis of equity and in accordance with CBDR-RC.⁹⁷

However, the agreements also acknowledged that the long-term goal may need to be strengthened on the basis of the best available scientific knowledge and in the context of the first review in 2015.⁹⁸ They thus hold open the possibility of modifying the long-term goal to a more ambitious increase in global average temperature below 1.5°C above preindustrial levels (footnote 98).

The agreements also established the Green Climate Fund (GCF) to help facilitate financial support to developing countries via thematic funding windows.⁹⁹ The GCF would provide funds to accredited entities for approved projects intended to mitigate climate change in developing countries and assist them in adapting to climate change impacts. The GCF would be supported by a significant portion of the \$100 billion per year that developed countries agreed to jointly mobilize by 2020 under the Copenhagen Accord.¹⁰⁰

⁹³ Footnote 91, Preamble.

⁹⁴ Footnote 91, para. 47.

⁹⁵ Footnote 87, para. 3.

⁹⁶ Footnote 87, para. 4.

⁹⁷ Footnote 87, para. 1.

⁹⁸ Footnote 87, para. 4, states, “[The Conference of the Parties ...] *also recognizes* the need to consider, in the context of the first review, as referred to in paragraph 138 below, strengthening the long-term global goal on the basis of the best available scientific knowledge, including in relation to a global average temperature rise of 1.5°C.” (italics in the original)

⁹⁹ Footnote 87, para. 102–112.

¹⁰⁰ Footnote 87, para. 98. See also Conference of the Parties, UNFCCC, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009–Addendum–Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session*, FCCC/CP/2009/11/Add.1 (30 March 2010), Decision 2/CP.15 (“Copenhagen Accord”), para. 8.

The agreements further created a Technology Mechanism¹⁰¹ to facilitate the innovation, development, and transfer of climate-friendly and environmentally sound technology to developing countries.¹⁰² The Technology Mechanism is composed of

- the Technology Executive Committee (TEC),¹⁰³ comprised of nine members from Annex I Parties and 11 members from non-Annex 1 Parties (three each from Africa, Asia and the Pacific, and Latin America and the Caribbean; one member from a small island developing state; and one member from a least developed country party);¹⁰⁴ and
- the Climate Technology Centre and Network, tasked with facilitating a network of national, regional, sectoral and international technology networks, organizations, and initiatives.¹⁰⁵

The TEC is mandated to “identify global technology needs, provide recommendations on how to address these needs, as well as to foster engagement and collaboration with relevant organizations and other platforms working on technology transfer.”¹⁰⁶ On the other hand, the Climate Technology Centre and Network is responsible for providing advice, support, capacity building, and information dissemination on environmentally sound technologies.

The LCA Agreements also established the Cancun Adaptation Framework to enhance adaptation action through

- planning and implementation of adaptation actions identified in national adaptation planning processes;
- impact, vulnerability, and adaptation assessments;
- strengthening institutional capacities and enabling environments;
- building resilience of socioeconomic and ecological systems;
- enhancing disaster risk reduction strategies;
- technology development and transfer; and
- improving access to climate-related data.¹⁰⁷

In this regard, the Adaptation Committee was created to promote the implementation of enhanced action on adaptation through technical support and guidance, sharing of relevant information and good practices, and promoting synergy and strengthening engagement with national, regional, and international organizations.¹⁰⁸

¹⁰¹ Footnote 87, para. 117.

¹⁰² Footnote 87, Preamble of Section IV(B).

¹⁰³ Footnote 87, para. 121.

¹⁰⁴ Footnote 87, Appendix IV, Art. 1(b).

¹⁰⁵ Footnote 87, para. 123.

¹⁰⁶ United Nations Environment Programme. *United Nations Environment Programme Finance Initiative Climate Change Working Group Briefing on COP 16 and the Cancun Agreements*. p. 2.

¹⁰⁷ Footnote 87, para. 14.

¹⁰⁸ Footnote 87, para. 20.

On issues relating to deforestation and degradation, the LCA Agreements encourage developing countries to slow, halt, and reverse forest cover and carbon loss¹⁰⁹ by reducing emissions from deforestation and forest degradation, conservation of existing forest carbon stocks, sustainable forest management, and enhancement of forest carbon stocks (REDD+).¹¹⁰ These activities are to be undertaken in the context of adequate and predictable support to developing country parties and based on national circumstances.¹¹¹ The agreements thus request developing countries to develop a national strategy or action plan, national forest reference levels or subnational reference levels as an interim measure, a robust and transparent national forest monitoring system, and a system for providing information on how safeguards are being addressed throughout implementation.¹¹²

The agreements also emphasized the need for enhanced action on mitigation. Consequently, Annex I countries are held to a higher standard of monitoring and reporting, in particular with respect to their national communications on mitigation targets, and on the provision of financial, technological and capacity building support to developing country parties.¹¹³ Guidelines on the development of common reporting formats, methodology for finance, and review of information in national communications (e.g., progress made in achieving emission reductions) were also enhanced.¹¹⁴ Annex I Parties are required to communicate information on their national GHG inventories annually.

To complement these efforts, developing countries are to take nationally appropriate mitigation actions in the context of sustainable development, aimed at achieving a deviation in emissions relative to “business as usual” emissions in 2020.¹¹⁵ They are encouraged, on a voluntary basis, to inform the Conference of the Parties (COP) of their intention to implement nationally appropriate mitigation actions.¹¹⁶ Their national communications are to be submitted every 4 years.¹¹⁷

Furthermore, consistent with their capabilities and the level of support provided for reporting, developing countries are also to submit biennial reports containing updates of national GHG inventories, including a national inventory report and information on mitigation actions, needs, and support received (footnote 117). Additional flexibility will be given to the least developed country parties and small island developing states (footnote 117).

Internationally supported mitigation actions will be measured, reported, and verified domestically, and will be subject to international measurement, reporting,

¹⁰⁹ Footnote 87, Preamble of Section III(C). This is deemed as the “aim” of the REDD+ provisions.

¹¹⁰ Footnote 87, para. 70.

¹¹¹ Footnote 87, Preamble of Section III(C) and para. 71.

¹¹² Footnote 87, para. 71.

¹¹³ Footnote 87, para. 40.

¹¹⁴ Footnote 87, para. 42.

¹¹⁵ Footnote 87, para. 48.

¹¹⁶ Footnote 87, para. 50.

¹¹⁷ Footnote 87, para. 60.

and verification.¹¹⁸ States that finance mitigation action independently will not be subject to the measurement, reporting, and verification requirement, but will report their own progress.¹¹⁹

V. 2012 Doha Amendment

The Doha Amendment to the Kyoto Protocol¹²⁰ established (i) new quantified emission limitation or reduction targets for parties listed under its Annex B, which replaces the original Annex B to the Kyoto Protocol, and (ii) the second commitment period, which began on 1 January 2013 and will end in 2020. The parties committed to GHG emission reductions by at least 18% below 1990 levels by the end of the second commitment period. The Doha Amendment also adds nitrogen trifluoride to Annex A of the Protocol (i.e., list of GHGs covered).

The amended Annex B consists of 38 parties with binding emission reduction targets. It does not include four original Annex B countries—Canada, Japan, New Zealand, and the Russian Federation—which had either withdrawn from the Kyoto Protocol,¹²¹ or participated in the first round but indicated their intention not to take on new emission reduction targets in the second commitment period.¹²² It also does not include the United States, which had previously stated that it would not ratify the Kyoto Protocol.

Similar to the original Annex B under the Kyoto Protocol, developing country parties do not have binding reduction targets. Consequently, the Doha Amendment was received with mixed reactions, as the second commitment period affects only 14% of global emissions.¹²³

The Doha Amendment has not yet come into force, but it will do so on 31 December 2020. Entry into force requires 144 parties to the Kyoto Protocol to deposit their instruments of acceptance with the Depositary,¹²⁴ and 146 have done so as of October 2020.¹²⁵ Nonetheless, parties are allowed to provisionally apply the Amendment pending its entry into force.¹²⁶ Parties that do not

¹¹⁸ Footnote 87, para. 61.

¹¹⁹ N. Hultman. 2014. *The Cancun Agreements on Climate Change*. The Brookings Institution. 14 December.

¹²⁰ *Doha Amendment to the Kyoto Protocol*, Doha, 8 December 2012.

¹²¹ In the case of Canada.

¹²² In the case of Japan, New Zealand, and the Russian Federation.

¹²³ G. Erbach. 2015. *Briefing Note on the Doha Amendment to the Kyoto Protocol*. Brussels: European Parliamentary Research Service.

¹²⁴ See Kyoto Protocol, footnote 69, Art. 20(4) and Art. 21(7), which provide that amendments to the Kyoto Protocol enter into force on the 90th day after the date of receipt by the Depositary of an instrument of acceptance by at least three-fourths of the parties to the Protocol. With 192 parties to the Kyoto Protocol, the three-fourths threshold is 144 parties.

¹²⁵ United Nations Treaty Collection. *Doha Amendment (Information Page)*.

¹²⁶ Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Eighth Session, Held in Doha from 26 November to 8 December 2012—Addendum—Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Eighth Session*, FCCC/KP/CMP/2012/13/Add.1 (28 February 2013). See Decision 1/CMP.8, para. 5.

provisionally apply the Amendment are to implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes, as of 1 January 2013.¹²⁷ In any event, Article 18 of the 1969 Vienna Convention on the Law of Treaties requires parties that have accepted the Doha Amendment to refrain from acts which would defeat the object and purpose of the Amendment, pending its entry into force.¹²⁸

VI. 2015 Paris Agreement

The 2015 Paris Agreement, an agreement within the UNFCCC framework, was negotiated during COP 21 in Paris.¹²⁹ It was adopted by consensus on 12 December 2015 and came into force on 4 November 2016. As of October 2020, it had 195 signatories and 189 parties, including the European Union. All ADB developing member countries (DMCs) are parties to the Paris Agreement.

Entry into force occurred 30 days after two conditions concurred: (i) at least 55 parties had deposited their instruments of ratification, acceptance, approval or accession; and (ii) these parties accounted in total for at least an estimated 55% of the total global GHG emissions.¹³⁰ The desire for a truly multilateral instrument supported by both developed and developing countries accounts for the high entry into force threshold. Parties are also not allowed to make reservations to the provisions of the Paris Agreement.¹³¹

A. Object and Purpose

The Paris Agreement seeks to enhance the implementation of the UNFCCC, including its objective.¹³² At the same time, Article 2 of the agreement declares that efforts to strengthen the global response to the threat of climate change come in the context of sustainable development and efforts to eradicate poverty—a clear reference to the needs of developing countries and the fundamental principles of equity and of CBDR-RC.

The agreement aims to hold the increase in global average temperature to “well below 2°C above preindustrial levels,” and to pursue efforts toward a 1.5°C

¹²⁷ Footnote 126, para. 6.

¹²⁸ Footnote 45, Art. 18. The provision states, “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

¹²⁹ *Paris Agreement*, Paris, 12 December 2015, *United Nations Treaty Series*, No. 54113.

¹³⁰ Footnote 129, Art. 21(1).

¹³¹ Footnote 129, Art. 27.

¹³² Footnote 129, Art. 2(1).

temperature cap (footnote 132). The aspirational 1.5°C goal was a core demand of small island developing states and least developed countries that are most vulnerable to climate change and its impacts.¹³³

The agreement does not contain quantitative emission reduction targets in pursuance of the temperature goal. Instead, Article 4(1) states a qualitative objective: to reach global peaking of GHG emissions as soon as possible, and to undertake rapid reductions thereafter in accordance with best available science. The ambition is to achieve “climate neutrality,”¹³⁴ a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the 21st century.¹³⁵

B. Architecture of the Agreement

The Paris Agreement features a hybrid top-down and bottom-up approach. The bottom-up element consists of nationally determined contributions (NDCs), whose collective effect, the parties hope, would achieve the Agreement’s overarching temperature goal. However, some parties—concerned that the self-determining character of the contributions would be self-serving—sought to provide a check to unrestrained autonomy.¹³⁶ To enhance the oversight of these contributions at the international level, the agreement provides for the transparency system, the global stocktake process, and the compliance mechanism.

1. Bottom-Up Element: Nationally Determined Contributions

Article 4 of the Paris Agreement outlines the core obligation of each party: to prepare, communicate, and maintain successive NDCs that it intends to achieve.¹³⁷ These contributions contain each party’s climate action plan, and are to be provided every 5 years and recorded in a public registry maintained by the UNFCCC Secretariat.¹³⁸ Article 4 of the agreement requires that these contributions progress over time and manifest the parties’ highest possible ambition, reflecting their CBDR-RC in the light of different national circumstances.¹³⁹ Parties are also obliged to pursue domestic mitigation measures to achieve the objectives of such contributions.¹⁴⁰

¹³³ L. Rajamani. 2016. Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics. *International and Comparative Law Quarterly*. 65 (2). pp. 493–514.

¹³⁴ UNFCCC. [What is the Paris Agreement?](#)

¹³⁵ Footnote 129, Art. 4(1).

¹³⁶ Footnote 133, p. 502.

¹³⁷ Footnote 129, Art. 4(2).

¹³⁸ Footnote 129, Art. 4(9), and Art. 4(12).

¹³⁹ Footnote 129, Art. 4(3).

¹⁴⁰ Footnote 129, Art. 4(2). See also Art. 4(4), which states, “Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.”

The language of Article 4 denotes that this core obligation is an obligation of conduct, not an obligation of result.¹⁴¹ The phrases “intends to achieve” and “with the aim of achieving the objectives of such contributions” create a good faith expectation that parties intend and will aim to achieve their NDCs, but stop short of actually requiring them to do so (footnote 141). The Paris Agreement likewise does not penalize them if they are unable to fulfill the stipulations in their NDCs.

2. Top-Down Element: Oversight Mechanisms

a) *Transparency Framework*

The Paris Agreement established an enhanced transparency framework for action and support.¹⁴² It lays down comprehensive information requirements that underscore both the obligation of conduct in Article 4, and other obligations in the agreement (e.g., engagement in adaptation efforts under Article 7). The transparency framework is applicable to all parties, but it has a “built-in flexibility” which takes into account the varying capacities of developing countries.¹⁴³

The information requirements are found in parts of the agreement, including

- Article 4(8), which requires parties to provide the information necessary for clarity, transparency, and understanding of their NDCs;
- Article 13(7), which obliges parties to provide (i) a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, and (ii) the information necessary to track progress made in implementing and achieving their NDCs; and
- Article 13(8), which indicates that each party should provide information related to climate change impacts and adaptation.

Article 13(11) supplements the informational oversight provided under Article 13(7) (i.e., information provided under Article 13(7) shall undergo a technical expert review). In addition, each party shall participate in a facilitative, multilateral consideration of progress with respect to its implementation and achievement of its NDCs.¹⁴⁴

Developed countries are further obliged to provide information on the financial, technology transfer, and capacity-building support they provide to developing countries.¹⁴⁵ This information is also subject to technical expert review and a multilateral assessment of progress made.¹⁴⁶ Developing countries, on the other hand, are to provide information on the support they need and have received.¹⁴⁷

¹⁴¹ Footnote 133, pp. 497–498.

¹⁴² Footnote 129, Art. 13(1)–13(15).

¹⁴³ Footnote 129, Art. 13(1) and Art. 13(2).

¹⁴⁴ Footnote 129, Art. 13(11).

¹⁴⁵ Footnote 129, Art. 13(9).

¹⁴⁶ Footnote 129, Art. 13(11). The technical expert review will be done in accordance with Decision 1/CP.21.

¹⁴⁷ Footnote 129, Art. 13(10).

b) Global Stocktake Process

The Paris Agreement requires a global stocktake process, beginning in 2023 and every 5 years thereafter.¹⁴⁸ Article 14 of the Paris Agreement describes this process as an assessment of the collective progress toward achieving (i) the purpose of the agreement (i.e., to hold the increase in global average temperature to “well below 2°C” above preindustrial levels, and to pursue efforts toward a 1.5°C temperature cap), and (ii) the agreement’s long-term goals.¹⁴⁹ Article 14 makes clear that only progress at the collective level is to be considered, thereby shielding individual parties from determinations of adequacy with respect to their actions (footnote 133).

The agreement requires that the global stocktake process be done in a comprehensive and facilitative manner—considering mitigation, adaptation, and the means of implementation and support—and in the light of equity and the best available science.¹⁵⁰ The outcome of the periodic global stocktake shall then shape and inform the parties’ NDCs.¹⁵¹ Considering equity in the global stocktake process was a win for developing countries. International climate change expert and academic Lavanya Rajamani notes that this leaves the door open to equitable burden sharing.¹⁵²

The global stocktake is an essential element of the Paris Agreement’s top-down oversight mechanism. Without it, it would be impossible to determine whether progress is being made toward the Agreement’s objectives, and whether parties are contributing as much as they should, given historical responsibilities, current capabilities, and development needs (footnote 133).

c) Compliance Mechanism

Article 15 of the Paris Agreement established a compliance mechanism to facilitate implementation of and promote compliance with its provisions. The agreement does not describe this mechanism in a detailed manner, and only states that it is a committee that shall (i) be expert-based and facilitative in nature, and (ii) function in a manner that is transparent, non-adversarial, and non-punitive. The intention of the parties was to agree on broad principles and leave the modalities and procedures of the compliance mechanism to future negotiations by the COP serving as the meeting of the parties to the Paris Agreement (CMA).

In December 2018, the CMA meeting in Krakow, Poland agreed on several important matters involving the compliance mechanism:

¹⁴⁸ Footnote 129, Art. 14(2).

¹⁴⁹ Footnote 129, Art. 14(1). The global stocktake is to be done by the Conference of the Parties serving as the meeting of the parties to the Paris Agreement.

¹⁵⁰ Footnote 129, Art. 14(1).

¹⁵¹ Footnote 129, Art. 14(3).

¹⁵² Footnote 133. Professor Rajamani is Professor of International Environmental Law at the Faculty of Law at the University of Oxford. She is an expert in international climate change law and policy, and has been involved in climate negotiations in various capacities.

- **Scope.** In carrying out its work, the Committee shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.¹⁵³
- **Institutional arrangements.** The Committee shall consist of 12 members with recognized competence in relevant scientific, technical, socioeconomic, or legal fields to be elected by the CMA on the basis of equitable geographical representation.¹⁵⁴
- **Consensus-based decision-making.** The Committee shall make every effort to reach agreement on any decision by consensus. If all efforts at reaching consensus have been exhausted, as a last resort, the decision may be adopted by at least three quarters of the members present and voting.¹⁵⁵
- **Appropriate measures.** To facilitate implementation and promote compliance, the Committee shall take appropriate measures, which may include: (i) engaging in a dialogue with the party concerned to identify challenges, make recommendations and share information, such as on access to finance, technology, and capacity building support, as appropriate; (ii) assisting the party concerned in the engagement with the appropriate finance, technology, and capacity building bodies or arrangements to identify possible challenges and solutions; (iii) recommending the development of an action plan and, if so requested, assisting the party concerned in developing the plan; and (iv) issuing findings of fact in relation to matters of implementation and compliance.¹⁵⁶

The Committee's initial members, elected in December 2019, will develop rules of procedure for consideration and adoption by the CMA in 2020.¹⁵⁷

C. Adaptation

Adaptation became more prominent in the Paris Agreement in relation to other climate-related international instruments. The Paris Agreement has established a global goal on adaptation—enhancing adaptive capacity, strengthening resilience, and reducing vulnerability to climate change in the context of sustainable development and the temperature goal.¹⁵⁸ It recognizes that adaptation is a global challenge faced by all, and that it is a key component of the long-term global response to climate change.¹⁵⁹ It also acknowledges the crucial link between mitigation and adaptation (i.e., greater levels of mitigation can reduce the need for additional adaptation efforts).¹⁶⁰

¹⁵³ Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018—Addendum—Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement*, FCCC/PA/CMA/2018/3/Add.2 (19 March 2019). See Decision 20/CMA.1, Annex [I(4)].

¹⁵⁴ Footnote 153, para. 5.

¹⁵⁵ Footnote 153, para. 16.

¹⁵⁶ Footnote 153, para. 30.

¹⁵⁷ Footnote 153, para. 17.

¹⁵⁸ Footnote 129, Art. 7(1).

¹⁵⁹ Footnote 129, Art. 7(2).

¹⁶⁰ Footnote 129, Art. 7(4).

Nevertheless, Professor Rajamani notes that the only individual commitments in the Paris Agreement (“each party”), formulated in mandatory terms (“shall”) with no qualifying or discretionary aspects, occur in relation to mitigation and transparency.¹⁶¹ In contrast, most of the commitments relating to adaptation are “soft” obligations that recommend and encourage action, rather than create individual, mandatory, and unqualified obligations (footnote 46).

For example, Article 7(10) of the Paris Agreement states that each party “should” (but not “shall”) submit and update periodically an adaptation communication, “as appropriate.” Similarly, Article 13(8) states that each party “should” also provide information related to climate change impacts and adaptation, “as appropriate.” The most strongly worded individual party commitment in relation to adaptation is found in Article 7(9) on adaptation planning and implementation, which uses “each party” and “shall.” However, even this provision is qualified by “as appropriate.”¹⁶²

D. Loss and Damage

Neither the UNFCCC nor the Paris Agreement provides an official definition of loss and damage in the context of climate change. Nevertheless, a literature review on loss and damage commissioned by the UNFCCC defines (i) loss as “negative impacts in relation to which reparation or restoration is impossible (such as loss of freshwater resources),” and (ii) damage as “negative impacts in relation to which reparation or restoration is possible (such as windstorm damage to the roof of a building, or damage to a coastal mangrove forest as a result of coastal surges).”¹⁶³ Many authors refer to loss and damage as the impacts of

¹⁶¹ Footnote 46. “It matters how the provision is phrased. If the provision uses the imperative ‘shall’, it typically creates rights and obligations for Parties. If it uses ‘will’, it implies a promise or expectation. If it uses terms such as ‘should’, ‘strive’ or ‘encourage’, it is recommendatory. [...] If the provision uses discretionary, qualifying and contextual language (using phrases such as ‘as appropriate’), it will expand the space for self-serving interpretations by Parties, and constrict the space for consistent application. [...] Notwithstanding several ‘soft’ obligations in the mitigation section, [...] the majority of obligations in relation to adaptation, loss and damage, finance, technology and capacity building are soft obligations. In these areas, provisions recommend and encourage actions or set aspirations for all Parties or for groups of Parties, rather than establish individual mandatory obligations. Many of these provisions also contain qualifying and discretionary elements.”

¹⁶² Art. 7(9) states, “**Each Party shall, as appropriate**, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions, which may include:

- (a) The implementation of adaptation actions, undertakings and/or efforts;
- (b) The process to formulate and implement national adaptation plans;
- (c) The assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems;
- (d) Monitoring and evaluating and learning from adaptation plans, policies, programmes and actions; and
- (e) Building the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources.” (emphasis supplied)

¹⁶³ See Subsidiary Body for Implementation (Thirty-seventh session, Doha, 26 November to 1 December 2012), *A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage: A Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change: Note by the Secretariat*, FCCC/SBI/2012/INF.14 (15 November 2012).

climate change after adaptation has occurred (i.e., akin to the concept of “residual damages” or the cost of climate change after optimal adaptation has taken place).¹⁶⁴

Article 8 of the Paris Agreement recognizes the importance of averting, minimizing, and addressing loss and damage associated with the adverse effects of climate change, and the role of sustainable development in reducing such risks. These loss and damage incidents may result from extreme weather events, such as storm surges, cyclones, droughts, and heat waves; and slow onset events, such as sea level rise, rising temperatures, desertification, loss of biodiversity, and forest degradation.¹⁶⁵

The Conference of the Parties has clarified that Article 8 of the agreement does not involve or provide a basis for any liability or compensation.¹⁶⁶ Instead, the Paris Agreement adopts the Warsaw International Mechanism for Loss and Damage (L&D Mechanism) to address loss and damage associated with impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change.¹⁶⁷ The L&D Mechanism promotes the implementation of approaches to address loss and damage in three ways:

- enhancing knowledge and understanding of comprehensive risk management approaches;
- strengthening dialogue, coordination, coherence, and synergies among relevant stakeholders; and
- enhancing action and support, including finance, technology, and capacity building.¹⁶⁸

In addition, the global stocktake may take into account, as appropriate, efforts that avert, minimize, and address loss and damage.”¹⁶⁹

¹⁶⁴ X. Lu and R. Abrigo. [Understanding the Risks of Loss and Damage from Climate Change. Development Asia.](#)

¹⁶⁵ Footnote 164; D. Puig et al. 2019. [Loss and Damage in the Paris Agreement’s Transparency Framework. Policy Brief.](#) June.

¹⁶⁶ Conference of the Parties, UNFCCC, [Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015–Addendum–Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session](#), FCCC/CP/2015/10/Add.1 (29 January 2016). See Decision 1/CP.21, para. 51.

¹⁶⁷ UNFCCC. [Frequently Asked Questions – Warsaw International Mechanism for Loss and Damage.](#) See also footnote 129, Art. 8(2).

¹⁶⁸ Conference of the Parties, UNFCCC, [Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013–Addendum–Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session](#), FCCC/CP/2013/10/Add.1 (31 January 2014). See Decision 2/CP.19, para. 5.

¹⁶⁹ Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, [Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018–Addendum–Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement](#), FCCC/PA/CMA/2018/3/Add.2 (19 March 2019). See Decision 19/CMA.1, para. 6(b)(ii).

E. Rulebook

The parties to the Paris Agreement intentionally drafted a text that conveys agreement on broad principles, a blueprint to the international response on climate change issues. Much of its language would thus, by design, have to be clarified by subsequent implementing rules. In December 2018, 3 years after the Paris Agreement was adopted, the parties agreed on the “Paris Rulebook” to operationalize the implementation of the Paris Agreement.¹⁷⁰ The Rulebook contains regulations on reporting, formats, tracking of NDCs, review of progress made, risks and vulnerabilities to climate impacts, and transparency and accountability.

However, two issues remain outstanding and will have to be resolved in the future: (i) rules on transfer and accounting for emission reduction schemes, such as international market mechanisms; and (ii) standardization of periods covered by NDCs—as some cover 2030 while other countries’ contributions cover until 2025 only.¹⁷¹

F. Human Rights Dimension

The Paris Agreement links the instrument to human rights principles. For instance, the Preamble states that states parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights; the right to health; the rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations; the right to development; gender equality; empowerment of women; and intergenerational equity. Adaptation action should follow a country-driven, gender-responsive, participatory, and fully transparent approach, taking into consideration vulnerable groups, communities, and ecosystems.¹⁷²

VII. Tabular Summaries of Treaty Status

Tables 2.1 and 2.2 summarize the status of each country covered in this report in relation to the treaties constituting the international climate change legal framework. The tabular summaries underscore the universal adoption of these treaties. All countries mentioned are Non-Annex I Parties.

¹⁷⁰ UNFCCC. [Katowice Climate Package](#).

¹⁷¹ N. Cogswell and Y. Dagnet. 2019. [Why Does the Paris Climate Agreement Need a Rulebook? 7 Questions and Answers](#). *World Resources Institute*. 13 June.

¹⁷² Footnote 129, Art. 7(5).

**Table 2.1: Summary of Status (Climate Change Treaties)—
Southeast Asia and South Asia Developing Member Countries**

| Country | UNFCCC | Kyoto Protocol | Doha Amendment | Paris Agreement |
|-----------------------|---------------|----------------|----------------|-----------------|
| Southeast Asia | | | | |
| Brunei Darussalam | 7 Aug 2007 a | 20 Aug 2009 a | 14 Nov 2014 A | 21 Sep 2016 r |
| Cambodia | 18 Dec 1995 a | 22 Aug 2002 a | 17 Nov 2015 A | 6 Feb 2017 r |
| Indonesia | 23 Aug 1994 r | 3 Dec 2004 r | 30 Sep 2014 A | 31 Oct 2016 r |
| Lao PDR | 4 Jan 1995 a | 6 Feb 2003 a | 23 Apr 2019 A | 7 Sep 2016 r |
| Malaysia | 13 Jul 1994 r | 4 Sep 2002 r | 12 Apr 2017 A | 16 Nov 2016 r |
| Myanmar | 25 Nov 1994 r | 13 Aug 2003 a | 19 Sep 2017 A | 19 Sep 2017 r |
| Philippines | 2 Aug 1994 r | 20 Nov 2003 r | 13 Apr 2016 A | 23 Mar 2017 r |
| Singapore | 29 May 1997 r | 12 Apr 2006 a | 23 Sep 2014 A | 21 Sep 2016 r |
| Thailand | 28 Dec 1994 r | 28 Aug 2002 r | 1 Sep 2015 A | 21 Sep 2016 r |
| Viet Nam | 16 Nov 1994 r | 25 Sep 2002 r | 22 Jun 2015 A | 3 Nov 2016 AA |
| South Asia | | | | |
| Afghanistan | 19 Sep 2002 r | 25 Mar 2013 a | – | 15 Feb 2017 r |
| Bangladesh | 15 Apr 1994 r | 22 Oct 2001 a | 13 Nov 2013 A | 21 Sep 2016 r |
| Bhutan | 25 Aug 1995 r | 26 Aug 2002 a | 29 Sep 2015 A | 19 Sep 2017 r |
| India | 1 Nov 1993 r | 26 Aug 2002 a | 8 Aug 2017 A | 2 Oct 2016 r |
| Maldives | 9 Nov 1992 r | 30 Dec 1998 r | 1 Jul 2015 A | 22 Apr 2016 r |
| Nepal | 2 May 1994 r | 16 Sep 2005 a | – | 5 Oct 2016 r |
| Pakistan | 1 Jun 1994 r | 11 Jan 2005 a | 31 Oct 2017 A | 10 Nov 2016 r |
| Sri Lanka | 23 Nov 1993 r | 3 Sep 2002 a | 2 Dec 2015 A | 21 Sep 2016 r |

Lao PDR = Lao People's Democratic Republic, UNFCCC = United Nations Framework Convention on Climate Change.

Notes: a = accession, A = acceptance, AA = approval, r = ratification.

Sources:

United Nations Treaty Collection. [Doha Amendment to the Kyoto Protocol](#) (accessed 27 October 2020).

United Nations Treaty Collection. [Kyoto Protocol to the United Nations Framework Convention on Climate Change](#) (accessed 27 October 2020).

United Nations Treaty Collection. [Paris Agreement](#) (accessed 27 October 2020).

United Nations Treaty Collection. [United Nations Framework Convention on Climate Change](#) (accessed 27 October 2020).

Table 2.2: Summary of Status (Climate Change Treaties)—Pacific Developing Member Countries

| Country | UNFCCC | Kyoto Protocol | Doha Amendment | Paris Agreement |
|------------------------------------|---------------|----------------|----------------------------|----------------------------|
| Cook Islands | 20 Apr 1993 r | 27 Aug 2001 r | 5 Nov 2018 A | 1 Sep 2016 r ^a |
| Fiji | 25 Feb 1993 r | 17 Sep 1998 r | 19 Sep 2017 A | 22 Apr 2016 r |
| Kiribati | 7 Feb 1995 r | 7 Sep 2000 a | 11 Feb 2016 A | 21 Sep 2016 r |
| Marshall Islands | 8 Oct 1992 r | 11 Aug 2003 r | 7 May 2015 A ^b | 22 Apr 2016 r ^a |
| Micronesia, Federated States of | 18 Nov 1993 r | 21 Jun 1999 r | 19 Feb 2014 A ^b | 15 Sep 2016 r ^a |
| Nauru | 11 Nov 1993 r | 16 Aug 2001 a | 1 Dec 2014 A ^b | 22 Apr 2016 r |
| Palau | 10 Dec 1999 a | 10 Dec 1999 a | 10 Mar 2015 A | 22 Apr 2016 r |
| Papua New Guinea | 16 Mar 1993 r | 28 Mar 2002 r | – | 21 Sep 2016 r |
| Samoa | 29 Nov 1994 r | 27 Nov 2000 r | 18 Sep 2015 A | 22 Apr 2016 r |
| Solomon Islands | 28 Dec 1994 r | 13 Mar 2003 r | 5 Sep 2014 A ^b | 21 Sep 2016 r ^c |
| Timor-Leste | 10 Oct 2006 a | 14 Oct 2008 a | – | 16 Aug 2017 r |
| Tonga | 20 Jul 1998 a | 14 Jan 2008 a | 22 Oct 2018 A | 21 Sep 2016 r |
| Tuvalu | 26 Oct 1993 r | 16 Nov 1998 r | 4 Dec 2014 A | 22 Apr 2016 r ^a |
| Vanuatu | 25 Mar 1993 r | 17 Jul 2001 a | 15 Mar 2018 A | 21 Sep 2016 r ^a |

UNFCCC = United Nations Framework Convention on Climate Change.

Notes: a = accession, A = acceptance, r = ratification.

^a Submitted a declaration to the effect that (i) the emission reduction obligations in Article 3 of the Kyoto Protocol, the Doha Amendment, and the Paris Agreement are inadequate to prevent a global temperature increase of 1.5°C above preindustrial levels, and (ii) this will have severe implications for the country's national interests.

^b Submitted a declaration to the effect that the emission reduction obligations in Article 3 of the Kyoto Protocol and the Doha Amendment are inadequate to prevent a global temperature increase of 1.5°C above preindustrial levels.

^c Submitted a declaration to the effect that the “low ambition” of the Paris Agreement will have severe impacts and undermine the country's sustainable development efforts.

Sources:

United Nations Treaty Collection. [Doha Amendment to the Kyoto Protocol](#) (accessed 27 October 2020).

United Nations Treaty Collection. [Kyoto Protocol to the United Nations Framework Convention on Climate Change](#) (accessed 27 October 2020).

United Nations Treaty Collection. [Paris Agreement](#) (accessed 27 October 2020).

United Nations Treaty Collection. [United Nations Framework Convention on Climate Change](#) (accessed 27 October 2020).



Photo by Eric Sales/ADB.

Erosion. A washed out seawall that was intended to protect the village in Tarawa, Kiribati from waves (photo by Eric Sales/ADB).





PART THREE

MULTILATERAL ENVIRONMENTAL LEGAL INSTRUMENTS

I. Hard Law

Hard law refers to legally binding sources of law that create rights and duties, such as treaties and customary norms. They are “precise (or can be made precise through adjudication or the issuance of detailed regulations) and delegate authority for interpreting and implementing the law.”¹

A. 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) is an international convention for the conservation and wise use of wetlands and their resources.² It follows a threefold approach whereby each contracting party is obliged to (i) designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance (the “Ramsar List”), and implement a plan promoting their conservation; (ii) work toward, as far as possible, the wise use of wetlands in its territory; and (iii) cooperate with other contracting parties, especially with respect to transboundary wetlands, shared water systems, and their resources.³

It entered into force on 21 December 1975, and had 171 contracting parties as of November 2019.

¹ K. Abbott and D. Snidal. 2000. Hard and Soft Law in International Governance. *Intl Org.* 54. p. 421.

² [Convention on Wetlands of International Importance Especially as Waterfowl Habitat](#), Ramsar, Iran, 2 February 1971, *United Nations Treaty Series*, Vol. 996, No. 14583, p. 245. See Art. 3(1) for the convention’s object and purpose. Wetlands are broadly defined in Art. 1(1) as “areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.”

³ Footnote 2, Arts. 2, 3, 4, and 5.

B. 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and Its 1996 Protocol

The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) aims to protect the marine environment by regulating pollution caused by ocean dumping. Dumping is the deliberate disposal at sea⁴ of (i) wastes or other matter from vessels, aircraft, platforms or other human-made structures at sea, or (ii) vessels, aircraft, platforms or other human-made structures at sea themselves.⁵ The convention creates a “black list” and “gray list” of wastes or other matter, and regulates them according to their hazardous impact on the environment:

- The dumping of wastes or other matter listed in its Annex I is generally prohibited.
- The dumping of wastes or other matter listed in its Annex II (substances requiring “special care”) needs a prior special permit.
- The dumping of all other wastes or matter requires a prior general permit.⁶

The London Convention entered into force on 30 August 1975. It had 87 parties as of September 2020.⁷ About 21 years later, the 1996 Protocol was adopted to modernize and, in due course, replace the London Convention (footnote 7). Thus, parties common to both the London Convention and the 1996 Protocol are obliged to follow the terms of the latter.⁸

The 1996 Protocol codifies the precautionary principle⁹ and the polluter pays principle.¹⁰ It also follows a “reverse listing” approach (i.e., dumping of any waste or other matter not listed in the 1996 Protocol’s Annex 1 is prohibited). Dumping of substances specified in Annex 1 is allowed, but requires a permit issued by the

⁴ *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, London, Mexico City, Moscow, Washington, DC, 29 December 1972, *United Nations Treaty Series*, Vol. 1046, No. 15749, p. 120. Art. III(3) defines “sea” as all marine waters other than the internal waters of states.

⁵ Footnote 4, Art. III(1)(a). Therefore, the convention does not cover the deliberate disposal at sea of wastes or other matter from land-based sources.

⁶ Footnote 4, Art. IV.

⁷ International Maritime Organization. *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (Information Page).

⁸ *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, London, 7 November 1996, *International Legal Materials*, Vol. 36, p. 7. Art. 23 states, “This Protocol will supersede the Convention as between Contracting Parties to this Protocol which are also Parties to the Convention.”

⁹ Footnote 8, Art. 3(1) states, “In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.”

¹⁰ Footnote 8, Art. 3(2) states, “Taking into account the approach that the polluter should, in principle, bear the cost of pollution, each Contracting Party shall endeavour to promote practices whereby those it has authorized to engage in dumping or incineration at sea bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest.”

appropriate authority designated by the state. The 1996 Protocol entered into force on 24 March 2006, and had 53 parties as of September 2020 (footnote 7).

C. 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage

On 16 November 1972, the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention). It came into force on 17 December 1975, and had 194 states parties as of 23 October 2020.

Through this treaty, the states parties committed to identify, protect, and conserve cultural and natural heritage of such outstanding universal value that its conservation and transmission to future generations are paramount (the “World Heritage List”).¹¹ Examples of natural heritage properties in Asia and the Pacific include the Sinharaja Forest Reserve of Sri Lanka, the Chitwan National Park of Nepal, the Great Himalayan National Park of India, Ha Long Bay of Viet Nam, the Mount Hamiguitan Range Wildlife Sanctuary of the Philippines, and the Phoenix Islands of Kiribati.¹²

D. 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol

The International Convention for the Prevention of Pollution from Ships and the 1978 Protocol (ICPPS 73/78) constitute the principal treaty dealing with preventing and minimizing pollution of the marine environment caused by ships from accidental or routine operational causes. The convention was adopted in November 1973.

However, prior to its entry into force, the states parties decided to come up with the 1978 Protocol to address issues arising from tanker accidents in 1976–1977.¹³ The 1978 Protocol thus absorbed the ICPPS main convention and entered into force in October 1983. As of September 2020, it had 159 parties, collectively representing 98.95% of the world’s tonnage.¹⁴

¹¹ [Convention Concerning the Protection of the World Cultural and Natural Heritage](#), Paris, 16 November 1972, *United Nations Treaty Series*, Vol. 1037, No. 15511, p. 151. Art. 4.

¹² Footnote 11, Art. 2 defines natural heritage as “(i) natural features, or physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; (ii) geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and (iii) natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.”

¹³ International Maritime Organization. [International Convention for the Prevention of Pollution from Ships \(Information Page\)](#); and [Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 \(with annexes, final act and International Convention of 1973\)](#), London, 17 February 1978, *United Nations Treaty Series*, Vol. 1340, No. 22484, p. 61.

¹⁴ International Maritime Organization. [Status of Treaties](#) (where the convention and the 1978 Protocol are collectively referred to as “MARPOL 1973/1978”).

The ICPPS has undergone several amendments since its entry into force. In its current form, it has six technical annexes which cover types of pollutants including oil and oily water; noxious liquid substances in bulk; harmful substances carried by sea in packaged form; and sewage, garbage, and air pollution from ships.

E. 1979 Convention on Long-Range Transboundary Air Pollution

The Convention on Long-Range Transboundary Air Pollution (CLRTAP) was adopted and opened for signature in November 1979. It came into force on 16 March 1983, and had 51 parties as of October 2020.¹⁵ The CLRTAP aims to limit and, as far as possible, gradually reduce and prevent air pollution, including long-range transboundary air pollution.¹⁶

The convention has been extended by eight protocols that specify measures to reduce states' emissions of air pollutants:

- (i) 1984 Protocol on long-term financing of the cooperative programme for monitoring and evaluation of the long-range transmission of air pollutants in Europe;
- (ii) 1985 Helsinki Protocol on the reduction of sulfur emissions or their transboundary fluxes by at least 30%;
- (iii) 1988 Protocol concerning the control of emissions of nitrogen oxides or their transboundary fluxes;
- (iv) 1991 Protocol on the control of emissions of volatile organic compounds or their transboundary fluxes;
- (v) 1994 Oslo Protocol on further reduction of sulfur emissions;
- (vi) 1998 Protocol on heavy metals;
- (vii) 1998 Aarhus Protocol on persistent organic pollutants; and
- (viii) 1999 Gothenburg Protocol to abate acidification, eutrophication and ground-level ozone.

F. 1982 United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) entered into force on 16 November 1994, and had 168 parties as of October 2020.¹⁷ It established the legal framework for marine and maritime activities, articulating the rights and responsibilities of states with respect to their use of the world's oceans. While it was negotiated and adopted in 1982 outside the then nascent climate change framework, its provisions present some overlap with the climate change regulatory space. For example:

¹⁵ United Nations Treaty Collection. [Convention on Long-Range Transboundary Air Pollution \(Information Page\)](#).

¹⁶ [Convention on Long-Range Transboundary Air Pollution](#), Geneva, 13 November 1979, *United Nations Treaty Series*, Vol. 1302, No. 21623, p. 217. Art. 2.

¹⁷ United Nations Treaty Collection. [UNCLOS \(Information Page\)](#).

- The Article 1 definition of marine pollution is broad enough to cover GHG emissions.¹⁸
- The general due diligence obligation under Article 194 (measures to prevent, reduce, and control pollution of marine environment from any source) can be interpreted in light of mitigation measures.
- In the context of pollution from land-based sources (Article 207) and pollution through or from the atmosphere (Article 212), UNCLOS mandates that states take into account internationally agreed rules, standards, and recommended practices and procedures when adopting laws and regulations to prevent, reduce, and control pollution of the marine environment.

G. 1985 Vienna Convention for the Protection of the Ozone Layer, 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and 2016 Amendment to the Montreal Protocol (Kigali Amendment)

The Vienna Convention for the Protection of the Ozone Layer (VCPOL) entered into force on 22 September 1988, and as of October 2020 had 198 parties.¹⁹ The convention did not require parties to have legally binding reduction targets for the use of human-made chlorofluorocarbons. However, the Ozone Secretariat of the United Nations Environment Programme (UNEP) has noted the convention's landmark nature on two fronts:

- (i) It serves as a framework agreement for further regulatory action in the international sphere on the issue of ozone layer protection (e.g., 1987 Montreal Protocol).
- (ii) It is likely the first major international negotiation that accepted the “precautionary principle” whereby states reached an agreement in principle to address a global environmental challenge prior to full-scale manifestation of its effects.²⁰

¹⁸ *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, *United Nations Treaty Series*, Vol. 1833, No. 31363, p. 3. Art. 1 defines pollution of the marine environment as “the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”

¹⁹ Including the European Union and the Holy See. See United Nations Treaty Collection. [Vienna Convention for the Protection of the Ozone Layer \(Information Page\)](#); and [Vienna Convention for the Protection of the Ozone Layer](#), Vienna, 22 March 1985, *United Nations Treaty Series*, Vol. 1513, No. 26164, p. 293.

²⁰ Secretariat for the Vienna Convention for the Protection of the Ozone Layer & The Montreal Protocol on Substances that Deplete the Ozone Layer. 2001. [The Vienna Convention for the Protection of the Ozone Layer](#). November. p. 26.

The Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the VCPOL) was adopted and opened for signature in September 1987.²¹ It entered into force on 1 January 1989. Along with the framework 1985 Vienna Convention, it is the most universally ratified treaty in United Nations history, with 198 parties.²² The protocol aims to protect the stratospheric ozone layer by phasing out the production and use of ozone depleting substances in a step-wise fashion. The stratospheric ozone layer protects the earth from harmful levels of ultraviolet radiation from the sun. The protocol has been amended several times since its entry into force: in 1990 (London), 1992 (Copenhagen), 1995 (Vienna), 1997 (Montreal), 1999 (Beijing), and 2016 (Kigali).²³

The 2016 Kigali Amendment, in particular, represents an innovative use of the Montreal Protocol to combat climate change and its adverse impacts.²⁴ It aims for a global phasedown of hydrofluorocarbons by reducing their production and consumption. Hydrofluorocarbons, used mainly in refrigeration and air conditioning as substitutes for ozone-depleting hydrochlorofluorocarbons and chlorofluorocarbons, are potent GHGs that are more harmful to the climate than carbon dioxide.²⁵ Global implementation of the Kigali Amendment could prevent up to 0.5°C of global warming by the end of this century (footnote 25). It entered into force on 1 January 2019, and had 110 states parties as of October 2020.²⁶

H. 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) is an international treaty that seeks to reduce the movement of hazardous wastes between countries, especially between developed and developing countries (“toxic trade”).²⁷ Its principal objective is to minimize the risk of damage to human health and the environment caused by hazardous wastes and other wastes, and the transboundary movement thereof, by reducing their generation to a minimum in terms of quantity and/or hazard potential.²⁸

²¹ *Montreal Protocol on Substances that Deplete the Ozone Layer*, Montreal, 16 September 1987, *United Nations Treaty Series*, Vol. 1522, No. 26369, p. 3.

²² Including the European Union and the Holy See. See United Nations Treaty Collection. *Montreal Protocol on Substances that Deplete the Ozone Layer (Information Page)*.

²³ United States Environmental Protection Agency. *International Treaties and Cooperation about the Protection of the Stratospheric Ozone Layer*.

²⁴ *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Kigali, Rwanda, 15 October 2016, *United Nations Treaty Series*, No. 26369.

²⁵ United Nations Environment Programme. 2016. *The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change*. 8 December.

²⁶ Including the European Union. See United Nations Treaty Collection. *Kigali Amendment (Information Page)*.

²⁷ K.K. Peiry. 2010. *Introductory Note. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*. *Audiovisual Library of International Law, United Nations*.

²⁸ *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Basel, 22 March 1989, *United Nations Treaty Series*, Vol. 1673, No. 28911, p. 57. Preamble. (See first and third paragraphs).

The term “hazardous wastes” covers a broad range of wastes that fulfill two conditions: (i) listed under Annex I of the convention, and (ii) demonstrate one of the characteristics stated in Annex III (e.g., explosive, flammable, toxic, oxidizing, poisonous, or corrosive).²⁹ Nevertheless, wastes that do not comply with the Annex I and Annex III requirements are still considered “hazardous waste” if they are considered to be such by the domestic legislation of the party of export, import or transit (footnote 29). “Other wastes,” also covered under the convention, are those listed under the convention’s Annex II (i.e., household waste and incinerator ash).³⁰ Transboundary movement of wastes covered by the convention is restricted, except if it is compliant with the principles of environmentally sound management.³¹

The Basel Convention entered into force in May 1992, and had 188 parties as of November 2020.³²

I. 1991 Convention on Environmental Impact Assessment in a Transboundary Context

The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in 1991 under the auspices of the United Nations Economic Commission for Europe (UNECE). The convention acknowledges the interrelationship between economic activities and their environmental consequences, and the need to ensure environmentally sound and sustainable development, especially in the transboundary context.³³ It thus obliges states parties to conduct environmental impact assessments of activities listed under its Appendix I³⁴ prior to a decision to authorize or undertake the activity.³⁵ Proposed activities not listed under Appendix I will nevertheless require an environmental impact assessment if concerned parties agree that they are likely to cause a significant adverse transboundary impact and thus should be treated as if they were so listed.³⁶

The Espoo Convention came into force on 10 September 1997, and initially was open only to states within the Economic Commission for Europe (ECE) region. Its First Amendment, adopted in 2001 and which entered into force on 26 August 2014,

²⁹ Footnote 28, Art. 1(1).

³⁰ Footnote 28, Art. 1(2).

³¹ Footnote 28, Art. 4.

³² United Nations Treaty Collection. [Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal \(Information Page\)](#).

³³ [Convention on Environmental Impact Assessment in a Transboundary Context](#), Espoo, Finland, 25 February 1991, *United Nations Treaty Series*, Vol. 1989, No. 34028, p. 309. Preamble.

³⁴ For example, installations for the reprocessing of irradiated nuclear fuel; integrated chemical installations; large-diameter pipelines for the transport of oil, gas, or chemicals; and large dams and reservoirs.

³⁵ Footnote 33, Art. 2(3).

³⁶ Footnote 33, Art. 2(5).

allowed accession to the convention by states outside the ECE region.³⁷ As of October 2020, the Espoo Convention had 45 parties.³⁸

J. 1994 Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects

The Energy Charter Treaty (ECT) is a multilateral convention that created a framework for transboundary cooperation in the energy industry. It aims for energy security via non-discriminatory energy markets, balanced with the principles of sustainable development and sovereignty over energy resources.³⁹ It focuses on the following areas:

- (i) trade of energy materials (e.g., crude oil), final energy products (e.g., electricity), and energy-related equipment, with the goal of establishing open and competitive energy markets through World Trade Organization rules;
- (ii) protection of foreign direct investment in energy against core political risks (e.g., expropriation, contractual breach, and nationalization), via the principle of national treatment (equal treatment of foreigners and the state's own citizens) and the most favored nation treatment, whichever is more favorable;⁴⁰
- (iii) energy efficiency, whereby parties are exhorted to “minimize in an economically efficient manner harmful environmental impacts...from all operations within the energy cycle” in a cost-effective manner, taking into account the precautionary principle and the polluter pays principle;⁴¹
- (iv) dispute settlement, covering (a) disputes between two states parties, and (b) disputes between the host state party and an investor holding the nationality of another state party (investor-state disputes); and
- (v) energy transit (i.e., trade and transportation of energy across jurisdictions).

³⁷ [Amendment to the Convention on Environmental Impact Assessment in a Transboundary Context](#), Sofia, 27 February 2001, *United Nations Treaty Series*, No. 34028.

³⁸ United Nations Treaty Collection. [Convention on Environmental Impact Assessment in a Transboundary Context \(Information Page\)](#).

³⁹ *The Energy Charter Treaty*, Lisbon, 17 December 1994, *United Nations Treaty Series*, Vol. 2080, No. 36116, p. 95.

⁴⁰ The most favored nation treatment ensures that “host States, while not granting national treatment, would accord a covered foreign investor a treatment that is no less favourable than that it accords to a third foreign investor and would benefit from national treatment as soon as the country would grant it.” See United Nations Conference on Trade and Development. 2010. [Most-Favoured-Nation Treatment: A Sequel](#). Geneva and New York. p. xiii.

⁴¹ Footnote 39, Art. 19(1). The provision states, “In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. [...]”

The ECT, along with the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (Energy Efficiency Protocol), was signed in December 1994 and entered into force on 16 April 1998. The Energy Efficiency Protocol builds on the ECT Article 19 provision on environmental aspects. As of February 2019, the ECT had 52 parties (including the European Union and Euratom).⁴²

K. 1992 United Nations Convention on Biological Diversity, 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, and the 2010 Nagoya Protocol

The 1992 Convention on Biological Diversity is a key sustainable development treaty that deals with the conservation and sustainable use of biodiversity, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources.⁴³ It marks the first time in international environmental law that conservation of biodiversity was characterized as a “common concern of mankind,” and links it and its sustainable use to economic and social development.⁴⁴ It also codifies the principle of prevention of transboundary harm (i.e., that states are responsible for ensuring 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).⁴⁵ Box 3.1 provides a brief summary of the duties and obligations of states parties under the convention.

The convention recognizes that economic and social development and poverty eradication are the first and overriding priorities of developing countries (footnote 44). Therefore, it also covers provision of new and additional financial resources to developing countries, as well as their access to relevant technologies.⁴⁶

The convention was opened for signature during the 1992 Rio Summit and entered into force on 29 December 1993. It had 196 parties as of October 2020.⁴⁷

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol)⁴⁸ and the Nagoya Protocol on Access to Genetic Resources

⁴² Australia, Norway, and the Russian Federation have signed but not ratified the Energy Charter Treaty. Belarus has not ratified the treaty, but applies it provisionally. See International Energy Charter. [Signatories / Contracting Parties](#). In April 2018, “the Russian Federation officially confirmed their intention not to be considered as Signatories to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects.” See International Energy Charter. [Russian Federation](#).

⁴³ [Convention on Biological Diversity](#), Rio de Janeiro, 5 June 1992, *United Nations Treaty Series*, Vol. 1760, No. 30619, p. 79. Art. 2 defines genetic resources as genetic material of actual or potential value. In turn, genetic material is defined as any material of plant, animal, microbial, or other origin containing functional units of heredity.

⁴⁴ Footnote 43, Preamble.

⁴⁵ Footnote 43, Art. 3.

⁴⁶ Footnote 43, Preamble, Arts. 16 and 20.

⁴⁷ United Nations Treaty Collection. [Convention on Biological Diversity \(Information Page\)](#).

⁴⁸ [Cartagena Protocol on Biosafety to the Convention on Biological Diversity](#), Montreal, 29 January 2000, *United Nations Treaty Series*, Vol. 2226, No. 30619, p. 208.

Box 3.1: Duties of States Parties under the Convention on Biological Diversity

The Convention on Biological Diversity covers a broad range of state obligations. These obligations relate to cooperation; measures for conservation and sustainable use; identification and monitoring of relevant components, processes, and activities; in-situ and ex-situ conservation;^a incentive measures; research and training; public education and awareness; impact assessments; genetic resources; access to and transfer of technology; exchange of information; technical and scientific cooperation; handling of biotechnology and distribution of its benefits; financial resources; and a financial mechanism for developing countries on a grant or concessional basis.

Some of the important state obligations include the duty to

- cooperate with other states parties with respect to areas beyond national jurisdiction or matters of mutual interest;^b
- develop national strategies, plans or programs for the conservation and sustainable use of biological diversity;^c
- identify and monitor components of biological diversity and processes and activities that have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity;^d
- establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity, and develop, where necessary, relevant guidelines for their selection, establishment and management;^e
- promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;^f
- rehabilitate and restore degraded ecosystems and promote the recovery of threatened species;^g
- adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components;^h
- integrate consideration of the conservation and sustainable use of biological resources into national decision-making;ⁱ
- promote public education and awareness with respect to conservation and sustainable use of biological diversity;^j
- conduct impact assessments and minimize adverse impacts;^k
- notify immediately the potentially affected states of imminent or grave danger or damage to biological diversity within the area under the jurisdiction of potentially affected states, if such danger or damage originates from an area under the jurisdiction or control of the notifying state;^l and
- in the immediately preceding case above, initiate action to prevent or minimize such danger or damage (footnote l).

These duties and obligations come in the context of the states' sovereign right to exploit their own resources pursuant to their own environmental policies.^m

^a *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992, *United Nations Treaty Series*, Vol. 1760, No. 30619, p. 79. Art. 2 of the convention defines "in-situ conservation" as the conservation of ecosystems and natural habitats. It also refers to the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties. "Ex-situ conservation" means the conservation of components of biological diversity outside their natural habitats.

^b Footnote a, Art. 5.

^c Footnote a, Art. 6.

^d Footnote a, Art. 7.

^e Footnote a, Art. 8(a)–(b).

^f Footnote a, Art. 8(d).

^g Footnote a, Art. 8(f).

^h Footnote a, Art. 9.

ⁱ Footnote a, Art. 10.

^j Footnote a, Art. 13.

^k Footnote a, Art. 14.

^l Footnote a, Art. 14(d).

^m Footnote a, Art. 3. Significantly, the sovereign right to exploit resources was stated alongside the principle of prevention of transboundary harm.

Source: Authors.

and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol)⁴⁹ serve as supplementary agreements:

- **The Cartagena Protocol** explicitly references the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development.⁵⁰ It seeks to ensure the safe transfer, handling, and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity (footnote 50). Focusing on transboundary movements, the Protocol was adopted in January 2000 and entered into force on 11 September 2003. It had 173 parties as of October 2020.⁵¹
- **The Nagoya Protocol** establishes a legal framework for the fair and equitable sharing of the benefits arising from the utilization of genetic resources.⁵² Core obligations of states parties involve access obligations, benefit-sharing obligations, and regulatory and legislative compliance obligations.⁵³ It was adopted in October 2010 and entered into force on 12 October 2014. It had 128 parties as of October 2020.⁵⁴

L. 1994 United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) is a multilateral treaty that aims to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa.⁵⁵ The UNCCD adopts an integrated approach, supported by international cooperation and partnership arrangements, addressing the physical, biological, and socioeconomic aspects of the processes of desertification and drought.⁵⁶ The affected parties are primarily obliged to establish relevant national action programs, strategies, and priorities,⁵⁷ within

⁴⁹ Secretariat of the Convention on Biological Diversity. 2011. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity: Text and Annex*. Montreal.

⁵⁰ Footnote 48, Art. 1.

⁵¹ United Nations Treaty Collection. *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Information Page).

⁵² Footnote 49, Art. 1.

⁵³ See Convention on Biological Diversity. *About the Nagoya Protocol*.

⁵⁴ United Nations Treaty Collection. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Information Page).

⁵⁵ *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Paris, 14 October 1994, *United Nations Treaty Series*, Vol. 1954, No. 33480, p. 3.

⁵⁶ Footnote 55, Arts. 2(1) and 4(2)(a).

⁵⁷ Footnote 55, Arts. 5(b) and 10.



Photo by Eric Sales/ADB.

the framework of sustainable development plans and in the context of poverty alleviation.⁵⁸ The developed country parties, on the other hand, are to actively support the efforts of the affected developing country parties to combat desertification and mitigate the effects of drought.⁵⁹ In addition, the developed country parties undertake to provide substantial financial resources and other forms of support to assist the affected developing country parties.⁶⁰

The UNCCD expressly references the contribution that combating desertification can make to achieving the objectives of the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity, and other related environmental conventions.⁶¹ Thus, parties are encouraged to coordinate activities under these related conventions to derive maximum benefit and avoid duplication of effort.⁶²

The UNCCD was adopted on 17 June 1994 and entered into force on 26 December 1996. It had 197 parties as of October 2020.⁶³

M. Tabular Summaries of Treaty Status

Tables 3.1 and 3.2 summarize the treaty status of each country covered in this report in relation to the multilateral environmental treaties discussed in Part Three Section I.

⁵⁸ Footnote 55, Arts. 4(2)(b) and 4(2)(c).

⁵⁹ Footnote 55, Arts. 6(a).

⁶⁰ Footnote 55, Arts. 6(b).

⁶¹ Footnote 55, *Chapeau*, para. 23.

⁶² Footnote 55, Art. 8.

⁶³ United Nations Treaty Collection. [United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa \(Information Page\)](#).

**Table 3.1: Summary of Status (Multilateral Environmental Treaties)—
Southeast Asia and South Asia Developing Member Countries**

| Country | Ramsar Convention | London Convention | 1996 Protocol to the London Convention | World Heritage Convention | ICPPS 73/78 | CLRTAP | UNCLOS | VCPOL |
|-------------------|-------------------|-------------------|--|---------------------------|---------------|--------|--------------------------|---------------|
| Southeast Asia | | | | | | | | |
| Brunei Darussalam | - | - | - | 12 Nov 2011 e | 23 Jan 1987 e | - | 5 Nov 1996 r | 26 Jul 1990 a |
| Cambodia | 23 Oct 1999 e | - | - | 28 Feb 1992 e | 28 Feb 1995 e | - | 1 Jul 1983 ^a | 27 Jun 2001 a |
| Indonesia | 8 Aug 1992 e | - | - | 6 Oct 1989 e | 21 Jan 1987 e | - | 3 Feb 1986 r | 26 Jun 1992 a |
| Lao PDR | 28 Sep 2010 e | - | - | 20 Jun 1987 e | - | - | 5 Jun 1998 r | 21 Aug 1998 a |
| Malaysia | 10 Mar 1995 e | - | - | 7 Mar 1989 e | 1 May 1997 e | - | 14 Oct 1996 r | 29 Aug 1989 a |
| Myanmar | 17 Mar 2005 e | - | - | 29 Jul 1994 e | 4 Aug 1988 e | - | 21 May 1996 r | 24 Nov 1993 a |
| Philippines | 8 Nov 1994 e | 30 Aug 1975 e | 8 Jun 2012 e | 19 Dec 1985 e | 15 Sep 2001 e | - | 8 May 1984 r | 17 Jul 1991 a |
| Singapore | - | - | - | 19 Sep 2012 e | 1 Feb 1991 e | - | 17 Nov 1994 r | 5 Jan 1989 a |
| Thailand | 13 Sep 1998 e | - | - | 17 Dec 1987 e | 2 Feb 2008 e | - | 15 May 2011 r | 7 Jul 1989 a |
| Viet Nam | 20 Jan 1989 e | - | - | 19 Jan 1988 e | 29 Aug 1991 e | - | 25 Jul 1994 r | 26 Jan 1994 a |
| South Asia | | | | | | | | |
| Afghanistan | - | 30 Aug 1975 e | - | 20 Jun 1979 e | - | - | 18 Mar 1983 ^c | 17 Jun 2004 a |
| Bangladesh | 21 Sep 1992 e | - | - | 3 Nov 1983 e | 18 Mar 2003 e | - | 27 Jul 2001 r | 2 Aug 1990 a |
| Bhutan | 7 Sep 2012 e | - | - | 17 Jan 2002 e | - | - | 10 Dec 1982 ^e | 23 Aug 2004 a |
| India | 1 Feb 1982 e | - | - | 14 Feb 1978 e | 24 Dec 1986 e | - | 29 Jun 1995 r | 18 Mar 1991 a |
| Maldives | - | - | - | 22 Aug 1986 e | 20 Aug 2005 e | - | 7 Sep 2000 r | 26 Apr 1988 a |
| Nepal | 17 Apr 1988 e | - | - | 20 Sep 1978 e | - | - | 2 Nov 1998 r | 6 Jul 1994 a |
| Pakistan | 23 Nov 1976 e | 8 Apr 1995 e | - | 23 Oct 1976 e | 22 Feb 1995 e | - | 26 Feb 1997 r | 18 Dec 1992 a |
| Sri Lanka | 15 Oct 1990 e | - | - | 6 Sep 1980 e | 24 Sep 1997 e | - | 19 Jul 1994 r | 15 Dec 1989 a |

CLRTAP = Convention on Long-Range Transboundary Air Pollution, ICPPS 73/78 = 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol, Lao PDR = Lao People's Democratic Republic, UNCLOS = United Nations Convention on the Law of the Sea, VCPOL = Vienna Convention for the Protection of the Ozone Layer.

Notes: a = accession, A = acceptance, AA = approval, e = entry into force, r = ratification.

^a Cambodia signed the UNCLOS on 1 July 1983, but has not yet ratified it.

^b Thailand signed the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity on 31 January 2012, but has not yet ratified it.

^c Afghanistan signed the UNCLOS on 18 March 1983, but has not yet ratified it.

^d Bangladesh signed the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity on 6 September 2011, but has not yet ratified it.

^e Bhutan signed the UNCLOS on 10 December 1982, but has not yet ratified it.

^f Nepal signed the Cartagena Protocol on Biosafety to the Convention on Biological Diversity on 2 March 2001, but has not yet ratified it.

Sources:

Convention on Biological Diversity. [List of Parties: CBD](#) (accessed 31 October 2020).

Convention on Biological Diversity. [List of Parties: Cartagena Protocol](#) (accessed 31 October 2020).

Convention on Biological Diversity. [List of Parties: Nagoya Protocol](#) (accessed 31 October 2020).

Energy Charter Secretariat. [The Energy Charter Treaty](#) (accessed 31 October 2020).

Energy Charter Secretariat. [The Protocol on Energy Efficiency and Related Environmental Aspects \(PEEREA\)](#) (accessed 31 October 2020).

International Maritime Organization. 2020. [Status of IMO Treaties](#). 15 September. pp. 111–115, 543–545, 555–556.

| 1987 Montreal Protocol | 2016 Kigali Amend- ment | Basel Convention | Espoo Conven- tion | Energy Charter Treaty | Energy Effi- ciency Protocol | Convention on Biological Diversity | 2000 Cartagena Protocol | 2010 Nagoya Protocol | Convention to Combat Desertifica- tion |
|------------------------------|----------------------------------|---------------------|--------------------------|-----------------------------|---------------------------------------|--|-------------------------------|----------------------------|---|
| 27 May 1993 a | - | 16 Mar 2003 e | - | - | - | 27 Jul 2008 e | - | - | 4 Dec 2002 a |
| 27 Jun 2001 a | - | 31 May 2001 e | - | - | - | 10 May 1995 e | 16 Dec 2003 e | 19 Apr 2015 e | 18 Aug 1997 r |
| 26 Jun 1992 r | - | 19 Dec 1993 e | - | - | - | 21 Nov 1994 e | 3 Mar 2005 e | 12 Oct 2014 e | 31 Aug 1998 r |
| 21 Aug 1998 a | 16 Nov 2017 A | 20 Dec 2010 e | - | - | - | 19 Dec 1996 e | 1 Nov 2004 e | 12 Oct 2014 e | 20 Sep 1996 A |
| 29 Aug 1989 a | 21 Oct 2020 r | 6 Jan 1994 e | - | - | - | 22 Sep 1994 e | 2 Dec 2003 e | 3 Feb 2019 e | 25 Jun 1997 r |
| 24 Nov 1993 a | - | 6 Apr 2015 e | - | - | - | 23 Feb 1995 e | 13 May 2008 e | 12 Oct 2014 e | 2 Jan 1997 a |
| 17 Jul 1991 r | - | 19 Jan 1994 e | - | - | - | 6 Jan 1994 e | 3 Jan 2007 e | 28 Dec 2015 e | 10 Feb 2000 r |
| 5 Jan 1989 a | - | 1 Apr 1996 e | - | - | - | 20 Mar 1996 e | - | - | 26 Apr 1999 a |
| 7 Jul 1989 r | - | 22 Feb 1998 e | - | - | - | 29 Jan 2004 e | 8 Feb 2006 e | 31 Jan 2012 ^b | 7 Mar 2001 a |
| 26 Jan 1994 a | 27 Sep 2019 AA | 11 Jun 1995 e | - | - | - | 14 Feb 1995 e | 20 Apr 2004 e | 12 Oct 2014 e | 25 Aug 1998 a |
| 17 Jun 2004 a | - | 23 Jun 2013 e | - | 20 Jun 2013 e | 20 Jun 2013 e | 18 Dec 2002 e | 21 May 2013 e | 4 Sep 2018 e | 1 Nov 1995 a |
| 2 Aug 1990 a | 8 Jun 2020 r | 30 Jun 1993 e | - | - | - | 1 Aug 1994 e | 5 May 2004 e | 6 Sep 2011 ^d | 26 Jan 1996 r |
| 23 Aug 2004 a | 27 Sep 2019 r | 24 Nov 2002 e | - | - | - | 23 Nov 1995 e | 11 Sep 2003 e | 12 Oct 2014 e | 20 Aug 2003 a |
| 19 Jun 1992 a | - | 22 Sep 1992 e | - | - | - | 19 May 1994 e | 11 Sep 2003 e | 12 Oct 2014 e | 17 Dec 1996 r |
| 16 May 1989 r | 13 Nov 2017 r | 27 Jul 1992 e | - | - | - | 29 Dec 1993 e | 11 Sep 2003 e | 29 Sep 2019 e | 3 Sep 2002 a |
| 6 Jul 1994 a | - | 13 Jan 1997 e | - | - | - | 21 Feb 1994 e | 2 Mar 2001 ^f | 28 Mar 2019 e | 15 Oct 1996 r |
| 18 Dec 1992 a | - | 24 Oct 1994 e | - | - | - | 24 Oct 1994 e | 31 May 2009 e | 21 Feb 2016 e | 24 Feb 1997 r |
| 15 Dec 1989 a | 28 Sep 2018 r | 26 Nov 1992 e | - | - | - | 21 Jun 1994 e | 26 Jul 2004 e | - | 9 Dec 1998 a |

Secretariat of the Basel Convention. [Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal](#) (accessed 31 October 2020).

The Ramsar Convention Secretariat. 2019. [Contracting Parties to the Ramsar Convention](#). 4 November.

United Nations Educational, Scientific and Cultural Organization. [States Parties Ratification Status](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer \(Kigali Amendment\)](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention for the Protection of the World Cultural and Natural Heritage](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on Environmental Impact Assessment in a Transboundary Context](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on Long-Range Transboundary Air Pollution](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Montreal Protocol on Substances that Deplete the Ozone Layer](#) (accessed 31 October 2020).

United Nations Treaty Collection. [United Nations Convention on the Law of the Sea](#) (accessed 31 October 2020).

United Nations Treaty Collection. [United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Vienna Convention for the Protection of the Ozone Layer](#) (accessed 31 October 2020).

**Table 3.2: Summary of Status (Multilateral Environmental Treaties)—
Pacific Developing Member Countries**

| Country | Ramsar Convention | London Convention | 1996 Protocol to the London Convention | World Heritage Convention | ICPPS 73/78 | CLRTAP | UNCLOS | VCPOL |
|---------------------------------|-------------------|-------------------|--|---------------------------|---------------|--------|---------------|---------------|
| Cook Islands | – | 30 Aug 1975 x | – | 16 Apr 2009 e | 12 Jun 2007 e | – | 15 Feb 1995 r | 22 Dec 2003 a |
| Fiji | 11 Aug 2006 e | – | – | 21 Feb 1991 e | 8 Jun 2016 e | – | 10 Dec 1982 r | 23 Oct 1989 a |
| Kiribati | 3 Aug 2013 e | 12 Jul 1979 d | – | 12 Aug 2000 e | 5 May 2007 e | – | 24 Feb 2003 a | 7 Jan 1993 a |
| Marshall Islands | 13 Nov 2004 e | – | 8 Jun 2008 e | 24 Jul 2002 e | 26 Jul 1988 e | – | 9 Aug 1991 a | 11 Mar 1993 a |
| Micronesia, Federated States of | – | – | – | 22 Oct 2002 e | – | – | 29 Apr 1991 a | 3 Aug 1994 a |
| Nauru | – | 25 Aug 1982 e | – | – | – | – | 23 Jan 1996 r | 12 Nov 2001 a |
| Palau | 18 Feb 2003 e | – | – | 11 Sep 2002 e | 29 Dec 2011 e | – | 30 Sep 1996 a | 29 May 2001 a |
| Papua New Guinea | 16 Jul 1993 e | 9 Apr 1980 e | – | 28 Oct 1997 e | 25 Jan 1994 e | – | 14 Jan 1997 r | 27 Oct 1992 a |
| Samoa | 6 Feb 2005 e | – | – | 28 Nov 2001 e | 7 May 2002 e | – | 14 Aug 1995 r | 21 Dec 1992 a |
| Solomon Islands | – | 7 Jul 1978 d | – | 10 Sep 1992 e | 30 Sep 2004 e | – | 23 Jun 1997 r | 17 Jun 1993 a |
| Timor-Leste | – | – | – | 31 Jan 2017 e | – | – | 8 Jan 2013 a | 16 Sep 2009 a |
| Tonga | – | 8 Dec 1995 e | 24 Mar 2006 e | 3 Sep 2004 e | 1 May 1996 e | – | 2 Aug 1995 a | 29 Jul 1998 a |
| Tuvalu | – | – | – | – | 22 Nov 1985 e | – | 9 Dec 2002 r | 15 Jul 1993 a |
| Vanuatu | 4 Nov 2019 e | 22 Oct 1992 e | 24 Mar 2006 e | 13 Sep 2002 e | 13 Jul 1989 e | – | 10 Aug 1999 r | 21 Nov 1994 a |

CLRTAP = Convention on Long-Range Transboundary Air Pollution, ICPPS 73/78 = 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol, UNCLOS = United Nations Convention on the Law of the Sea, VCPOL = Vienna Convention for the Protection of the Ozone Layer.

Notes: a = accession, A = acceptance, d = succession, e = entry into force, r = ratification, x = exclusion.

^a The Cook Islands signed the Cartagena Protocol on Biosafety to the Convention on Biological Diversity on 21 May 2001, but has not yet ratified it.

Sources:

Convention on Biological Diversity. [List of Parties: CBD](#) (accessed 31 October 2020).

Convention on Biological Diversity. [List of Parties: Cartagena Protocol](#) (accessed 31 October 2020).

Convention on Biological Diversity. [List of Parties: Nagoya Protocol](#) (accessed 31 October 2020).

Energy Charter Secretariat. [The Energy Charter Treaty](#) (accessed 31 October 2020).

Energy Charter Secretariat. [The Protocol on Energy Efficiency and Related Environmental Aspects \(PEEREA\)](#) (accessed 31 October 2020).

International Maritime Organization. 2020. [Status of IMO Treaties](#). 15 September. pp. 111–115, 543–545, 555–556.

Secretariat of the Basel Convention. [Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal](#) (accessed 31 October 2020).

The Ramsar Convention Secretariat. 2019. [Contracting Parties to the Ramsar Convention](#). 4 November.

United Nations Educational, Scientific and Cultural Organization. [States Parties Ratification Status](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer \(Kigali Amendment\)](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention for the Protection of the World Cultural and Natural Heritage](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on Environmental Impact Assessment in a Transboundary Context](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on Long-Range Transboundary Air Pollution](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Montreal Protocol on Substances that Deplete the Ozone Layer](#) (accessed 31 October 2020).

United Nations Treaty Collection. [United Nations Convention on the Law of the Sea](#) (accessed 31 October 2020).

United Nations Treaty Collection. [United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Vienna Convention for the Protection of the Ozone Layer](#) (accessed 31 October 2020).

| 1987 Montreal Protocol | 2016 Kigali Amend- ment | Basel Convention | Espoo Conven- tion | Energy Charter Treaty | Energy Effi- ciency Protocol | Convention on Biological Diversity | 2000 Cartagena Protocol | 2010 Nagoya Protocol | Convention to Combat Desertifica- tion |
|------------------------------|----------------------------------|---------------------|--------------------------|-----------------------------|---------------------------------------|--|-------------------------------|----------------------------|---|
| 22 Dec 2003 a | 22 Aug 2019 A | 27 Sep 2004 e | - | - | - | 29 Dec 1993 e | 21 May 2001 ^a | - | 21 Aug 1998 a |
| 23 Oct 1989 a | 16 Jun 2020 r | - | - | - | - | 29 Dec 1993 e | 11 Sep 2003 e | 12 Oct 2014 e | 26 Aug 1998 a |
| 7 Jan 1993 a | 26 Oct 2018 r | 6 Dec 2000 e | - | - | - | 14 Nov 1994 e | 19 Jul 2004 e | - | 8 Sep 1998 a |
| 11 Mar 1993 a | 15 May 2017 r | 27 Apr 2003 e | - | - | - | 29 Dec 1993 e | 11 Sep 2003 e | 8 Jan 2015 e | 2 Jun 1998 a |
| 6 Sep 1995 a | 12 May 2017 r | 5 Dec 1995 e | - | - | - | 18 Sep 1994 e | - | 12 Oct 2014 e | 25 Mar 1996 r |
| 12 Nov 2001 a | - | 10 Feb 2002 e | - | - | - | 8 Feb 1994 e | 11 Sep 2003 e | - | 22 Sep 1998 a |
| 29 May 2001 a | 29 Aug 2017 r | 7 Dec 2011 e | - | - | - | 6 Apr 1999 e | 11 Sep 2003 e | 11 Sep 2018 e | 15 Jun 1999 a |
| 27 Oct 1992 a | - | 30 Nov 1995 e | - | - | - | 29 Dec 1993 e | 12 Jan 2006 e | - | 6 Dec 2000 a |
| 21 Dec 1992 a | 23 Mar 2018 r | 20 Jun 2002 e | - | - | - | 10 May 1994 e | 11 Sep 2003 e | 12 Oct 2014 e | 21 Aug 1998 a |
| 17 Jun 1993 a | - | - | - | - | - | 1 Jan 1996 e | 26 Oct 2004 e | 22 Jan 2020 e | 16 Apr 1999 a |
| 16 Sep 2009 a | - | - | - | - | - | 8 Jan 2007 e | - | - | 20 Aug 2003 a |
| 29 Jul 1998 a | 17 Sep 2018 r | 24 Jun 2010 e | - | - | - | 17 Aug 1998 e | 17 Dec 2003 e | 1 Jan 2020 e | 25 Sep 1998 a |
| 15 Jul 1993 a | 21 Sep 2017 r | 19 Nov 2020 e | - | - | - | 20 Mar 2003 e | - | 26 Nov 2018 e | 14 Sep 1998 a |
| 21 Nov 1994 a | 20 Apr 2018 r | 14 Jan 2019 e | - | - | - | 29 Dec 1993 e | - | 12 Oct 2014 e | 10 Aug 1999 r |

II. Soft Law

Soft law refers to instruments or documents, which may have the appearance of law, but are not legally binding. They do not create rights and obligations. However, soft law can be politically influential in setting down objectives and aspirations.⁶⁴

A. 1972 Stockholm Declaration

The Stockholm Declaration consists of a seven-point Preamble and 26 Principles.⁶⁵ The language of Principle 1 suggests a right to a healthy environment and a correlated intergenerational responsibility.⁶⁶ However, several proposals for a more direct and unequivocal reference to a human right to an adequate or healthy environment were rejected at the United Nations Conference on the Human Environment.⁶⁷

Principle 6, dealing with “the discharge of toxic substances...and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless,” touched on the issue of climate change.⁶⁸ Principle 21 declared that within the limits set by international law, states have the sovereign right to exploit their own resources.⁶⁹ However, this right comes with the concomitant responsibility to ensure that these activities do not cause damage to areas beyond their national jurisdiction (footnote 69).

An ambitious action plan accompanies the declaration. Recommendation 70 of the action plan recommends that “Governments be mindful of activities in which there is an appreciable risk of effects on climate, and to this end, carefully evaluate the likelihood and magnitude of climatic effects.”⁷⁰

⁶⁴ J.P. Grant, C.J. Barker, and C. Parry. 2004. *Parry and Grant Encyclopaedic Dictionary of International Law*. 2nd ed. New York: Oceana Publications, Inc.

⁶⁵ United Nations. 1973. *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972*. A/CONF.48/14/Rev.1. New York. pp. 3–5.

⁶⁶ Footnote 65, Principle 1 states, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.”

⁶⁷ G. Handl. 2012. *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992*. *United Nations Audiovisual Library of International Law*.

⁶⁸ Footnote 65, Principle 6 states, “The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported.”

⁶⁹ Footnote 65, Principle 21 states, “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

⁷⁰ Footnote 65, p. 20.

The declaration in itself was not intended to be a legally binding instrument. However, some of its provisions were understood to have been reflective of customary international law at the time of its adoption (footnote 67). Other provisions were expected to serve as the basis for future normative developments (footnote 67).

B. 1992 Rio Declaration on Environment and Development

The Rio Declaration reaffirms the principles of the Stockholm Declaration and seeks to build upon them by establishing “a new and equitable global partnership.”⁷¹ In particular, the Rio Declaration

- affirms the state’s obligation 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;⁷²
- recognizes that the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations;⁷³
- urges states to apply the precautionary approach “according to their capabilities.”⁷⁴ (Note: While a European proposal at the Rio Summit to include the precautionary approach “as a principle” did not get enough support, the concept is now widely reflected in international practice [footnote 67]. This is also one of several principles that do not have a counterpart in the Stockholm Declaration [footnote 67]);
- acknowledges the “common but differentiated responsibilities” of developed and developing states, in view of their different contributions to global environmental degradation and the technologies and financial resources they command;⁷⁵
- recognizes that national environmental standards, management objectives, and priorities must reflect the environmental and developmental context in which they apply (again, the developed and developing country dichotomy);⁷⁶
- calls on states to implement procedural safeguards—such as environmental impact assessments,⁷⁷ emergency notifications,⁷⁸ and customary

⁷¹ United Nations. 1993. *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*. A/CONF.151/26/Rev.1 (Vol. I). New York: United Nations. pp. 3–8. Preamble.

⁷² Footnote 71, Principle 2. See *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, pp. 55–56; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

⁷³ Footnote 71, Principle 3.

⁷⁴ Footnote 71, Principle 15.

⁷⁵ Footnote 71, Principle 7.

⁷⁶ Footnote 71, Principle 11.

⁷⁷ Footnote 71, Principle 17 states, “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

⁷⁸ Footnote 71, Principle 18 states, “States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.”

notification and consultation⁷⁹—for activities that potentially have significant adverse impacts on other states;⁸⁰

- calls on states to ensure that citizens have access to information, public participation, and legal redress and remedies in environmental issues;⁸¹ and
- recognizes the vital role of women in environmental management and development.⁸² The Rio Declaration is the first international instrument that expressly acknowledges that women’s participation in their countries’ economic and social processes is crucial for sustainable development (footnote 67). This perspective continues to inform current climate change discussions in the context of the disproportionate effects of climate change on women compared with men.⁸³

C. 2015 Sendai Framework for Disaster Risk Reduction (2015–2030)

The Sendai Framework for Disaster Risk Reduction (2015–2030) is a voluntary, non-binding international instrument on disaster risk reduction adopted by United Nations member states in March 2015. It applies to the risk of disaster (small or large scale, frequent or infrequent, sudden or slow onset, or caused by natural or human-made hazards), as well as to related environmental, technological, and biological hazards and risks.⁸⁴

The framework seeks to implement integrated and inclusive measures that prevent and reduce hazard exposure and vulnerability to disaster, increase

⁷⁹ Footnote 71, Principle 19 states, “States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.”

⁸⁰ Footnote 67. Günther Handl notes that Principles 17 to 19 of the Rio Declaration have gained customary norm status: “At the time of the Rio Conference, and perhaps for a short while thereafter, it might have been permissible to question whether the contents of all three principles corresponded to international customary legal obligations. However, today given a consistently supportive international practice and other evidence, including the International Law Commission’s draft articles on Prevention of Transboundary Harm from Hazardous Activities, any such doubts would be misplaced.” (p. 6).

⁸¹ Footnote 71, Principle 10. Günther Handl (footnote 67) posits that Principle 10 “represents a trail blazer, laying down for the first time, at a global level, a concept that is critical both to effective environmental management and democratic governance. Since then, international community expectations, as reflected notably in the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention), the 2010 UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters and various resolutions of international organizations and conferences, have coalesced to the point where the normative provisions of Principle 10 must be deemed legally binding.” (p. 6).

⁸² Footnote 71, Principle 20.

⁸³ See, for example, the following discussions on the nexus of women and climate change: (i) UNFCCC. [Introduction to Gender and Climate Change](#), (ii) UN Women. [In Focus: Climate Action by, and for, Women](#), and (iii) UNESCO. [Climate Change and Gender Equality](#).

⁸⁴ United Nations Office for Disaster Risk Reduction. 2015. [Sendai Framework for Disaster Risk Reduction, 2015–2030](#). Geneva. Preamble, para. 15.

Box 3.2: Global Targets of the Sendai Framework for Disaster Risk Reduction (2015–2030)

1. Substantially reduce global disaster mortality by 2030, aiming to lower the average per 100,000 global mortality rate in the decade 2020–2030 compared with the period 2005–2015;
2. Substantially reduce the number of affected people globally by 2030, aiming to lower the average global figure per 100,000 in the decade 2020–2030 compared with the period 2005–2015;
3. Reduce direct disaster economic loss in relation to global gross domestic product (GDP) by 2030;
4. Substantially reduce disaster damage to critical infrastructure and disruption of basic services, among them health and educational facilities, including through developing their resilience by 2030;
5. Substantially increase the number of countries with national and local disaster risk reduction strategies by 2020;
6. Substantially enhance international cooperation to developing countries through adequate and sustainable support to complement their national actions for implementation of the Framework by 2030; and
7. Substantially increase the availability of and access to multi-hazard early warning systems and disaster risk information and assessments to people by 2030.

Source: United Nations Office for Disaster Risk Reduction. 2015. *Sendai Framework for Disaster Risk Reduction, 2015–2030*. Geneva. (Expected outcome and goal, para. 18).

preparedness for response and recovery, and thus strengthen resilience.⁸⁵ Box 3.2 enumerates the seven global targets of the Sendai Framework.

The Sendai Framework specifically references climate change and variability—along with consequences of poverty and inequality, unplanned and rapid urbanization, and poor land management—as an underlying disaster risk driver.⁸⁶ Accordingly, it promotes the inclusion of climate change scenarios in disaster risk assessments;⁸⁷ surveys on multi-hazard risks (footnote 87); and disaster preparedness and contingency policies, plans, and programs.⁸⁸ It also emphasizes the importance of policy, institutional, and instrumental coherence across sustainable development and growth, food security, health and safety, climate change and variability, environmental management, and disaster risk reduction agendas.⁸⁹

The framework also recognizes the critical need to build resilience and provide particular support to small island developing states, which can be disproportionately affected by disasters (including climate change-related disasters) owing to their unique and particular vulnerabilities.⁹⁰

⁸⁵ Footnote 84, Expected outcome and goal, para. 17. “Measures” cover economic, structural, legal, social, health, cultural, educational, environmental, technological, political, and institutional measures.

⁸⁶ Footnote 84, Preamble, paras. 6 and 10.

⁸⁷ Footnote 84, Priorities for action, para. 25(b).

⁸⁸ Footnote 84, Priorities for action, para. 33(a).

⁸⁹ Footnote 84, Preamble, para. 11; Guiding principles, para. 19(h); Priorities for action, para. 28(b).

⁹⁰ Footnote 84, International cooperation and global partnership, para. 42.

D. 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda

The 2030 Agenda for Sustainable Development, adopted by the United Nations General Assembly (UNGA) in September 2015,⁹¹ outlines 17 “integrated and indivisible”⁹² global goals intended to be attained by 2030 (Box 3.3). These Sustainable Development Goals (SDGs) build on the Millennium Development Goals and cover the economic, social, and environmental dimensions of sustainable development.⁹³

Box 3.3: Sustainable Development Goals

- Goal 1** End poverty in all its forms everywhere.
- Goal 2** End hunger, achieve food security and improved nutrition and promote sustainable agriculture.
- Goal 3** Ensure healthy lives and promote well-being for all at all ages.
- Goal 4** Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.
- Goal 5** Achieve gender equality and empower all women and girls.
- Goal 6** Ensure availability and sustainable management of water and sanitation for all.
- Goal 7** Ensure access to affordable, reliable, sustainable and modern energy for all.
- Goal 8** Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.
- Goal 9** Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation.
- Goal 10** Reduce inequality within and among countries.
- Goal 11** Make cities and human settlements inclusive, safe, resilient and sustainable.
- Goal 12** Ensure sustainable consumption and production patterns.
- Goal 13** Take urgent action to combat climate change and its impacts.^a
- Goal 14** Conserve and sustainably use the oceans, seas and marine resources for sustainable development.
- Goal 15** Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.
- Goal 16** Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.
- Goal 17** Strengthen the means of implementation and revitalize the global partnership for sustainable development.

^a The United Nations Framework Convention on Climate Change is recognized as the primary international, intergovernmental forum for negotiating the global response to climate change.

Source: General Assembly Resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015). para. 59.

⁹¹ [General Assembly Resolution 70/1](#), *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015).

⁹² Footnote 91, para. 5.

⁹³ Footnote 91, para. 2.

The 2030 Agenda characterizes climate change as “one of the greatest challenges of our time” whose “adverse impacts undermine the ability of all countries to achieve sustainable development.”⁹⁴ Goal 13 on climate change thus identifies five targets relating to adaptation, mitigation, financing, capacity, and institutional public programming:

- (i) Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries.
- (ii) Integrate climate change measures into national policies, strategies, and planning.
- (iii) Improve education, awareness-raising, and human and institutional capacity on climate change mitigation, adaptation, impact reduction, and early warning.
- (iv) Implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly \$100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalizing the Green Climate Fund through its capitalization as soon as possible.
- (v) Promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing states, including a focus on women, youth, and local and marginalized communities.⁹⁵

The implementation targets of the other SDGs underscore their interdependence with climate change response and objectives. For instance, one of the targets of Goal 1 (ending poverty) is build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other environmental shocks and disasters.⁹⁶ Goal 2 (food security) seeks to ensure sustainable food production systems and implement resilient agricultural practices that can strengthen capacity for adaptation to climate change, extreme weather, drought, flooding, and other disasters.⁹⁷ Goal 7 (affordable and clean energy) urges substantially increasing the share of renewable energy in the global energy mix and enhancing international cooperation to facilitate access to clean energy research and technology.⁹⁸ Goal 11 (sustainable cities and communities) encourages cities and settlements to adopt and implement integrated policies that address mitigation and adaptation to climate change and resilience to disasters.⁹⁹ This objective is premised on minimizing the impact of cities on the global climate

⁹⁴ Footnote 91, para. 14.

⁹⁵ Footnote 91, para. 59, subparas. 13.1 to 13.b.

⁹⁶ Footnote 91, para. 59, subpara. 1.5.

⁹⁷ Footnote 91, para. 59, subpara. 2.4.

⁹⁸ Footnote 91, para. 59, subparas. 7.2 and 7.a.

⁹⁹ Footnote 91, para. 59, subpara. 11.b.

system.¹⁰⁰ Goal 17 (partnerships) promotes the development and transfer of environmentally sound technologies to developing countries on favorable terms.¹⁰¹

The 2030 Agenda explicitly makes the Addis Ababa Action Agenda an integral component, the full implementation of which is characterized as “critical” to realizing the SDGs and implementation targets.¹⁰² The Addis Ababa Action Agenda, the outcome document of the Third International Conference on Financing for Development, establishes a global framework that aims to coordinate public and private financing, as well as international development cooperation and trade—focusing on the priorities of the universal post-2015 development agenda.¹⁰³ In addition, it strengthens the follow-up process by (i) mandating an annual Economic and Social Council forum on financing for development with universal, intergovernmental participation,¹⁰⁴ and (ii) creating an inter-agency task force to report annually on progress in implementing the outcomes and the means of implementation of the post-2015 development agenda.¹⁰⁵

E. Draft Global Pact for the Environment

The Draft Global Pact for the Environment is an instrument prepared by an international group of experts intended to reflect and codify general principles of environmental law, and fill the gaps in the existing legal framework.¹⁰⁶ The President of France launched the Draft Global Pact in June 2017. It aims to inform the discussions of the United Nations Open-ended Working Group ‘Towards a Global Pact for the Environment.’ In 2018–2019, the Working Group deliberated on the possibility of adopting a legally binding global framework on the environment that embodies a unified approach (as opposed to the current sectorial approach, such as on biodiversity, climate, and pollution).¹⁰⁷ This global framework, if passed, would be “the first international treaty on the environment as a whole.”¹⁰⁸

The Draft Global Pact intends to triangulate fundamental rights under international law by supplementing the 1966 conventions on civil and political rights¹⁰⁹ and economic, social and cultural rights¹¹⁰ with environmental rights (footnote 108). It is premised on intergenerational equity (i.e., the need to

¹⁰⁰ Footnote 91, para. 34.

¹⁰¹ Footnote 91, para. 59, subpara. 17.7.

¹⁰² Footnote 91, paras. 40 and 62.

¹⁰³ [General Assembly Resolution 69/313](#), *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, A/RES/69/313 (27 July 2015). p. 2, para. 2.

¹⁰⁴ Footnote 103, para. 132.

¹⁰⁵ Footnote 103, para. 133.

¹⁰⁶ Global Pact for the Environment. [Draft Global Pact for the Environment \(Preliminary Draft of the Group of Experts\)](#).

¹⁰⁷ Global Pact for the Environment. [The Pact Explained in 3 Minutes](#).

¹⁰⁸ Global Pact for the Environment. [Objectives](#).

¹⁰⁹ [International Covenant on Civil and Political Rights](#), New York, 16 December 1966, *United Nations Treaty Series*, Vol. 999, No. 14668, p. 171.

¹¹⁰ [International Covenant on Economic, Social and Cultural Rights](#), New York, 16 December 1966, *United Nations Treaty Series*, Vol. 993, No. 14531, p. 3.

promote sustainable development that allows each generation to satisfy its needs without compromising the capability of future generations to meet theirs, while respecting the balance and integrity of Earth's ecosystem).¹¹¹

The Draft Global Pact's two core provisions are reflected in Article 1 (a human right to live in an ecologically sound environment) and Article 2 (a duty to take care of the environment—a duty universally held by every state, international institution, and person, whether natural or legal, public or private). It also lays out state obligations, including the duties to

- integrate the requirements of environmental protection in government policies and activities;¹¹²
- ensure the promotion of public support policies, as well as patterns of production and consumption that are both sustainable and respectful of the environment;¹¹³
- prevent environmental harm, including transboundary harm;¹¹⁴
- ensure environmental impact assessments are conducted prior to any project or activity that is likely to have a significant adverse impact on the environment, and keep under surveillance the effect of these projects or activities (i.e., the related obligation of due diligence);¹¹⁵
- ensure an adequate remediation of environmental damages;¹¹⁶
- ensure application of the polluter pays principle (i.e., prevention, mitigation, and remediation costs for pollution, environmental disruptions, and degradation are to be borne by their originator, to the greatest extent possible);¹¹⁷
- encourage the implementation of the Pact by non-state actors and subnational entities, including civil society, economic actors, cities, and regions;¹¹⁸
- adopt effective environmental laws, and ensure their effective and fair implementation and enforcement;¹¹⁹ and
- take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation, and recover and adapt (i.e., the resilience obligation).¹²⁰

Other substantive principles include intergenerational equity, the precautionary principle,¹²¹ and the principle of non-regression.¹²²

¹¹¹ Footnote 106, Preamble and Art. 4.

¹¹² Footnote 106, Art. 3, para. 1.

¹¹³ Footnote 106, Art. 3, para. 2.

¹¹⁴ Footnote 106, Art. 5, paras. 1 and 2.

¹¹⁵ Footnote 106, Art. 5, paras. 3 and 4.

¹¹⁶ Footnote 106, Art. 7.

¹¹⁷ Footnote 106, Art. 8.

¹¹⁸ Footnote 106, Art. 14.

¹¹⁹ Footnote 106, Art. 15.

¹²⁰ Footnote 106, Art. 16.

¹²¹ Footnote 106, Art. 6 states, "Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation."

¹²² Footnote 106, Art. 17 states, "The Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law."

The Draft Global Pact also codifies several important procedural rights on the part of the citizenry (as reflected in the language “every person has a/the right to”). These procedural rights include

- access environmental information held by public authorities, without being required to state an interest;¹²³
- participate, at an appropriate stage and while options are still open, in the preparation of decisions, plans, activities, and policies of public authorities that may have a significant effect on the environment;¹²⁴ and
- access environmental justice (i.e., effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law).¹²⁵

The Draft Global Pact further recognizes the special situation and needs of developing countries, particularly the least developed and those that are most environmentally vulnerable, and mandates that they be given special attention.¹²⁶ It also reflects the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC).¹²⁷

However, during the third and last session of the Working Group in May 2019, the states recommended that a simple political declaration (instead of a legally binding treaty) be adopted, in the context of the 50th anniversary of the Stockholm Conference. On 21 August 2019, the UNGA endorsed the recommendations of the Working Group.¹²⁸

F. Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Safe, Orderly and Regular Migration (GCSOR) is a non-binding¹²⁹ instrument adopted under the auspices of the United Nations and endorsed by the General Assembly in December 2018.¹³⁰ It provides a global framework covering “international migration in all its dimensions.”¹³¹

¹²³ Footnote 106, Art. 9.

¹²⁴ Footnote 106, Art. 10.

¹²⁵ Footnote 106, Art. 11.

¹²⁶ Footnote 106, Art. 20, para. 1.

¹²⁷ Footnote 106, Art. 20, para. 2.

¹²⁸ [General Assembly Resolution 73/333](#), *Follow-up to the Report of the Ad Hoc Open-ended Working Group Established Pursuant to General Assembly Resolution 72/277*, A/RES/73/333 (30 August 2019).

¹²⁹ [General Assembly Resolution 73/195](#), *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195 (19 December 2018). Annex, para. 7.

¹³⁰ The countries that voted against the General Assembly resolution adopting the Global Compact for Safe, Orderly and Regular Migration are the Czech Republic, Hungary, Israel, Poland, and the United States.

¹³¹ Footnote 129, Annex, *Chapeau*.

At the outset, the GCSOR clarifies that migrants and refugees are distinct groups governed by separate legal frameworks.¹³² While refugees and migrants are entitled to the same universal human rights and fundamental freedoms, only refugees are entitled to the specific international protection as defined by international refugee law (footnote 132).

The GCSOR does not distinguish between “legal” and “illegal” migration. Instead, it makes a distinction between “regular” and “irregular” migration, but does not explicitly define either. Irregular migration is associated with several factors, such as desperation and deteriorating environments that compel migrants to seek a livelihood in countries other than their own;¹³³ smuggling of migrants;¹³⁴ exploitation by human trafficking networks to recruit and victimize smuggled or irregular migrants;¹³⁵ and geographic areas beset with consistent impacts of structural factors (such as poverty, unemployment, climate change and disasters, inequality, corruption, and poor governance).¹³⁶ Within their jurisdiction, states may distinguish between regular and irregular migration status, and have the sovereign right to determine their national migration policy.¹³⁷

The GCSOR’s cooperative framework is comprised of 23 objectives for safe, orderly and regular migration (Box 3.4).

The GCSOR states that it rests, among other things, on the UNFCCC, the Paris Agreement, the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, and the Sendai Framework for Disaster Risk Reduction.¹³⁸ It mentions climate change mitigation and adaptation in the context of human rights and the fulfillment of the SDGs (i.e., eliminating the adverse drivers and structural factors that compel people to leave their country of origin).¹³⁹

States are thus enjoined to strengthen joint analysis and sharing of information to better map, understand, predict, and address migration movements, such as those that may result from sudden- and slow-onset natural disasters, the adverse effects of climate change, and environmental degradation (footnote 139). They are also urged

¹³² Footnote 129, Annex, para. 4.

¹³³ Footnote 129, Annex, para. 18.

¹³⁴ Footnote 129, Annex, paras. 16 and 25.

¹³⁵ Footnote 129, Annex, paras. 16 and 26.

¹³⁶ Footnote 129, Annex, para. 39.

¹³⁷ Footnote 129, Annex, para. 15.

¹³⁸ Footnote 129, Annex, para. 2.

¹³⁹ Footnote 129, Annex, para. 18. Subparagraph (b) states other drivers and factors: “Invest in programmes that accelerate States’ fulfilment of the Sustainable Development Goals with the aim of eliminating the adverse drivers and structural factors that compel people to leave their country of origin, including through poverty eradication, food security, health and sanitation, education, inclusive economic growth, infrastructure, urban and rural development, employment creation, decent work, gender equality and empowerment of women and girls, resilience and disaster risk reduction, climate change mitigation and adaptation, addressing the socioeconomic effects of all forms of violence, non-discrimination, the rule of law and good governance, access to justice and protection of human rights, as well as creating and maintaining peaceful and inclusive societies with effective, accountable and transparent institutions[.]”

Box 3.4: Objectives for Safe, Orderly and Regular Migration

1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies.
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin.
3. Provide accurate and timely information at all stages of migration.
4. Ensure that all migrants have proof of legal identity and adequate documentation.
5. Enhance availability and flexibility of pathways for regular migration.
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work.
7. Address and reduce vulnerabilities in migration.
8. Save lives and establish coordinated international efforts on missing migrants.
9. Strengthen the transnational response to smuggling of migrants.
10. Prevent, combat and eradicate trafficking in persons in the context of international migration.
11. Manage borders in an integrated, secure and coordinated manner.
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral.
13. Use migration detention only as a measure of last resort and work towards alternatives.
14. Enhance consular protection, assistance and cooperation throughout the migration cycle.
15. Provide access to basic services for migrants.
16. Empower migrants and societies to realize full inclusion and social cohesion.
17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration.
18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences.
19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries.
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants.
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration.
22. Establish mechanisms for the portability of social security entitlements and earned benefits.
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration.

Source: General Assembly Resolution 73/195, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195 (19 December 2018). Annex, para. 16.

to develop adaptation and resilience strategies, taking into account the potential implications for migration, while recognizing that adaptation in the country of origin is a priority (footnote 139). Displacement considerations must be integrated in disaster preparedness strategies (footnote 139). Approaches to address the challenges of migration movements in the context of sudden- and slow-onset natural disasters must be coherent and informed by relevant recommendations from state-led consultative processes (such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change) (footnote 139).

G. Global Compact on Refugees

The Global Compact on Refugees (GCR) seeks to provide predictable and equitable burden- and responsibility-sharing for hosting and supporting the world's refugees among United Nations member states and relevant



The principle of non-*refoulement* forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations. Under international human rights law, the prohibition of *refoulement* is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). In regional instruments, the principle is explicitly found in the Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. International human rights bodies, regional human rights courts, as well as national courts have guided that this principle is an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights. Human rights treaty bodies regularly receive individual petitions concerning non-*refoulement*, including the Committee Against Torture, the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child.

The prohibition of *refoulement* under international human rights law applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations. As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of non-*refoulement* is characterised by its absolute nature without any exception. In this respect, the scope of this principle under relevant human rights law treaties is broader than that contained in international refugee law. The prohibition applies to all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or effective control, even when outside of that State's territory.

Source: United Nations Office of the High Commissioner for Human Rights. *The Principle of Non-Refoulement under International Human Rights Law*. p. 1.

stakeholders.¹⁴⁰ It is grounded in the international refugee protection regime and centered on the cardinal principle of “non-*refoulement*.”¹⁴¹

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol lie at the core of the GCR (footnote 141). It is also guided by relevant international human rights instruments, international humanitarian law, and other international instruments, as applicable.¹⁴²

The GCR aims to (i) ease pressures on host countries, (ii) enhance refugee self-reliance, (iii) expand access to third country solutions, and (iv) support conditions in countries of origin for return in safety and dignity.¹⁴³ It is composed of

- the Comprehensive Refugee Response Framework, previously adopted by the UNGA as Annex I of the New York Declaration for Refugees and Migrants;¹⁴⁴
- a Program of Action which stipulates (i) arrangements for burden- and responsibility-sharing (including the quadrennial Global Refugee Forum at the international level; national arrangements for host countries at the domestic level; funding and use of resources; partnerships; and securing reliable, comparable, and timely data); and (ii) areas in need of support, such as reception and admission, meeting needs and supporting communities (e.g., education, health, jobs and livelihood, and food security), and solutions (e.g., support for countries of origin and voluntary repatriation, resettlement, complementary pathways for admission to third countries, and local integration); and
- arrangements for follow-up and review.

¹⁴⁰ United Nations, General Assembly, *Global Compact on Refugees: Report of the United Nations High Commissioner for Refugees (Part II)*, A/73/12 (Part II) (13 September 2018). paras. 1 and 3.

¹⁴¹ Footnote 140, para. 5.

¹⁴² Footnote 141. Para. 5 enumerates “relevant international human rights instruments” as including, but not limited to, the Universal Declaration of Human Rights (which *inter alia* enshrines the right to seek asylum in its Art. 14); the Vienna Declaration and Programme of Action; the Convention on the Rights of the Child; the Convention against Torture; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of Persons with Disabilities. Para. 5 examples of “other international instruments as applicable” are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

¹⁴³ Footnote 140, para. 7.

¹⁴⁴ Footnote 140, para. 10. See *General Assembly Resolution No. 71/1, New York Declaration for Refugees and Migrants*, A/RES/71/1 (19 September 2016).

The GCR refers to climate, environmental degradation, and natural disasters as not in themselves causes of refugee movements.¹⁴⁵ However, they are factors that increasingly interact with the drivers of refugee movements (footnote 145). Significantly, the GCR does not recognize “climate refugees,” but does state that in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation.¹⁴⁶

In certain situations, host countries may request support from the international community to address the accommodation and environmental impacts of large numbers of refugees.¹⁴⁷ Environmental impact assessments and national sustainable development projects, among others, will be actively supported.¹⁴⁸

The GCR is not legally binding, but it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries.¹⁴⁹ The General Assembly affirmed the GCR on 17 December 2018.¹⁵⁰

¹⁴⁵ Footnote 140, para. 8.

¹⁴⁶ Footnote 140, para. 12.

¹⁴⁷ Footnote 140, para. 78.

¹⁴⁸ Footnote 140, para. 79.

¹⁴⁹ Footnote 140, para. 4.

¹⁵⁰ [General Assembly Resolution 73/151](#), *Office of the United Nations High Commissioner for Refugees*, A/RES/73/151 (17 December 2018).

Agriculture and food security. Farmers harvest wheat crop in Punjab, Pakistan. Climate change threatens crop yields due to temperature increases and increased rainfall. Reduced crop yields undermine availability of and access to food, and adversely affect nutritional value (photo by Sara Farid/ADB).





PART FOUR

REGIONAL ENVIRONMENTAL AND CLIMATE CHANGE INSTRUMENTS

I. South Asia

A. 2007 Malé Declaration on the Human Dimension of Global Climate Change

The Malé Declaration on the Human Dimension of Global Climate Change is the outcome document of the Small Island States Conference, convened in Maldives in November 2007.¹ The Malé Declaration characterizes climate change as having clear and immediate implications on the full enjoyment of human rights, including the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.²

The Malé Declaration requested the Conference of the Parties (COP) of the United Nations Frameworks Convention on Climate Change (UNFCCC) to seek the cooperation of the Office of the United Nations High Commissioner for Human Rights and the United Nations Human Rights Council in assessing the human rights implications of climate change.³ It also requested the Office of the United Nations High Commissioner for Human Rights to conduct a detailed study on the effects of climate change on the full enjoyment of human rights, to be submitted to the Human Rights Council.⁴

The Malé Declaration was presented during the Thirteenth COP to the UNFCCC (COP 13) in Bali, Indonesia.

¹ *Malé Declaration on the Human Dimension of Global Climate Change*, Malé, Maldives, 14 November 2007.

² Footnote 1, Preamble, subpara. 4.

³ Footnote 1, para. 3.

⁴ Footnote 1, para. 4.

B. 2010 SAARC Convention on Cooperation on Environment

The South Asian Association for Regional Cooperation (SAARC)⁵ Convention on Cooperation on Environment seeks to promote closer cooperation among the states parties for the protection, preservation, management, and enhancement of the environment, in the context of intergenerational responsibility.⁶ Cooperation consists of exchange of best practices and knowledge, capacity building, and transfer of eco-friendly technology.⁷ The scope of the convention covers

- afforestation and reforestation,
- air quality management,
- biological diversity,
- climate change,
- coastal zone management,
- coral reef management,
- ecosystem management for sustainable livelihoods,
- global environmental issues,
- land degradation and desertification,
- mountain ecosystem glaciers and glacial lake including high altitude hydrological monitoring,
- river ecosystem including river cleaning,
- seawater and freshwater quality management,
- strengthening disaster management capabilities,
- waste management,
- wildlife conservation and combating illegal trade in wildlife and bio-resources,
- water management and conservation,
- environmental impact assessment studies,
- soil erosion and sedimentation, and
- role and/or impact of human activity (footnote 7).

A governing council comprising of environmental ministers from member states implements the convention.⁸ All eight member states ratified the convention, which came into force on 23 October 2013.⁹

⁵ SAARC is composed of the Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, Nepal, the Islamic Republic of Pakistan, and the Democratic Socialist Republic of Sri Lanka.

⁶ [SAARC Convention on Cooperation on Environment](#), Thimphu, Bhutan, 29 April 2010. Preamble and Art. 1. The relevant section of the Preamble states, "Taking into consideration the deep concerns of the Member States on the unabated degradation of the environment and the adverse impacts of climate change in the region and their shared interest in its conservation for the well being of present and future generations."

⁷ Footnote 6, Art. 2.

⁸ Footnote 6, Art. 5.

⁹ SAARC. [Areas of Cooperation: Environment, Natural Disasters and Biotechnology](#).

II. Southeast Asia

A. 2002 Association of Southeast Asian Nations Agreement on Transboundary Haze Pollution

The Association of Southeast Asian Nations (ASEAN)¹⁰ Agreement on Transboundary Haze Pollution (the Haze Agreement) is a legally binding treaty that seeks to prevent, monitor, and mitigate transboundary haze pollution as a result of land and/or forest fires.¹¹ The parties are to engage in concerted national efforts and international cooperation, and are required to

- cooperate in developing and implementing measures to prevent, monitor, and mitigate transboundary haze pollution, and to control sources of fires—including identification of fires; development of monitoring, assessment, and early warning systems; exchange of information and technology; and provision of mutual assistance;
- when the transboundary haze pollution originates from within their territories, respond promptly to a request for relevant information sought by the state(s) that are or may be affected by such transboundary haze pollution, with a view to minimizing the consequence of the transboundary haze pollution; and
- take legal, administrative and/or other measures to implement their obligations under the agreement.¹²

The Haze Agreement was adopted in June 2002 and entered into force on 25 November 2003.¹³ All ASEAN members have ratified the Haze Agreement.¹⁴

B. 2007 ASEAN Declaration on Environmental Sustainability

The ASEAN Declaration on Environmental Sustainability is a soft law instrument that undertakes to protect the environment, respond to climate change, and conserve natural resources in the region.¹⁵ Leaders of ASEAN member states adopted the declaration on 20 November 2007 in Singapore.

It envisions an ASEAN Community that is economically vibrant and environmentally friendly, so that the present and future generations can enjoy a clean and sustainable environment.¹⁶ At the same time, it acknowledges

¹⁰ ASEAN is composed of Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam.

¹¹ [ASEAN Agreement on Transboundary Haze Pollution](#), Kuala Lumpur, 10 June 2002. Art. 2.

¹² Footnote 11, Art. 4.

¹³ ASEAN Haze Action Online. [ASEAN Agreement on Transboundary Haze Pollution \(Information Page\)](#).

¹⁴ ASEAN Haze Action Online. [Status of Ratification](#).

¹⁵ [ASEAN Declaration on Environmental Sustainability](#), Singapore, 20 November 2007.

¹⁶ Footnote 15, Preamble.

that ASEAN member states are at different stages of economic development (footnote 16). They thus require different levels of resources to effectively address environmental issues without compromising competitiveness or social and economic development (footnote 16).

The declaration's environment protection plan references international and regional cooperation to combat transboundary environmental pollution, including haze pollution.¹⁷ This approach requires building capacity, enhancing public awareness, strengthening law enforcement, promoting environmentally sustainable practices, and combating illegal logging and its associated illegal trade (footnote 17).

The declaration also promotes the sustainable management and use of soil, forest, coastal, and marine environments as part of regional and global efforts on biodiversity conservation, as these measures contribute toward mitigating the effects of climate change and environmental degradation.¹⁸ It emphasizes, in particular, sustainable forest management and development (afforestation, reforestation, reduction in deforestation, forest degradation, and forest fires).¹⁹ The declaration states an aspirational goal of significantly increasing the cumulative forest cover in the ASEAN region by at least 10 million hectares by 2020.²⁰

The climate change measures include improving energy efficiency²¹ and promoting the use of renewable and alternative energy sources (such as solar, hydro, wind, and geothermal energy).²² However, the declaration acknowledges that fossil fuels will continue to be part of the energy landscape in the region (footnote 16). It thus seeks to intensify cooperation on the joint research, development, and deployment of low emission technologies for the cleaner use of fossil fuels, recognizing that fossil fuels will still play a “major role in [the] energy mix.”²³

C. 2007 Singapore Declaration on Climate Change, Energy, and the Environment

The 2007 Singapore Declaration on Climate Change, Energy, and the Environment is the outcome document of the Third East Asia Summit (EAS),

¹⁷ Footnote 15, para. 6.

¹⁸ Footnote 15, para. 8.

¹⁹ Footnote 15, Preamble states, “Recognising the importance of sustainable forest management in ASEAN, which will contribute significantly to the international efforts to promote environmental sustainability, and to mitigate the effects of climate change as well as transboundary environmental pollution...” Para. 10 states, “To call upon the international community to participate in and contribute to afforestation and reforestation, and to reduce deforestation, forest degradation, and forest fires, including by promoting sustainable forest management and development, and combating illegal logging...”

²⁰ Footnote 15, para. 28.

²¹ Footnote 15, para. 18.

²² Footnote 15, para. 17.

²³ Footnote 15, para. 16.

held on 21 November 2007 in Singapore.²⁴ ASEAN member states as well as Australia, the People's Republic of China, India, Japan, New Zealand, and the Republic of Korea attended the Summit.

The Singapore Declaration reaffirms the interrelatedness of the challenges of climate change, energy security, and other environmental and health issues.²⁵ It also emphasizes that adaptation is a critical issue for the region—emphasis thus has to be on both mitigation and adaptation measures.²⁶ These measures include mobilization of financial support and cooperation to build capacity in EAS developing countries; deployment of clean technology; scientific and technical cooperation; promotion of sustainable patterns of consumption and production; and sustainable planning and management of the region's forests.²⁷

However, the Singapore Declaration echoes the ASEAN Declaration on Environmental Sustainability on the issue of fossil fuels. It acknowledges that EAS participating countries are at different stages of economic development, and in many cases are heavily dependent on fossil fuels (footnote 25). Thus, actions to tackle global environmental issues should take into account diverse national and regional circumstances in accordance with the principle of common but differentiated responsibilities and respective capabilities (CBRD-RC) (footnote 25). While the Singapore Declaration urges intensified cooperation on the use of renewable and alternative sources of energy, it also seeks the development of “cleaner fossil fuel technologies including clean use of coal.”²⁸

D. 2012 ASEAN Human Rights Declaration

The ASEAN member states adopted the ASEAN Human Rights Declaration on 18 November 2012 in Phnom Penh, Cambodia.²⁹ It specifically affirms the “universal, indivisible, interdependent and interrelated” human rights set forth in the Universal Declaration of Human Rights (UDHR),³⁰ and categorizes them into (i) civil and political rights; and (ii) economic, social, and cultural rights:

- **Civil and political rights** include the right to life;³¹ the right to personal liberty and security;³² the right to be free from servitude or slavery;³³ the right not to be subjected to torture or to cruel, inhuman or degrading

²⁴ *2007 Singapore Declaration on Climate Change, Energy and the Environment*, Singapore, 21 November 2007.

²⁵ Footnote 24, Preamble.

²⁶ Footnote 24, para. 4.

²⁷ Footnote 24, paras. 7 and 9.

²⁸ Footnote 24, para. 8(d).

²⁹ *ASEAN Human Rights Declaration*, Phnom Penh, 18 November 2012.

³⁰ Footnote 29, Preamble, paras. 7 and 26.

³¹ Footnote 29, para. 11.

³² Footnote 29, para. 12.

³³ Footnote 29, para. 13.

treatment;³⁴ the right to freedom of movement and residence;³⁵ the right to seek and receive asylum;³⁶ the right to be free from arbitrary deprivation of property;³⁷ the right to a nationality;³⁸ the right to marry and found a family;³⁹ the right to be presumed innocent until proven guilty of a criminal offense;⁴⁰ the right to privacy;⁴¹ the right to freedom of religion;⁴² the right to freedom of expression;⁴³ the right to freedom of peaceful assembly;⁴⁴ and the right to participate and vote.⁴⁵

- **Economic, social, and cultural rights** include the right to work in just, decent and favorable conditions;⁴⁶ the right to an adequate standard of living;⁴⁷ the right to enjoy the highest attainable standard of physical, mental and reproductive health;⁴⁸ the right to social security;⁴⁹ the right to education;⁵⁰ and the right, individually or in association with others, to freely take part in cultural life.⁵¹

Notably, the ASEAN Human Rights Declaration substantively went beyond the UDHR in several respects. The right to an adequate standard of living under the ASEAN Declaration specifically includes the “right to safe drinking water and sanitation” and “the right to a safe, clean and sustainable environment,” neither of which were expressly stated in the UDHR.⁵² Similarly, the provision on the right to health in the ASEAN Declaration requires member states to create a positive environment in overcoming stigma, silence, denial, and discrimination in the prevention, treatment, care, and support of people suffering from communicable diseases, including HIV/AIDS.⁵³

The ASEAN Declaration also identifies a right to development, which is characterized as an “inalienable human right by which every human person... is entitled to participate in, contribute to, enjoy, and benefit equitably and sustainably from economic, social, cultural and political development.”⁵⁴ The right

³⁴ Footnote 29, para. 14.

³⁵ Footnote 29, para. 15.

³⁶ Footnote 29, para. 16.

³⁷ Footnote 29, para. 17.

³⁸ Footnote 29, para. 18.

³⁹ Footnote 29, para. 19.

⁴⁰ Footnote 29, para. 20.

⁴¹ Footnote 29, para. 21.

⁴² Footnote 29, para. 22.

⁴³ Footnote 29, para. 23.

⁴⁴ Footnote 29, para. 24.

⁴⁵ Footnote 29, para. 25.

⁴⁶ Footnote 29, para. 27.

⁴⁷ Footnote 29, para. 28.

⁴⁸ Footnote 29, para. 29.

⁴⁹ Footnote 29, para. 30.

⁵⁰ Footnote 29, para. 31.

⁵¹ Footnote 29, para. 32.

⁵² Footnote 29, para. 28(e) and (f).

⁵³ Footnote 29, para. 29(2).

⁵⁴ Footnote 29, paras. 35 to 37.

to development should be fulfilled to equitably meet the developmental and environmental needs of present and future generations.⁵⁵ Lastly, the ASEAN Declaration recognizes the right to enjoy peace within a framework of security and stability, neutrality, and freedom.⁵⁶

The ASEAN Declaration has nevertheless been criticized for including language that suggests variable benchmarks for human rights (e.g., “...the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds”).⁵⁷

E. 2012 Action Plan on Joint Response to Climate Change

The Action Plan on Joint Response to Climate Change seeks to implement the ASEAN Leaders’ Statement on Joint Response to Climate Change, which was adopted on 9 April 2010 at the 16th ASEAN Summit.⁵⁸ It consists of action points on adaptation, mitigation, finance and investment, technology transfer, and cooperation with other existing regional and subregional institutions and initiatives. These action points include sharing of information and best practices on

- (i) research and development in hydrological and agricultural management that aims to enhance food security, agricultural productivity, and water resources sustainability;⁵⁹
- (ii) adaptation efforts;⁶⁰
- (iii) mitigating greenhouse gas (GHG) emissions from energy production and use, agriculture, LULUCF (including REDD/REDD+), industrial processes, and waste;⁶¹
- (iv) strengthening science and policy interface toward low carbon development and green economy;⁶² and
- (v) promoting, developing, and enhancing Clean Development Mechanism (CDM) activities.⁶³

The Action Plan also calls for enhancing existing ASEAN climate, meteorological, and oceanographical centers and networks to assess climate change impacts and strengthen regional climate data sharing.⁶⁴ It further seeks a common understanding on institutional arrangements for accessing multilateral funds (such as the Green Climate Fund).⁶⁵

⁵⁵ Footnote 29, para. 35.

⁵⁶ Footnote 29, para. 38.

⁵⁷ Footnote 29, para. 7.

⁵⁸ [ASEAN Action Plan on Joint Response to Climate Change](#), Phnom Penh, 18 October 2011. A.3 and A.4.

⁵⁹ Footnote 58, C.1(i).

⁶⁰ Footnote 58, C.1(ii).

⁶¹ Footnote 58, C.2(i).

⁶² Footnote 58, C.4(ii).

⁶³ Footnote 58, C.2(iii).

⁶⁴ Footnote 58, C.1(iii).

⁶⁵ Footnote 58, C.3(i).

The Action Plan was endorsed in principle during the 13th Informal ASEAN Ministerial Meeting on the Environment on 18 October 2011 in Phnom Penh, Cambodia.⁶⁶ It is implemented by the ASEAN Working Group on Climate Change.⁶⁷

F. ASEAN Sociocultural Community Blueprint 2025

The ASEAN Sociocultural Community Blueprint (ASCC) 2025 is a strategy and planning mechanism that features complementarities between the region's goals and the SDGs.⁶⁸ It recognizes that a number of ASEAN member states remain vulnerable to natural and human-induced disasters, which tend to disproportionately and adversely affect the poor.⁶⁹ Pollution, resource degradation, and the fact that the ASEAN region is at the forefront of the adverse impacts of climate change also present serious challenges (footnote 69).

The ASCC 2025 vision is an ASEAN community that engages and benefits the people, and is inclusive, sustainable, resilient, and dynamic.⁷⁰ In terms of environment and climate change, it aims to realize

- a sustainable community that promotes social development and environmental protection through effective mechanisms to meet the ASEAN people's current and future needs; and
- a resilient community with enhanced capacity and capability to adapt and respond to social and economic vulnerabilities, disasters, and climate change.⁷¹

The ASCC 2025 lays out strategic measures to accomplish these objectives. A “sustainable climate” requires comprehensive and coherent responses to climate change challenges, as well as strengthened human and institutional capacity in implementing adaptation and mitigation measures, especially in vulnerable and marginalized communities.⁷² Access to new and innovative financing mechanisms to address climate change should be explored, including leveraging on the private sector.⁷³ Sectoral institutions and local governments should also build capacity in conducting GHG inventory, vulnerability assessments, and adaptation needs.⁷⁴ Climate change risk management and GHG emission reduction should be mainstreamed in sectoral planning.⁷⁵

In addition, a “resilient ASEAN” requires that initiatives on disaster risk reduction, climate change adaptation and mitigation, humanitarian actions, and sustainable

⁶⁶ Footnote 58, Adoption.

⁶⁷ Footnote 58, D.8.

⁶⁸ ASEAN Secretariat. 2016. *ASEAN Sociocultural Community Blueprint 2025*. Jakarta.

⁶⁹ Footnote 68, para. 3.

⁷⁰ Footnote 68, para. 5.

⁷¹ Footnote 68, paras. 5.3 and 5.4.

⁷² Footnote 68, para. 16, (C)(3)(i) to (ii).

⁷³ Footnote 68, para. 16, (C)(3)(iii).

⁷⁴ Footnote 68, para. 16, (C)(3)(iv).

⁷⁵ Footnote 68, para. 16, (C)(3)(vi).

development be synergized.⁷⁶ This approach includes considering indigenous and traditional knowledge and practices in responding and adapting to the impacts of climate change.⁷⁷ It also covers promotion and utilization of renewable energy and green technologies.⁷⁸

III. The Pacific

A. 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and Related Protocols

The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (also known as the SPREP Convention or Noumea Convention) obliges states parties to take all appropriate measures to prevent, reduce, and control pollution from any source in the marine and coastal environment of the South Pacific Region, and to ensure sound environmental management and development of natural resources, using the best practicable means at their disposal and in accordance with their capabilities.⁷⁹ Articles 6 to 13 of the convention identify possible sources of pollution and environmental damage, such as vessels, land-based sources, sea-bed activities, airborne pollution, dumping, storage of toxic and hazardous wastes, testing of nuclear devices, and mining and coastal erosion. The convention does not apply to internal waters or archipelagic waters of the states parties.⁸⁰

The obligation to prevent, reduce, and control pollution applies even in cases of emergencies. To this end, the parties are obliged to develop individual and joint contingency plans for responding to emergency incidents involving pollution or the threat thereof.⁸¹ Parties are also obliged to conduct environmental impact assessments and invite public comment thereon.⁸²

The convention did not set up a detailed liability regime. Instead, it invites the parties to cooperate in formulating and adopting appropriate rules and procedures regarding liability and compensation for damage resulting from pollution.⁸³

Parties to the Noumea Convention are Australia, the Cook Islands, the Federated States of Micronesia, Fiji, France, the Marshall Islands, Nauru, New Zealand, Papua

⁷⁶ Footnote 68, para. 19, (D)(1)(iv).

⁷⁷ Footnote 68, para. 19, (D)(3)(iii).

⁷⁸ Footnote 68, para. 19, (D)(5)(ii).

⁷⁹ *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, Noumea, New Caledonia, 24 November 1986. Art. 5.

⁸⁰ Footnote 79, Art. 1(2).

⁸¹ Footnote 79, Art. 15(1).

⁸² Footnote 79, Art. 16.

⁸³ Footnote 79, Art. 20.

New Guinea, Samoa, Solomon Islands, and the United States.⁸⁴ Palau, Tuvalu, and the United Kingdom (for the Pitcairn Islands) have signed but not yet ratified it (footnote 84). The Noumea Convention entered into force on 22 August 1990.

The convention has two protocols: the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Dumping Protocol),⁸⁵ and the Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region (Emergencies Protocol).⁸⁶ The Dumping Protocol is a regional agreement consistent with both the main Noumea Convention and the global London Convention (1972).⁸⁷ The Emergencies Protocol seeks national preparation and mutual cooperation and assistance between states parties in responding effectively to pollution emergencies.⁸⁸

Both the Dumping Protocol and the Emergencies Protocol entered into force on 22 August 1990, and have the same states parties as the Noumea Convention (except for Australia which is not a party to the Dumping Protocol) (footnote 84). Three subsequent Protocols—the Oil Pollution Protocol, the Hazardous and Noxious Substances Pollution Protocol, and the Dumping Protocol Amendment—are not yet in force.

B. 2006 Pacific Islands Framework for Action on Climate Change 2006–2015

The Pacific Islands Framework for Action on Climate Change 2006–2015 addresses climate change issues in all Pacific Island Countries and Territories (PICTs), including American Samoa, the Cook Islands, Fiji, French Polynesia, Guam, Kiribati, the Commonwealth of the Northern Marianas, the Marshall Islands, the Federated States of Micronesia, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis and Futuna.⁸⁹ It consists of six themes, implemented through 2015 at the national and regional levels:

- (i) **Implementing tangible, on-ground adaptation measures.** Best practice adaptation and risk reduction measures aim to enhance resilience to the adverse effects of climate change.⁹⁰ These measures should target priority development sectors, and be guided by policies and strategies that integrate with broader national planning processes

⁸⁴ Secretariat of the Pacific Regional Environment Programme. *Status as at July 2017 of the Apia, Noumea (or SPREP) and Waigani Conventions, for which SPREP is the Secretariat*.

⁸⁵ *Protocol for the Prevention of Pollution of the South Pacific Region by Dumping*, Noumea, New Caledonia, 25 November 1986.

⁸⁶ *Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region*, Noumea, New Caledonia, 25 November 1986.

⁸⁷ Footnote 85, Preamble.

⁸⁸ Footnote 86, Preamble and Art. 3.

⁸⁹ Secretariat of the Pacific Regional Environment Programme. 2011. *Pacific Islands Framework for Action on Climate Change 2006–2015*. 2nd ed. Apia, Samoa. p. 8.

⁹⁰ Footnote 89, p. 14

(footnote 90). The framework also seeks improved access to, and management and dissemination of, equitable amounts of climate change financing at regional, national, and community levels.⁹¹

- (ii) **Governance and decision-making.** This theme covers strengthened national and regional climate change governance mechanisms (i.e., policy and institutional frameworks); enhanced cross sectoral and multi-disciplinary coordination, collaboration, and decision-making around climate change; and enhanced integration of climate change risks into development decision-making process and assessment cycles, sectoral planning, and management at all levels.⁹²
- (iii) **Improving understanding of climate change.** This theme acknowledges that better understanding of climate change, variability, and extreme events is needed to inform responses at the community, national, and regional levels.⁹³ This means understanding existing observations, improving the quality and quantity of relevant data, improving access to data and information, undertaking analysis to understand key climate processes, and translating climate change science into applicable information products and tools to inform decision makers (footnote 93).
- (iv) **Education, training, and awareness.** Increased awareness and understanding of climate change issues among communities and other stakeholders is critical in developing and implementing effective responses to climate change challenges.⁹⁴ This theme thus seeks strengthened capacity to (i) monitor and assess environmental, social, and economic risks and impacts of climate change, and (ii) identify, design, and implement effective adaptation and mitigation measures that integrate economic, scientific, and traditional knowledge.⁹⁵
- (v) **Mitigation of global GHG emissions.** The framework recognizes that PICTs' contributions to the total global emission of GHGs are insignificant compared with those of the rest of the international community.⁹⁶ Nonetheless, PICTs intend to contribute to the global effort to reduce emissions by promoting cost-effective mitigation measures, including increased energy efficiency, increased use of appropriate low carbon and renewable energy technologies, enhanced ability to engage in carbon market mechanisms including REDD+, and development and implementation of CDM initiatives.⁹⁷
- (vi) **Partnerships and cooperation.** The framework advocates effective, coordinated, and harmonized organizational arrangements between

⁹¹ Footnote 89, p. 15.

⁹² Footnote 89, pp. 16–17.

⁹³ Footnote 89, p. 18.

⁹⁴ Footnote 89, p. 21.

⁹⁵ Footnote 89, p. 22.

⁹⁶ Footnote 89, p. 23.

⁹⁷ Footnote 89, pp. 23–24.

government agencies, the private sector, civil society, the community, and other stakeholders (such as relevant international partnerships).⁹⁸ Active participation in global, regional, and multilateral programs and forums, such as climate change negotiation meetings, is encouraged (footnote 98).

C. 2016 Framework for the Resilient Development of the Pacific

The Framework for Resilient Development in the Pacific: An Integrated Approach to Address Climate Change and Disaster Risk Management (2017–2030) is a regional, non-political policy document that “provides high-level strategic guidance to different stakeholder groups on how to enhance resilience to climate change and disasters, in ways that contribute to, and are embedded in sustainable development.”⁹⁹ It identifies three interrelated goals:

- strengthened integrated adaptation and risk reduction to enhance resilience to climate change and disasters;
- low carbon development (with the greatest opportunities for reducing GHG emissions in electricity generation and the transport and industrial sectors);¹⁰⁰ and
- strengthened disaster preparedness, response, and recovery.

All three goals are underpinned by the “All-Stakeholder Approach” (involving all stakeholders from different sectors, organization types, and governance levels).¹⁰¹ As such, the goals delineate a non-exhaustive list of priority actions to be undertaken by national and subnational governments and administrations, civil society and local communities, the private sector, regional organizations, and other development partners.

D. 2018 Boe Declaration on Regional Security

The 2018 Boe Declaration on Regional Security recognizes an “expanded concept of security,” which includes human security, humanitarian assistance, prioritizing environmental and resource security, transnational crime, and cybersecurity.¹⁰² It reaffirms that climate change remains the single greatest threat to the livelihoods, security, and well-being of the people of the Pacific.¹⁰³ Pacific states are therefore committed to the implementation of the Paris Agreement (footnote 103).

⁹⁸ Footnote 89, pp. 25–26.

⁹⁹ Pacific Community (SPC) et al. 2016. *Framework for Resilient Development in the Pacific: An Integrated Approach to Address Climate Change and Disaster Risk Management (FRDP) 2017–2030*. Suva, Fiji. p. 2.

¹⁰⁰ Footnote 99, p. 18.

¹⁰¹ Footnote 99, p. 8.

¹⁰² *Boe Declaration on Regional Security*, Yaren, Nauru, 5 September 2018. Preamble and para. 7.

¹⁰³ Footnote 102, para. 1.

In addition, Pacific states agreed to strengthen their respective national security approaches because national security impacts on regional security.¹⁰⁴ They also agreed to strengthen the existing regional security architecture (inclusive of regional law enforcement secretariats and regional organizations) to

- account for the expanded concept of security;
- identify and address emerging security challenges;
- improve coordination among existing security mechanisms;
- facilitate open dialogue and strengthened information sharing;
- further develop early warning mechanisms;
- support implementation;
- promote regional security analysis, assessment, and advice; and
- engage and cooperate, where appropriate, with international organizations, partners, and other relevant stakeholders.¹⁰⁵

¹⁰⁴ Footnote 102, para. 8.

¹⁰⁵ Footnote 102, para. 9.

Renewable energy. Solar panels gather sun power and turbines harvest wind power at the Burgos Wind and Solar Farm in Ilocos Norte, Philippines. Shifting to renewable energy from carbon-intensive energy sources is a key mitigation strategy (photo by Al Benavente/ADB).





PART FIVE

RIGHTS-BASED INSTRUMENTS

I. Hard Law

A. 1951 Convention Relating to the Status of Refugees

The Convention Relating to the Status of Refugees (Refugee Convention) establishes the legal framework for treatment of refugees (i.e., a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group, or political opinion; and is unable or unwilling to avail himself or herself of the protection of that country, or to return there, for fear of persecution).¹

The Refugee Convention lays out the rights to which refugees are entitled as a minimum standard. These rights include protection of artistic rights and industrial property,² association in non-political and non-profit-making associations and trade unions,³ access to the courts of law,⁴ engaging in wage-earning employment,⁵ public education,⁶ freedom of movement,⁷ and issuance of identity papers and travel documents.⁸

The core state obligation adopts the principle of non-*refoulement*, that is, states parties are not permitted to expel or return (“*refouler*”) refugees in any manner whatsoever to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.⁹ This obligation is non-derogable and reservations are not allowed.¹⁰

¹ [Convention Relating to the Status of Refugees](#), Geneva, 28 July 1951, *United Nations Treaty Series*, Vol. 189, No. 2545, p. 137. Art. 1(A)(2).

² Footnote 1, Art. 14.

³ Footnote 1, Art. 15.

⁴ Footnote 1, Art. 16.

⁵ Footnote 1, Art. 17.

⁶ Footnote 1, Art. 22.

⁷ Footnote 1, Art. 26.

⁸ Footnote 1, Arts. 27 and 28.

⁹ Footnote 1, Art. 33(1).

¹⁰ Footnote 1, Art. 42(1).

Nonetheless, the principle of non-*refoulement* does not apply to a refugee who (i) based on reasonable grounds, may be regarded as a danger to the security of the country in which he or she is, or (ii) having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. states parties are obliged to apply Refugee Convention provisions without discrimination as to race, religion, or country of origin.¹¹ They are also prohibited, with a few exceptions, from penalizing refugees for their illegal entry or stay.¹²

The Refugee Convention does not apply to internally displaced persons (persons who have been forced to flee their homes, but have not crossed international borders).¹³ It also explicitly does not apply to any person who otherwise may fall under the definition of refugee, but for whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge prior to his or her admission to that country as a refugee, or acts contrary to the purposes and principles of the United Nations.¹⁴ Lastly, the restrictive definition of refugee under the convention suggests that “climate refugees”—persons who are forced to flee their homes due to the effects of climate change, such as sea level rise—do not fall within the ambit of the convention.

The Refugee Convention entered into force on 22 April 1954. It had 146 states parties as of October 2020.¹⁵

The 1984 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, provides a more extensive definition of refugee.¹⁶ Its definition includes “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order.”¹⁷ The inclusion of human rights and public order grounds opens the possibility of categorizing “climate refugees” under the umbrella “refugee” definition. Should courts, for instance, embrace an expanded concept of the right to life or right to food security, there may be a colorable claim that “climate refugees” suffer from massive violation of human rights.

Nonetheless, national court decisions around the world involving “climate refugees” have not so far referred to the Cartagena Declaration. Its status as a soft law instrument limited to the Latin American region, and the seeming reluctance of courts to move beyond the convention definition of “refugee,” indicate that the

¹¹ Footnote 1, Art. 3.

¹² Footnote 1, Art. 31.

¹³ USA for UNHCR. [Refugee Facts: What is a Refugee?](#)

¹⁴ Footnote 1, Art. 1(F).

¹⁵ Including the Holy See. United Nations Treaty Collection. [Convention Relating to the Status of Refugees \(Information Page\)](#).

¹⁶ [Cartagena Declaration on Refugees](#), Cartagena de Indias, Colombia, 22 November 1984.

¹⁷ Footnote 16, III, para. 3.

expanded Cartagena definition has not crossed over to customary law or general principle of law status.

B. 1966 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a landmark multilateral human rights treaty that identifies civil and political rights derived from the inherent dignity of the human person.¹⁸ The ICCPR had 173 states parties as of October 2020.¹⁹ It entered into force on 23 March 1976.

States parties are obliged to respect and ensure the civil and political rights of all individuals within their territories or subject to their jurisdiction, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.²⁰ These rights are

- the right to self-determination;²¹
- the right to life;²²
- freedom from torture or cruel, inhuman or degrading treatment or punishment;²³
- the right to not be enslaved;²⁴
- the right to liberty and security of person;²⁵
- the right of detainees to be treated with humanity and with respect for the inherent dignity of the human person;²⁶
- the right to not be imprisoned merely on the ground of inability to fulfill a contractual obligation;²⁷
- freedom of movement;²⁸
- the right of aliens in regard to expulsion from the territory of a state party;²⁹
- the right to equality before courts and tribunals and the right to a fair trial;³⁰
- the right to not be found guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense at the time when it was committed;³¹
- the right to recognition as a person before the law;³²

¹⁸ [International Covenant on Civil and Political Rights](#), New York, 16 December 1966, *United Nations Treaty Series*, Vol. 999, No. 14668, p. 171. Preamble.

¹⁹ United Nations Treaty Collection. [International Covenant on Civil and Political Rights \(Information Page\)](#).

²⁰ Footnote 18, Art. 2(1).

²¹ Footnote 18, Art. 1.

²² Footnote 18, Art. 6.

²³ Footnote 18, Art. 7.

²⁴ Footnote 18, Art. 8.

²⁵ Footnote 18, Art. 9.

²⁶ Footnote 18, Art. 10.

²⁷ Footnote 18, Art. 11.

²⁸ Footnote 18, Art. 12.

²⁹ Footnote 18, Art. 13.

³⁰ Footnote 18, Art. 14.

³¹ Footnote 18, Art. 15.

³² Footnote 18, Art. 16.

- freedom from arbitrary or unlawful interference;³³
- freedom of thought, conscience and religion;³⁴
- the right to hold opinions without interference and the right to freedom of expression;³⁵
- the right to be free from any propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;³⁶
- the right of peaceful assembly;³⁷
- freedom of association;³⁸
- the right to marry;³⁹
- the rights of children to protection, registration, have a name, and acquire a nationality;⁴⁰
- the right to political participation;⁴¹
- the right to equality before the law;⁴² and
- the right of ethnic, religious or linguistic minorities to their own culture, religion, and language.⁴³

Article 2(2) of the ICCPR requires states parties to take the necessary steps to adopt such laws or other measures to give effect to these rights. In addition, they are obliged to ensure that any person whose rights are violated shall have an effective remedy before competent judicial, administrative, or legislative authorities.⁴⁴

The ICCPR characterizes a subset of these rights as non-derogable under any circumstances, including the right to life and the right to be free from torture or cruel, inhuman or degrading treatment or punishment.⁴⁵ For other rights, states parties may take measures derogating from their obligations under the ICCPR in times of public emergencies which threaten the life of the nation and the existence of which is officially proclaimed.⁴⁶

The ICCPR right most commonly associated with climate change issues is the right to life (Article 6). The adverse effects of climate change may in some circumstances pose a risk to human life, including, for example, the existential impact of sea level rise on small island developing states.

³³ Footnote 18, Art. 17.

³⁴ Footnote 18, Art. 18.

³⁵ Footnote 18, Art. 19.

³⁶ Footnote 18, Art. 20.

³⁷ Footnote 18, Art. 21.

³⁸ Footnote 18, Art. 22.

³⁹ Footnote 18, Art. 23.

⁴⁰ Footnote 18, Art. 24.

⁴¹ Footnote 18, Art. 25.

⁴² Footnote 18, Art. 26.

⁴³ Footnote 18, Art. 27.

⁴⁴ Footnote 18, Art. 2(3).

⁴⁵ Footnote 18, Art. 4(2).

⁴⁶ Footnote 18, Art. 4(1).

The United Nations Human Rights Committee's resolution of a communication filed by a Kiribati citizen against New Zealand demonstrates the distinctions between right to life cases and "traditional" refugee cases (Box 5.1). The committee's views indicate that "the obligation not to extradite, deport or otherwise transfer pursuant to Article 6 of the ICCPR may be broader than the scope of the principle of non-*refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status."⁴⁷

Box 5.1: Views Adopted by the Human Rights Committee on the Right to Life, the Principle of Non-*Refoulement*, and "Climate Refugees"

(Communication submitted by Ioane Teitiota against New Zealand)

Ioane Teitiota claimed that he fled his home in Kiribati due to the effects of climate change and sea level rise. He sought asylum in New Zealand, but the Immigration and Protection Tribunal denied his claim. The tribunal examined his claim for protection separately under both the Convention Relating to the Status of Refugees (Refugee Convention) and the International Covenant on Civil and Political Rights (ICCPR). As to the first, it stated that he was not a "refugee" as defined in the Refugee Convention because he did not objectively face a real risk of being persecuted if returned to Kiribati.^a As to the second, it ruled that the evidence Teitiota provided did not establish that he faced a risk of an imminent, or likely, risk of arbitrary deprivation of life upon return to Kiribati.^b The Court of Appeal and the Supreme Court denied Teitiota's appeals, although the Supreme Court did not rule out the possibility that environmental degradation resulting from climate change or other natural disasters could "create a pathway into the Refugee Convention or other protected person jurisdiction."^c

Teitiota was then deported back to Kiribati. Subsequently, he filed a communication with the Human Rights Committee under the auspices of the ICCPR Optional Protocol alleging that, with his removal to Kiribati, New Zealand violated his right to life.

The committee opined that states parties under the ICCPR are obliged not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm to his or her right to life.^d Significantly, the committee acknowledged that environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.^e Nonetheless, the risk must be personal. It cannot derive merely from the general conditions in the receiving State (in this case, Kiribati), except in the most extreme cases.^f In addition, there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists (footnote f).

The committee was of the view that New Zealand did not violate Teitiota's right to life when he was removed to Kiribati. It noted that Teitiota appeared to accept that he was alleging not a risk of harm specific to him, but rather a general risk faced by all individuals in Kiribati.^g He also stated that he had never been involved in a land or overcrowding dispute between different land claimants. As to his claim that he would be seriously harmed by the lack of access to potable water in Kiribati, the committee noted the findings of New Zealand authorities that there was no evidence thereof. While there may be some hardship caused by water rationing, there was not sufficient information indicating that the supply of fresh water is inaccessible, insufficient, or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair Teitiota's right to enjoy a life with dignity or cause his unnatural or premature death (footnote g).

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⁴⁷ United Nations, Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, CCPR/C/127/D/2728/2016 (24 October 2019), p. 9, para. 9.3.

Box 5.1 *continued*

Teitiota also claimed that his right to life had been violated because he had been deprived of his means of subsistence, as his crops had been destroyed due to salt deposits on the ground.^h The committee acknowledged that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change (footnote h). However, the information made available to the committee does not indicate that when Teitiota's removal occurred, there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to a life with dignity (footnote h). While it was difficult to grow crops, it was not impossible (footnote h). In fact, most nutritious crops remained available in Kiribati.

Finally, Teitiota claimed that he faces a risk to his right to life because of overpopulation and frequent and increasingly intense flooding and breaches of seawalls.ⁱ The committee noted that both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel cross-border movement of individuals seeking protection from harms related to climate change.^j Without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under Article 6 (right to life) or Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR, thereby triggering the non-*refoulement* obligations of the sending states (footnote j). Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized (footnote j).

In Teitiota's case, the committee accepted his claim that sea level rise is likely to render Kiribati uninhabitable. However, even if it were to accept the time frame of 10 to 15 years as suggested by Teitiota, the committee opined that this timeframe could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.^k Kiribati was in fact taking adaptive measures to reduce existing vulnerabilities and build resilience to harms related to climate change (footnote k).

The committee was thus unable to hold that the assessment conducted by New Zealand authorities was arbitrary, erroneous, or amounted to a denial of justice. Nonetheless, this conclusion was without prejudice to the continuing responsibility of New Zealand to take into account, in future deportation cases, the situation at the time in Kiribati and new and updated data on the effects of climate change and rising sea levels.^l

^a United Nations, Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, CCPR/C/127/D/2728/2016 (24 October 2019). para. 2.8.

^b Footnote a, para. 9.6.

^c Footnote a, para. 2.10 (quoted from the Supreme Court decision).

^d Footnote a, para. 9.3.

^e Footnote a, para. 9.4.

^f Footnote d. N.B. Para. 9.7 gives examples of "extreme cases" in relation to a general situation of violence in the receiving state (e.g., where there is a real risk of harm simply by virtue of an individual being exposed to such violence upon return, or where the individual in question is in a particularly vulnerable situation).

^g Footnote a, para. 9.7.

^h Footnote a, para. 9.9.

ⁱ Footnote a, para. 9.10.

^j Footnote a, para. 9.11.

^k Footnote a, para. 9.12.

^l Footnote a, para. 9.14.

Source: United Nations, Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, CCPR/C/127/D/2728/2016 (24 October 2019).

C. 1966 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a landmark multilateral human rights treaty that identifies economic, social, and cultural rights derived from the inherent dignity of the human person.⁴⁸ The ICESCR had 171 states parties as of October 2020.⁴⁹ It entered into force on 3 January 1976.

Article 1 of the ICESCR defines the right to self-determination, using identical language as the ICCPR. By virtue of this right, people freely determine their political status and freely pursue their economic, social, and cultural development.⁵⁰ They may, for their own ends, freely dispose of their natural wealth and resources; in no case may they be deprived of their own means of subsistence.⁵¹ Other ICESCR rights include

- the right to work;⁵²
- the right to just and favorable conditions of work, including a decent living and safe and healthy working conditions;⁵³
- the right to form and join trade unions;⁵⁴
- the right to social security;⁵⁵
- the right to family life, including paid maternal leave and the protection of children;⁵⁶
- the right to an adequate standard of living, including the right to adequate food, clothing, and housing;⁵⁷
- the right to health, specifically the highest attainable standard of physical and mental health;⁵⁸
- the right to education;⁵⁹ and
- the right to take part in cultural life.⁶⁰

Article 2 of the ICESCR establishes the concept of progressive realization. States parties are obliged to take steps, to the maximum of their available resources, toward achieving progressively the full realization of the rights recognized in the covenant. In doing so, they are to adopt all appropriate means, including particularly the adoption of legislative measures.

⁴⁸ [International Covenant on Economic, Social and Cultural Rights](#), New York, 16 December 1966, *United Nations Treaty Series*, Vol. 993, No. 14531, p. 3. Preamble.

⁴⁹ United Nations Treaty Collection. [International Covenant on Economic, Social and Cultural Rights \(Information Page\)](#).

⁵⁰ Footnote 48, Art. 1(1).

⁵¹ Footnote 48, Art. 1(2).

⁵² Footnote 48, Art. 6.

⁵³ Footnote 48, Art. 7.

⁵⁴ Footnote 48, Art. 8.

⁵⁵ Footnote 48, Art. 9.

⁵⁶ Footnote 48, Art. 10.

⁵⁷ Footnote 48, Art. 11.

⁵⁸ Footnote 48, Art. 12.

⁵⁹ Footnote 48, Arts. 13 and 14.

⁶⁰ Footnote 48, Art. 15.

The language of ICESCR's Article 2 ("take steps," "available resources," "achieving progressively") is comparatively weaker than that of ICCPR's Article 2 (an immediate obligation "to respect and to ensure"). The Committee on Economic, Social and Cultural Rights clarified that Article 2 of the ICESCR merely recognizes that, in general, it is not possible to achieve, in a short period of time, the full realization of all economic, social and cultural rights, especially in the context of resource availability.⁶¹ Progressive realization is thus a necessary flexibility device that generally disallows deliberately retrogressive measures (footnote 61). The minimum core obligation of each state party is to ensure the satisfaction of, at the very least, the minimum essential levels of each ICESCR right.⁶²

The adverse effects of climate change can impact several ICESCR rights:

- **The right to self-determination (Common Article 1 of both the ICCPR and the ICESCR).** The effects of climate change on small island developing states are often described as existential, with rising sea levels foreseen to completely submerge entire countries in a few decades.
- **The right to an adequate standard of living under Article 11.** Food insecurity (e.g., decreased agricultural productivity and crop yields) undermines the "fundamental right to be free from hunger."⁶³ This, in turn, jeopardizes the realization of the right to food. Rising sea levels, extreme weather events, drought, erosion, and flooding displace communities, thereby impacting on the right to housing.
- **The right to health under Article 12.** The World Health Organization identified the health risks posed by climate change—increasingly intense heat waves and fires; greater risk of food-, water- and vector-borne diseases; greater likelihood of undernutrition; negative impacts on food systems; lowered work capacity and productivity, especially in vulnerable populations; and violent conflict associated with resource scarcity and population movement.⁶⁴ These health risks can worsen poverty and exacerbate existing health inequalities both between and within populations (footnote 64). In addition, the landmark treaties on climate change reflect the close link between the right to health and climate change. Article 4(1)(f) of the United Nations Framework Convention on Climate Change (UNFCCC) obliges states parties to take climate change into account and employ appropriate methods to minimize its adverse

⁶¹ United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23 (14 December 1990). para. 9.

⁶² Footnote 61, para. 10.

⁶³ Footnote 57; and C. Mbow et al. 2019. *Chapter 5: Food Security*. In P.R. Shukla et al., eds. *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems*. In press.

⁶⁴ United Nations, General Assembly, Human Rights Council, *Analytical Study on the Relationship between Climate Change and the Human Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/32/23 (6 May 2016). para. 6.

effects on, among other things, public health. The Preamble of the Paris Agreement states that, when taking action to address climate change, the parties should respect, promote, and consider their respective obligations on human rights and the right to health.

- **The right to education under Articles 13 and 14.** Climate change effects, such as decreased productivity and extreme weather events, can cause children to be out-of-school and forced to work to augment family income. State funds earmarked for education may also be diverted to respond to immediate emergencies, such as disaster relief.

D. 1979 Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international convention that promotes equal rights for men and women.⁶⁵ It is frequently characterized as an international bill of rights for women. CEDAW had 189 states parties as of October 2020.⁶⁶ It entered into force on 3 September 1981.

Discrimination against women is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁶⁷ Temporary special measures aimed at accelerating de facto equality between men and women are not considered discrimination.⁶⁸

The rights enumerated under CEDAW cover

- **women’s rights in the political and public life of the country**, such as the right to vote in all elections and public referenda; the right to be eligible for election to all publicly elected bodies; the right to participate in the formulation of government policy and the implementation thereof; the right to hold public office; the opportunity to represent their governments at the international level; and the right to acquire, change, or retain their nationality;⁶⁹
- **economic and social rights of women** in the fields of education, employment, health and other areas of economic and social life, including special protections for rural women;⁷⁰ and

⁶⁵ [Convention on the Elimination of All Forms of Discrimination against Women](#), New York, 18 December 1979, *United Nations Treaty Series*, Vol. 1249, No. 20378, p. 13.

⁶⁶ United Nations Treaty Collection. [Convention on the Elimination of All Forms of Discrimination against Women \(Information Page\)](#).

⁶⁷ Footnote 65, Art. 1.

⁶⁸ Footnote 65, Art. 4(1).

⁶⁹ Footnote 65, Art. 7-9.

⁷⁰ Footnote 65, Art. 10-14.

- **women’s personal and family rights**, such as (i) the right of equality with men before the law, including a legal capacity identical to that of men and the same opportunities to exercise that capacity; and (ii) the same rights as men relating to marriage and family relations, including the right to enter into marriage, the right to freely choose a spouse and to enter into marriage only with their free and full consent, the rights and responsibilities during marriage and at its dissolution, the rights and responsibilities as parents, and the right to decide freely and responsibly on the number and spacing of their children.⁷¹

General Comment No. 37 of the Committee on the Elimination of Discrimination Against Women specifically discusses gender-related dimensions of disaster risk reduction in the context of climate change.⁷² Under Articles 2 and 24 of CEDAW, states parties are obliged to take “all appropriate measures” including legislation, in all fields, to guarantee the full development and advancement of women on the basis of equality with men.⁷³

General Comment No. 37 thus clarifies that states parties should ensure that all policies, legislation, and activities related to disaster risk reduction and climate change are gender responsive and based on human-rights based principles.⁷⁴ These principles include substantive equality and non-discrimination, participation and empowerment, and accountability and access to justice.⁷⁵

Discrimination that relates to property, land, and natural resources—including ownership, access, use, disposal, control, governance, and inheritance—should be prioritized. So should barriers that impede women’s full legal capacity and autonomy in areas such as freedom of movement and equal access to economic, social, and cultural rights (including food, health, work, and social protection).⁷⁶ Effective mechanisms to guarantee that the rights of women and girls are a primary consideration in devising disaster risk reduction and climate change measures at the domestic and global levels—local, national, regional, and international—are necessary (footnote 76).

Furthermore, the guarantee of political equality under Articles 7, 8, and 14 of CEDAW encompasses women’s leadership, representation, and participation.⁷⁷ These are essential in developing and implementing effective disaster risk reduction and climate change programs that consider the different needs of the population, in particular women (footnote 77).

⁷¹ Footnote 65, Art. 15–16.

⁷² Committee on the Elimination of Discrimination Against Women, *General Comment No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, CEDAW/C/GC/37 (13 March 2018).

⁷³ Footnote 72, para. 28.

⁷⁴ Footnote 72, paras. 26–27.

⁷⁵ Footnote 72, para. 27.

⁷⁶ Footnote 72, para. 31.

⁷⁷ Footnote 72, para. 35.

General Comment No. 37 notes that the Paris Agreement acknowledges the factors that should inform climate change adaptation: the best available science and, as appropriate, by traditional, indigenous and local knowledge systems.⁷⁸ The local traditional knowledge held by women located in agricultural regions is especially relevant. “These women are well positioned to observe changes in the environment and to respond to these through different adaptive practices in crop selection, planting, harvesting, land conservation techniques, and careful management of water resources.”⁷⁹

In line with Article 15(1) of CEDAW, women should be accorded equality before the law.⁸⁰ This is of utmost importance in situations of disasters and climate change. Women may encounter significant access to justice barriers, such as in claiming compensation and other forms of reparation to mitigate their losses and to adapt to climate change (footnote 80).

Box 5.2 summarizes other specific areas of concern discussed in General Comment No. 37.

Box 5.2: Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change

Women, girls, men, and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks, burdens, and impacts.^a Situations of crisis exacerbate pre-existing gender inequalities and compound the intersecting forms of discrimination against, among others, women living in poverty; indigenous women; women belonging to ethnic, racial, religious, and sexual minority groups; women with disabilities; refugee and asylum-seeking women; internally displaced, stateless, and migrant women; rural women; unmarried women; and adolescents and older women, who are often disproportionately affected compared with men or other women (footnote a).

General Comment No. 37 highlights the nexus between women’s and girl’s rights recognized by the Convention on the Elimination of All Forms of Discrimination against Women, and disaster risk reduction and climate change. Specific areas of concern include the following:

- **The right to live free from gender-based violence against women and girls.** Situations of disaster and the degradation and destruction of natural resources are factors that affect and exacerbate gender-based violence against women and girls.^b Sexual violence is common in humanitarian crises and may become acute in the wake of a national disaster.^c In a time of heightened stress, lawlessness, and homelessness, women face an increased threat of violence (footnote c).
- **The right to education.** Girls’ and women’s access to education is often already limited as a result of social, cultural and economic barriers.^d In the aftermath of disasters, they may face even greater obstacles to participation in education due to the destruction of infrastructures, lack of teachers and other resources, economic hardship, and security concerns (footnote d).

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⁷⁸ Footnote 72, para. 34.

⁷⁹ Footnote 72, para. 33.

⁸⁰ Footnote 72, para. 37.

Box 5.2 *continued*

- **The rights to work and social protection.** The burden of caretaking and domestic work often increases for women following disasters.^e Gendered inequalities increase the vulnerability and mortality of women and girls (footnote e). These inequalities also frequently leave them with less time to engage in economic activities or to access important resources, including information and education, which are necessary for recovery and adaptation (footnote e). Social and legal inequalities further restrict the ability of women to move to safer, less disaster-prone areas and may limit women's rights to access financial services, credit, social security benefits, and secure tenure of land and other productive resources.^f
- **The right to health.** Health services and systems, including sexual and reproductive health services, should be available, accessible, acceptable, and of good quality even in contexts of disasters.^g Climate change and disasters, including pandemics, influence the prevalence, distribution, and severity of new and re-emerging diseases.^h The susceptibility of women and girls to disease is heightened as a result of inequalities in access to food, nutrition, and health care as well as social expectations that women will act as primary caregivers for children, the elderly, and the sick (footnote h).
- **The right to an adequate standard of living.** As a result of discriminatory laws and social norms, women have limited access to secure land tenure and their farmlands tend to be of inferior quality and more prone to flooding, erosion or other adverse climatic events.ⁱ Increasingly, due to male out-migration, women are being left with responsibility for farming in climate change affected areas (footnote i). However, they do not possess legal and socially recognized land ownership necessary for adapting to changing climatic conditions (footnote i). This situation implicates (i) Articles 12 and 14 of CEDAW, which contain specific guarantees on nutrition and women's equal participation in decision-making about food production and consumption, (ii) the state's obligation to eliminate discrimination under Article 2, (iii) the state's obligation under Article 5(a) to modify cultural patterns of behavior based on discriminatory stereotypes, (iv) the state's obligation under Article 15 to ensure equality before the law, and (v) the state's obligation under Article 16 to guarantee equality within marriage and family relations.^j
- **The right to freedom of movement.** In several regions, climate change and disasters are contributing to an increase in the feminization of migration (i.e., the migration of women on their own into feminized sectors of work to support family members who no longer have local livelihood opportunities.^k At the same time, women who are left behind when male family members migrate may also find themselves having to take on non-traditional economic and community leadership tasks for which they have had little preparation or training.^l This situation is of particular relevance when disasters occur and women are responsible for coordinating mitigation, recovery, and adaptation efforts without the assistance of male community members (footnote l).

^a Committee on the Elimination of Discrimination Against Women, *General Comment No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, CEDAW/C/GC/37 (13 March 2018), para. 2.

^b Footnote a, para. 55.

^c Footnote a, para. 56.

^d Footnote a, para. 59.

^e Footnote a, para. 62.

^f Footnote a, para. 63.

^g Footnote a, para. 65.

^h Footnote a, para. 66.

ⁱ Footnote a, para. 70.

^j Footnote a, para. 71.

^k Footnote a, para. 74.

^l Footnote a, para. 77.

Source: Committee on the Elimination of Discrimination Against Women, *General Comment No. 37 (2018) on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, CEDAW/C/GC/37 (13 March 2018).

E. 1989 United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is an international human rights convention that enumerates the civil, political, economic, social, health, and cultural rights of children.⁸¹ The CRC had 196 states parties as of October 2020.⁸² It came into force on 2 September 1990.

The CRC is based on four guiding principles: the principle of equality and non-discrimination;⁸³ the best interests of the child;⁸⁴ the right to life, survival and development;⁸⁵ and respect for the views of the child in matters that affect him or her, according to his or her age and maturity.⁸⁶ “Child” is defined as every person below the age of 18 years unless under domestic legislation, majority is attained earlier.⁸⁷

The CRC establishes the basic minimum standards and rights to which children are entitled, including

- the right to life (footnote 85);
- the right to a name, to acquire a nationality and, as far as possible, to know and be cared for by his or her parents;⁸⁸
- the right to preserve his or her identity;⁸⁹
- the right to freedom of expression and access to information;⁹⁰
- the right to freedom of thought, conscience and religion;⁹¹
- the right to freedom of association and to freedom of peaceful assembly;⁹²
- the right to privacy;⁹³
- the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse;⁹⁴
- the right to the enjoyment of the highest attainable standard of health;⁹⁵
- the right to an adequate standard of living;⁹⁶
- the right to education, including compulsory primary education;⁹⁷

⁸¹ *Convention on the Rights of the Child*, New York, 20 November 1989, *United Nations Treaty Series*, Vol. 1577, No. 27531, p. 3.

⁸² Including the Holy See. United Nations Treaty Collection. [Convention on the Rights of the Child \(Information Page\)](#).

⁸³ Footnote 81, Art. 2.

⁸⁴ Footnote 81, Art. 3.

⁸⁵ Footnote 81, Art. 6.

⁸⁶ Footnote 81, Art. 12.

⁸⁷ Footnote 81, Art. 1.

⁸⁸ Footnote 81, Art. 7.

⁸⁹ Footnote 81, Art. 8.

⁹⁰ Footnote 81, Arts. 13 and 17.

⁹¹ Footnote 81, Art. 14.

⁹² Footnote 81, Art. 15.

⁹³ Footnote 81, Art. 16.

⁹⁴ Footnote 81, Arts. 19 and 34.

⁹⁵ Footnote 81, Art. 24.

⁹⁶ Footnote 81, Art. 27.

⁹⁷ Footnote 81, Arts. 28 and 29.

- the right to rest and leisure;⁹⁸
- the right to be protected from economic exploitation and from performing any work that is likely to be hazardous, harmful, or to interfere with the child's education;⁹⁹ and
- the right to be protected from torture or other cruel, inhuman or degrading treatment or punishment, including capital punishment and life imprisonment without possibility of release.¹⁰⁰

In addition, a child belonging to ethnic, religious or linguistic minorities, as well as a child of indigenous origin, has the right to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.¹⁰¹

The CRC has been invoked in climate litigation, the most notable of which is the petition filed by 16 children against Argentina, Brazil, France, Germany, and Turkey before the Committee on the Rights of the Child, under the Optional Protocol to the CRC on a Communications Procedure.¹⁰² The Optional Protocol had 46 parties as of May 2020.¹⁰³ The petitioners could only include as respondents states that are parties to the Optional Protocol. Box 5.3 briefly summarizes the case brought by the petitioners against the five respondent states, itemizing the

Box 5.3: Chiara Sacchi et al. v. Argentina et al.
(Communication to the Committee on the Rights of the Child,
Submitted on 23 September 2019)

Sixteen children submitted a communication to the Committee on the Rights of the Child (CRC). The petitioners claim that Argentina, Brazil, France, Germany, and Turkey (respondent states) breached their human rights duties by causing and perpetuating the climate crisis, despite their decade-long knowledge of the deadly and foreseeable consequences of climate change.^a The respondent states, petitioners assert, have all failed to (i) reduce their emissions at the “highest possible ambition,” and (ii) protect children from the acts of the major carbon emitters.^b

Petitioners thus allege that the respondent states violated and continue to violate the following rights:

- **Right to life under Article 6 of the CRC.** The petitioners invoke the precautionary principle and claim that respondent states “[take] dangerous actions with uncertain but foreseeable fatal consequences and accept the risks of those foreseeable consequences[.]”^c This constitutes ‘depraved indifference, reckless endangerment, or dolus eventualis’ sufficient to trigger an Article 6 violation (footnote c).

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⁹⁸ Footnote 81, Art. 31.

⁹⁹ Footnote 81, Art. 32.

¹⁰⁰ Footnote 81, Art. 37.

¹⁰¹ Footnote 81, Art. 30.

¹⁰² *Chiara Sacchi et al. v. Argentina et al.* Communication to the Committee on the Rights of the Child, submitted on 23 September 2019. The petition was submitted under Art. 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child.

¹⁰³ United Nations Treaty Collection. [Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure \(Information Page\)](#).

Box 5.3 *continued*

- **Right to health under Article 24 of the CRC.** The petitioners have suffered from various illnesses under circumstances that were either brought about or exacerbated by climate change. For instance, two of them have suffered asthma attacks because of wildfires and heat-related pollution.^d Three of the petitioners contracted vector-borne diseases (malaria, dengue, and chikungunya), whose spread and intensification, they allege, were worsened by climate change (footnote d).
- **Right to culture under Article 30 of the CRC.** Several of the petitioners are children of indigenous origin. They allege that the respondents' acts and omissions perpetuating the climate crisis have already jeopardized thousands of years-old subsistence practices of indigenous people.^e These practices (e.g., subsistence hunting, fishing, and gathering [Akiak, Alaska]; reindeer herding [Sapmi, Sweden]; and fishing and ancient cultural traditions [Marshall Islands]) are not just main source of livelihoods, but directly relate to a specific way of being, seeing, and acting in the world, and form part of their cultural identity (footnote e).
- **Right to have the children's best interests a primary consideration in the respondent states' climate actions under Article 3 of the CRC.** The petitioners assert that by delaying decarbonization, despite all scientific evidence, the respondents' climate policies have under-valued children's lives and treated their present and future interests as lesser considerations.^f

The petitioners do not seek compensation in their request for relief. Instead, they request that the Committee on the Rights of the Child

- find that climate change is a children's rights crisis;
- find that each respondent, along with other states, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change;
- find that by recklessly perpetuating life-threatening climate change, each respondent is violating the petitioners' rights to life, health, and the prioritization of the child's best interests, as well as the cultural rights of the petitioners from indigenous communities;
- recommend that the respondents review, and where necessary, amend their laws and policies to ensure that mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to (i) protect the petitioners' rights and (ii) make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and [adaptation];
- recommend that each respondent initiate cooperative international action—and increase its efforts with respect to existing cooperative initiatives—to establish binding and enforceable measures to mitigate the climate crisis, prevent further harm to the petitioners and other children, and secure their inalienable rights; and
- recommend that pursuant to Article 12, the respondents shall ensure the child's right to be heard and to express their views freely, in all international, national, and subnational efforts to mitigate or adapt to the climate crisis, and in all efforts taken in response to the Communication submitted to the Committee.^g

^a Chiara Sacchi et al. v. Argentina et al. Communication to the Committee on the Rights of the Child, submitted on 23 September 2019, pp. 54–59.

^b Footnote a, pp. 59–70.

^c Footnote a, p. 80.

^d Footnote a, p. 83.

^e Footnote a, p. 87.

^f Footnote a, p. 89.

^g Footnote a, pp. 7–8.

Source: Chiara Sacchi et al. v. Argentina et al. Communication to the Committee on the Rights of the Child, submitted on 23 September 2019.

rights under the CRC they claim to have been violated. The Committee on the Rights of the Child is still deliberating on the petition as of September 2020.

F. Tabular Summaries of Treaty Status

Tables 5.1 and 5.2 summarize the status of each country covered in this report in relation to the human rights treaties discussed in Part Five Section I.

**Table 5.1: Summary of Status (Human Rights Treaties)—
Southeast Asia and South Asia Developing Member Countries**

| Country | 1951 Refugee Convention | ICCPR | ICESCR | CEDAW | CRC |
|-------------------|-------------------------|---------------|---------------|---------------|---------------|
| Southeast Asia | | | | | |
| Brunei Darussalam | – | – | – | 24 May 2006 a | 27 Dec 1995 a |
| Cambodia | 15 Oct 1992 a | 26 May 1992 a | 26 May 1992 a | 15 Oct 1992 a | 15 Oct 1992 a |
| Indonesia | – | 23 Feb 2006 a | 23 Feb 2006 a | 13 Sep 1984 r | 5 Sep 1990 r |
| Lao PDR | – | 25 Sep 2009 r | 13 Feb 2007 r | 14 Aug 1981 r | 8 May 1991 a |
| Malaysia | – | – | – | 5 Jul 1995 a | 17 Feb 1995 a |
| Myanmar | – | – | 6 Oct 2017 r | 22 Jul 1997 a | 15 Jul 1991 a |
| Philippines | 22 Jul 1981 a | 23 Oct 1986 r | 7 Jun 1974 r | 5 Aug 1981 r | 21 Aug 1990 r |
| Singapore | – | – | – | 5 Oct 1995 a | 5 Oct 1995 a |
| Thailand | – | 29 Oct 1996 a | 5 Sep 1999 a | 9 Aug 1985 a | 27 Mar 1992 a |
| Viet Nam | – | 24 Sep 1982 a | 24 Sep 1982 a | 17 Feb 1982 r | 28 Feb 1990 r |
| South Asia | | | | | |
| Afghanistan | 30 Aug 2005 a | 24 Jan 1983 a | 24 Jan 1983 a | 5 Mar 2003 r | 28 Mar 1994 r |
| Bangladesh | – | 6 Sep 2000 a | 5 Oct 1998 a | 6 Nov 1984 a | 3 Aug 1990 r |
| Bhutan | – | – | – | 31 Aug 1981 r | 1 Aug 1990 r |
| India | – | 10 Apr 1979 a | 10 Apr 1979 a | 9 Jul 1993 r | 11 Dec 1992 a |
| Maldives | – | 19 Sep 2006 a | 19 Sep 2006 a | 1 Jul 1993 a | 11 Feb 1991 r |
| Nepal | – | 14 May 1991 a | 14 May 1991 a | 22 Apr 1991 r | 14 Sep 1990 r |
| Pakistan | – | 23 Jun 2010 r | 17 Apr 2008 r | 12 Mar 1996 a | 12 Nov 1990 r |
| Sri Lanka | – | 11 Jun 1980 a | 11 Jun 1980 a | 5 Oct 1981 r | 12 Jul 1991 r |

CEDAW = Convention on the Elimination of All Forms of Discrimination against Women, CRC = Convention on the Rights of the Child, ICCPR = International Covenant on Civil and Political Rights, ICESCR = International Covenant on Economic, Social and Cultural Rights, Lao PDR = Lao People's Democratic Republic.

Notes: a = accession, r = ratification.

Sources:

United Nations Treaty Collection. [Convention on the Elimination of All Forms of Discrimination against Women](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on the Rights of the Child](#) (accessed 31 October 2020).

United Nations Treaty Collection. [International Covenant on Civil and Political Rights](#) (accessed 31 October 2020).

United Nations Treaty Collection. [International Covenant on Economic, Social and Cultural Rights](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention Relating to the Status of Refugees](#) (accessed 31 October 2020).

**Table 5.2: Summary of Status (Human Rights Treaties)—
Pacific Developing Member Countries**

| Country | 1951 Refugee Convention | ICCPR | ICESCR | CEDAW | CRC |
|---------------------------------|-------------------------|--------------------------|----------------------------|--------------------------|---------------|
| Cook Islands | – | – | – | 11 Aug 2006 a | 6 Jun 1997 a |
| Fiji | 12 Jun 1972 d | 16 Aug 2018 a | 16 Aug 2018 a | 28 Aug 1995 a | 13 Aug 1993 r |
| Kiribati | – | – | – | 17 Mar 2004 a | 11 Dec 1995 a |
| Marshall Islands | – | 12 Mar 2018 a | 12 Mar 2018 a | 2 Mar 2006 a | 4 Oct 1993 r |
| Micronesia, Federated States of | – | – | – | 1 Sep 2004 a | 5 May 1993 a |
| Nauru | 28 Jun 2011 a | 12 Nov 2001 ^a | – | 23 Jun 2011 a | 27 Jul 1994 a |
| Palau | – | 20 Sep 2011 ^b | 20 Sep 2011 ^b | 20 Sep 2011 ^b | 4 Aug 1995 a |
| Papua New Guinea | 17 Jul 1986 a | 21 Jul 2008 a | 21 Jul 2008 a | 12 Jan 1995 a | 2 Mar 1993 r |
| Samoa | 21 Sep 1988 a | 15 Feb 2008 a | – | 25 Sep 1992 a | 29 Nov 1994 r |
| Solomon Islands | 28 Feb 1995 a | 20 May 1976 ^c | 17 Mar 1982 d ^c | 6 May 2002 a | 10 Apr 1995 a |
| Timor-Leste | 7 May 2003 a | 18 Sep 2003 a | 16 Apr 2003 a | 16 Apr 2003 a | 16 Apr 2003 a |
| Tonga | – | – | – | – | 6 Nov 1995 a |
| Tuvalu | 7 Mar 1986 d | 20 May 1976 ^c | 20 May 1976 ^c | 6 Oct 1999 a | 22 Sep 1995 a |
| Vanuatu | – | 21 Nov 2008 r | – | 8 Sep 1995 a | 7 Jul 1993 r |

CEDAW = Convention on the Elimination of All Forms of Discrimination against Women, CRC = Convention on the Rights of the Child, ICCPR = International Covenant on Civil and Political Rights, ICESCR = International Covenant on Economic, Social and Cultural Rights.

Notes: a = accession, d = succession, r = ratification.

^a Nauru signed the ICCPR on 12 November 2001, but has not yet ratified it.

^b Palau signed the ICCPR, the ICESCR, and the CEDAW on 20 September 2011, but has not yet ratified these instruments.

^c The United Kingdom of Great Britain and Northern Ireland's ratification of the ICCPR and ICESCR on 20 May 1976 has territorial application on Solomon Islands and Tuvalu.

Sources:

United Nations Treaty Collection. [Convention on the Elimination of All Forms of Discrimination against Women](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention on the Rights of the Child](#) (accessed 31 October 2020).

United Nations Treaty Collection. [International Covenant on Civil and Political Rights](#) (accessed 31 October 2020).

United Nations Treaty Collection. [International Covenant on Economic, Social and Cultural Rights](#) (accessed 31 October 2020).

United Nations Treaty Collection. [Convention Relating to the Status of Refugees](#) (accessed 31 October 2020).

II. Soft Law

A. 1948 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a historic international human rights instrument adopted by the United Nations General Assembly on 10 December 1948.¹⁰⁴ It was drafted in the context of the two preceding world wars.

The UDHR lays out the fundamental human rights rooted in the dignity and worth of the human person and in the equal rights of men and women.¹⁰⁵ These rights include civil and political rights, such as the right to life, liberty and security of person;¹⁰⁶ the right to be free from slavery or servitude;¹⁰⁷ the right to be free from torture or cruel, inhuman or degrading treatment or punishment;¹⁰⁸ the right to equal protection of the law;¹⁰⁹ and the right to be free from arbitrary arrest, detention, or exile.¹¹⁰ The UDHR also defines economic, social, and cultural rights, such as the right to social security;¹¹¹ the right to work, to free choice of employment, and to just and favorable conditions of work;¹¹² the right to health;¹¹³ and the right to education.¹¹⁴

The UDHR does not directly bind states because it is not a treaty. This was the clear understanding at the time it was drafted.¹¹⁵ However, the rights it defines have made their way into landmark human rights treaties such as the ICCPR and the ICESCR. In addition, some academics and scholars have argued that at least part of the declaration has attained the status of customary law (and is therefore binding as such).¹¹⁶ Jayawickrama (1992) states that at least 90 constitutions

¹⁰⁴ [General Assembly Resolution 217 A \(III\)](#), *Universal Declaration of Human Rights*, A/RES/217(III) (10 December 1948).

¹⁰⁵ Footnote 104, Preamble.

¹⁰⁶ Footnote 104, Art. 3.

¹⁰⁷ Footnote 104, Art. 4.

¹⁰⁸ Footnote 104, Art. 5.

¹⁰⁹ Footnote 104, Art. 7.

¹¹⁰ Footnote 104, Art. 9.

¹¹¹ Footnote 104, Art. 22.

¹¹² Footnote 104, Art. 23.

¹¹³ Footnote 104, Art. 25.

¹¹⁴ Footnote 104, Art. 26.

¹¹⁵ Eleanor Roosevelt, then the Chair of the UN Commission on Human Rights and simultaneously a United States representative to the General Assembly, stated, “In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.” Quoted in M.M. Whiteman. 1965. *Digest of International Law* 5. Washington, DC: Department of State Publication 7873. p. 243; and in H. Hannum. 1998. [The UDHR in National and International Law](#). *Health and Human Rights*. 3 (2). p. 147.

¹¹⁶ H. Hannum. 1998. [The UDHR in National and International Law](#). *Health and Human Rights*. 3 (2). p. 147–149. See also I. Zamfir. 2018. [The Universal Declaration of Human Rights and its Relevance for the European Union](#). *European Parliamentary Research Service*. November.

promulgated since 1948 have either been inspired by the UDHR or contain statements of fundamental rights drawn from it.¹¹⁷

B. 2007 United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹¹⁸ is a framework instrument that establishes minimum standards for the survival, dignity and well-being of indigenous peoples.¹¹⁹ The General Assembly adopted the declaration on 13 September 2007.

The UNDRIP identifies both individual and collective rights of indigenous peoples. It takes into account the concern that other international human rights instruments emphasize individual rights, but may not have addressed collective rights that are “indispensable for the existence, well-being and integral development of indigenous peoples.”¹²⁰ At the same time, the UNDRIP amplifies existing human rights standards as they apply specifically to indigenous peoples.¹²¹

Climate change affects indigenous peoples disproportionately, due to their intricate relationship with their lands, environment, territories, and resources.¹²² The UNDRIP provisions thus help mitigate vulnerability and strengthen resilience and adaptive capacity by identifying elements that have a significant role in environmental management.

Article 29(1) of the UNDRIP states that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and resources. The provision emphasizes that hazardous materials should not be stored or disposed in their lands without their free, prior, and informed consent.¹²³ Furthermore, Article 25 acknowledges their right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned (or otherwise occupied and used) lands, territories, waters, and coastal seas and other resources, and to uphold their responsibilities to future generations in this regard.

¹¹⁷ N. Jayawickrama. 1992. Hong Kong and the International Protection of Human Rights. In R. Wicks, ed. *Human Rights in Hong Kong*. Hong Kong: Oxford University Press.

¹¹⁸ [General Assembly Resolution 61/295](#), *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (13 September 2007).

¹¹⁹ Footnote 118, Art. 43.

¹²⁰ Footnote 118, Preamble.

¹²¹ United Nations Department of Economic and Social Affairs. [United Nations Declaration on the Rights of Indigenous Peoples](#).

¹²² United Nations, Economic and Social Council, Permanent Forum on Indigenous Issues, *Impact of Climate Change Mitigation Measures on Indigenous Peoples and on Their Territories and Lands: Report of the Special Rapporteurs*, E/C.19/2008/10 (20 March 2008).

¹²³ Footnote 118, Art. 29(2).

The rights stated in the UNDRIP also include the right to autonomy or self-government, in the exercise of the indigenous peoples' right to self-determination, in matters relating to

- their internal and local affairs;¹²⁴
- the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions;¹²⁵
- the right not to be subjected to forced assimilation or destruction of their culture;¹²⁶
- the right to not be relocated without their free, prior, and informed consent, and after agreement on just and fair compensation and, where possible, with the option of return;¹²⁷
- the right to revitalize, use, develop, and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems, and literatures;¹²⁸
- the right to establish and control their educational systems;¹²⁹
- the right not to be subjected to any discriminatory conditions of labor;¹³⁰
- the right to determine and develop priorities and strategies for exercising their right to development;¹³¹
- the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used;¹³² and
- the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions.¹³³

C. 2011 United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) include 31 principles that relate to the issue of human rights and transnational corporations and other business enterprises.¹³⁴ They are anchored on the United Nations' "Protect, Respect and Remedy" Framework.¹³⁵ The Special Representative of the Secretary General, John Ruggie, developed the UNGPs,

¹²⁴ Footnote 118, Art. 4.

¹²⁵ Footnote 118, Art. 5. See also Art. 20.

¹²⁶ Footnote 118, Art. 8.

¹²⁷ Footnote 118, Art. 10.

¹²⁸ Footnote 118, Art. 13.

¹²⁹ Footnote 118, Art. 14.

¹³⁰ Footnote 118, Art. 17.

¹³¹ Footnote 118, Art. 23.

¹³² Footnote 118, Art. 26.

¹³³ Footnote 118, Art. 31.

¹³⁴ United Nations Office of the High Commissioner for Human Rights. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. New York and Geneva.

¹³⁵ United Nations, General Assembly, Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie—Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (21 March 2011).

and the United Nations Human Rights Council unanimously endorsed them on 16 June 2011.¹³⁶

The “Protect, Respect and Remedy” Framework is composed of three essential components featuring an interrelated and dynamic system of preventative and remedial measures:

- the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;
- the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and
- the need for greater access by victims to effective remedy, both judicial and non-judicial.¹³⁷

The state duty to protect is a “duty of conduct,” not an obligation of result.¹³⁸ Thus, human rights abuse by private actors do not necessarily implicate state responsibility (footnote 138). However, states may breach their international human rights obligation to respect, protect, and fulfill the human rights of individuals within their territory and/or jurisdiction

- (i) if these abuses are attributable to them—either through conduct of a state organ;¹³⁹ or conduct of persons or entities exercising elements of governmental authority;¹⁴⁰ or conduct of organs placed at the disposal of a state by another state;¹⁴¹ or conduct by private actors directed or controlled by a state;¹⁴² or conduct that may not have been attributable to the state at the time of commission, but is later acknowledged and adopted by a state as its own;¹⁴³ or
- (ii) where states fail to take appropriate steps to prevent, investigate, punish, and redress private actors’ abuse (footnote 138).

UNGP Principle 3 thus states that, in meeting their duty to protect, states should

- enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and to assess periodically the adequacy of such laws and address any gaps;

¹³⁶ United Nations, General Assembly, Human Rights Council, *Resolution 17/4: Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/RES/17/4 (16 June 2011).

¹³⁷ Footnote 135, para. 6.

¹³⁸ Footnote 134, p. 3 (commentary under Principle 1).

¹³⁹ International Law Commission. 2001. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Art. 4.

¹⁴⁰ Footnote 139, Art. 5.

¹⁴¹ Footnote 139, Art. 6.

¹⁴² Footnote 139, Art. 8.

¹⁴³ Footnote 139, Art. 11.

- ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- provide effective guidance to business enterprises on how to respect human rights throughout their operations; and
- encourage, and where appropriate, require business enterprises to communicate how they address their human rights impacts.

The corporate responsibility to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights (consisting of the UDHR and the main instruments through which it has been codified: the ICCPR and the ICESCR) and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.¹⁴⁴ Thus, when national standards fall below international standards, the UNGP clarifies that businesses should respect the latter as minimum reference points.

The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.¹⁴⁵ Moreover, businesses should seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships, even if they have not contributed to those impacts (footnote 145).

UNGP Principle 15 states that in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances. These policies and processes include the following:

- **A policy commitment to meet their responsibility to respect human rights.** This statement of policy should be approved at the most senior level of the business enterprise; be informed by relevant internal and/or external expertise; stipulate the enterprise’s human rights expectations of personnel, business partners, and other parties directly linked to its operations, products, or services; be publicly available and communicated internally and externally; and be reflected in operational policies and procedures.¹⁴⁶
- **A human rights due diligence process** to identify, prevent, mitigate, and account for how businesses address their impacts on human rights. Human rights due diligence should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships.¹⁴⁷ It should also be ongoing, recognizing that the human rights risks may change over time (footnote 147).

¹⁴⁴ Footnote 134, Principle 12.

¹⁴⁵ Footnote 134, Principle 13.

¹⁴⁶ Footnote 134, Principle 16.

¹⁴⁷ Footnote 134, Principle 17.

- **Processes to enable the remediation of any adverse human rights impacts** they cause or to which they contribute.¹⁴⁸

Access to effective remedy requires states to take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses.¹⁴⁹ These steps include considering ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy (footnote 149). There should also be non-judicial grievance mechanisms, both state-based and non-state-based.¹⁵⁰ Non-judicial state-based mechanisms are administrative, legislative, and other similar mechanisms, including national human rights institutions.¹⁵¹ Non-judicial non-state-based mechanisms include (i) those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group; and (ii) regional and international human rights bodies.¹⁵²

The UNGPs are relevant for climate change considerations in a dual context, depending on how courts construe environmental rights. They may be directly linked to environmental rights (e.g., the right to a healthy environment) if such rights—in and of themselves, separate from civil, political, economic, social, and cultural rights—are considered part of the international human rights regime. However, even if environmental rights are not considered a “proper” category of rights under the international human rights regime, the UNGPs may still be relevant if these environmental rights are triangulated with more established human rights (e.g., the right to life).

D. 2003 Equator Principles

The Equator Principles serve as a common baseline and framework for participating financial institutions (Equator Principles Financial Institutions, or EPFIs) to identify, assess, and manage environmental and social risks when financing projects.¹⁵³ EPFIs commit not to provide project finance advisory services, project finance, project-related corporate loans, bridge loans, project-related refinancing, or project-related acquisition finance to projects that do not comply with the relevant Equator Principles requirements.¹⁵⁴ However, these institutions adopt and implement the Equator Principles voluntarily and independently, without reliance on or recourse to the International Finance Corporation, the World Bank Group, the Equator Principles Association, or other financial institutions.¹⁵⁵

¹⁴⁸ Footnote 134, Principle 15.

¹⁴⁹ Footnote 134, Principle 26.

¹⁵⁰ Footnote 134, Principles 27–31.

¹⁵¹ Footnote 134, p. 30 (commentary under Principle 27).

¹⁵² Footnote 134, p. 31 (commentary under Principle 28).

¹⁵³ Equator Principles. 2020. *The Equator Principles*. Preamble, p. 3.

¹⁵⁴ Footnote 153, Preamble, pp. 3–4. There are qualifying criteria for each of the financial products mentioned.

¹⁵⁵ Footnote 153, Disclaimer, p. 18.

Broadly, EPFIs commit to respect human rights in line with the UNGPs by carrying out human rights due diligence (footnote 153). They also commit to supporting the objectives of the Paris Agreement and recognize that they have a role to play in improving the availability of climate-related information (footnote 153). Lastly, EPFIs support conservation, including as it relates to biodiversity (footnote 153). Box 5.4 provides a brief overview of the 10 Equator Principles.

As of 15 November 2020, a total of 111 financial institutions in 37 countries have adopted the Equator Principles.¹⁵⁶

Box 5.4: The Equator Principles

Principle 1 – Review and categorization. When a project is proposed for financing, the Equator Principles Financial Institution (EPFI) categorizes the project based on the magnitude of potential environmental and social risks and impacts, including those related to human rights, climate change, and biodiversity. This is part of its internal environmental and social review and due diligence. The categories are category A (significant risks), category B (limited risks), and category C (minimal or no risks).

Principle 2 – Environmental and Social Assessment. The EPFI requires the client to conduct an appropriate assessment process to address—to the EPFI’s satisfaction—the relevant environmental and social risks and scale of impacts of the proposed project. The assessment documentation should propose measures to minimize, mitigate, and where residual impacts remain, to compensate, offset, and/or remedy for risks and impacts to workers, affected communities, and the environment. A Climate Change Risk Assessment is required (i) for all category A and, as appropriate, category B projects; and (ii) for all projects, in all locations, when combined emissions are expected to be more than 100,000 tonnes of CO₂ equivalent annually.

Principle 3 – Applicable Environmental and Social Standards. The assessment process should address compliance with relevant host country laws, regulations, and permits that pertain to environmental and social issues. The EPFI’s due diligence includes its review and confirmation of how the project and transaction—for all category A and category B projects globally—meet each of the Equator Principles.

Principle 4 – Environmental and Social Management System and Equator Principles Action Plan. The clients are required to develop or maintain an environmental and social management system for all category A and category B projects. Where the applicable standards are not met to the EPFI’s satisfaction, the client and the EPFI will agree to an Equator Principles Action Plan.

Principle 5 – Stakeholder Engagement. For all category A and category B projects, the EPFI requires the client to demonstrate effective stakeholder engagement as an ongoing process in a structured and culturally appropriate manner, with affected communities, workers and, where relevant, other stakeholders. All projects affecting indigenous peoples are subject to a process of informed consultation and participation, and need to comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law.

Principle 6 – Grievance Mechanism. For all category A and, as appropriate, category B projects, the EPFI requires the client, as part of the environmental and social management system, to establish effective

continued on next page

¹⁵⁶ Equator Principles. [EP Association Members & Reporting](#) (accessed 15 November 2020).

Box 5.4 *continued*

grievance mechanisms. These mechanisms are designed for use by affected communities and workers, as appropriate, to receive and facilitate resolution of concerns and grievances about the project's environmental and social performance.

Principle 7 – Independent Review. For all category A and, as appropriate, category B projects, an independent environmental and social consultant, carries out a review of the assessment process to assist the EPFI's due diligence and determination of Equator Principles compliance.

Principle 8 – Covenants. For all projects, where a client is not in compliance with its environmental and social covenants, the EPFI works with the client on remedial actions to bring the project back into compliance. If the client fails to re-establish compliance within an agreed grace period, the EPFI reserves the right to exercise remedies, including calling an event of default, as considered appropriate.

Principle 9 – Independent Monitoring and Reporting. The EPFI requires independent monitoring and reporting for all category A and, as appropriate, category B projects, in order to assess project compliance with the Equator Principles after financial closure and over the life of the loan. An independent environmental and social consultant should do the monitoring and reporting. Alternatively, the EPFI can require that the client retain qualified and experienced external experts to verify its monitoring information, to be shared with the EPFI.

Principle 10 – Reporting and Transparency. The client ensures, at a minimum, that (i) a summary of the environmental and social impact assessment is accessible and available online; and (ii) it includes a summary of human rights and climate change risks and impacts when relevant. The client also reports publicly, on an annual basis, greenhouse gas (GHG) emission levels during the operational phase for projects emitting more than 100,000 tonnes of CO₂ equivalent annually. Lastly, the EPFI encourages the client to share commercially non-sensitive, project-specific biodiversity data with the Global Biodiversity Information Facility and relevant national and global data repositories.

Source: Equator Principles. 2020. *The Equator Principles*. July.

E. 2014 International Law Association Declaration of Legal Principles Relating to Climate Change

The Declaration of Legal Principles Relating to Climate Change contains 10 Draft Articles that, according to the International Law Association, set out legal principles applicable to states in addressing climate change and its adverse effects.¹⁵⁷ The association adopted the declaration during its 76th Conference in April 2014. The declaration intended to influence climate negotiations for the 2015 Paris Agreement.

Draft Article 3 characterizes the climate system as a common natural resource for the benefit of present and future generations, within the broader context of

¹⁵⁷ Committee on Legal Principles Relating to Climate Change, International Law Association. *Declaration of Legal Principles Relating to Climate Change*. Draft Art. 2.

the international community's commitment to sustainable development.¹⁵⁸ In the context of addressing climate change and its adverse effects, sustainable development requires states to balance economic and social development and the protection of the climate system.¹⁵⁹ Sustainable development also supports the realization of the right of all human beings to an adequate living standard and the equitable distribution of the benefits thereof (footnote 159). States shall thus anticipate, prevent, and minimize the causes of climate change, and mitigate its adverse effects for the benefit of present and future generations.¹⁶⁰

Protection on the basis of equity acknowledges that (i) present generations in developing states have a legitimate expectation of equitable access to sustainable development, and (ii) future generations in all states have a legitimate expectation of equitable access to the earth's resources.¹⁶¹ The common but differentiated responsibilities and respective capabilities (CBDR-RC) of states requires developed states (in particular, the most advanced among them) to take the lead in addressing climate change.¹⁶² They can do this by committing to more stringent mitigation and assisting developing states (in particular, the least developed among them, small island developing states, and other vulnerable states), to the extent of their need, to address climate change and adapt to its adverse effects (footnote 162).

At the same time, developing states shall be subject to less stringent mitigation commitments, and benefit from delayed compliance schedules and financial, technological, and other assistance (footnote 162). The rights and obligations of developing countries with regard to climate change and its impacts shall also be differentiated based on their special circumstances and vulnerability.¹⁶³

Draft Article 7A references the responsibility of states to avoid transboundary environmental harm. However, it goes beyond previous international law instruments by explicitly tying this principle to climate change. States are to exercise due diligence to avoid, minimize, and reduce environmental and other damage through climate change.¹⁶⁴ In exercising due diligence, states shall take all appropriate measures to anticipate, prevent, or minimize the causes of climate change, especially through effective measures to reduce GHG emissions, and to minimize the adverse effects of climate change through the adoption of suitable adaptation measures (footnote 164).

Similarly, Draft Article 7B ties the precautionary principle with climate change. Precautionary measures include proactive and cost-effective measures which enable sustainable development, maintain the stability of the climate system, and protect the climate system against human-induced change.¹⁶⁵ The obligation

¹⁵⁸ Footnote 157, Draft Art. 3(1).

¹⁵⁹ Footnote 157, Draft Art. 3(3).

¹⁶⁰ Footnote 157, Draft Art. 3(2).

¹⁶¹ Footnote 157, Draft Art. 4.

¹⁶² Footnote 157, Draft Art. 5(3).

¹⁶³ Footnote 157, Draft Art. 6(2).

¹⁶⁴ Footnote 157, Draft Art. 7A(2).

¹⁶⁵ Footnote 157, Draft Art. 7B(2).

of prevention on the part of states—as well as the need for precautionary measures—should be subject to continuing assessment, as new scientific knowledge regarding climate change becomes available.¹⁶⁶ Where there is a reasonably foreseeable threat that a proposed activity may cause serious transboundary environmental damage, an environmental impact assessment on the potential impacts of such activity is required.¹⁶⁷ Damage in this context includes serious or irreversible damage through climate change to vulnerable states (footnote 167).

Draft Article 9 requires states to act in good faith in addressing climate change and its adverse effects and to achieve internationally agreed objectives.¹⁶⁸ This includes engaging in constant monitoring and supervision at both domestic and international levels (footnote 168). The principle of good faith also requires states, when negotiating legal instruments on climate change, not to insist on their own position without contemplating any modification of it.¹⁶⁹

F. 2015 Oslo Principles on Climate Change Obligations

The Oslo Principles on Climate Change Obligations (Oslo Principles) articulate a set of principles comprising the essential obligations of states and enterprises to avert the critical level of global warming.¹⁷⁰ An international group of jurists, academics, and experts in international law, human rights law, and environmental law adopted the Oslo Principles in March 2015.¹⁷¹ Box 5.5 summarizes the legal bases underpinning the Oslo Principles.

Principle 1 of the Oslo Principles references the precautionary principle. In the context of climate change, the precautionary principle requires that GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided.¹⁷² Reductions in this context should be based on a worst-case scenario that is (i) credible, (ii) realistic, and (iii) accepted by a substantial number of eminent climate change experts (footnote 172). These precautionary measures should be adopted without regard to the cost, unless that cost is “completely disproportionate” to the anticipated reduction in emissions (footnote 172).

As such, all states and enterprises must reduce their GHG emissions to the extent that they can achieve such reduction without relevant additional cost.¹⁷³ Principle 7 gives several examples, such as switching off power-consuming equipment

¹⁶⁶ Footnote 157, Draft Art. 7B(3).

¹⁶⁷ Footnote 157, Draft Art. 7B(4).

¹⁶⁸ Footnote 157, Draft Art. 9(1).

¹⁶⁹ Footnote 157, Draft Art. 9(2).

¹⁷⁰ Expert Group on Global Climate Obligations. 2015. [Oslo Principles on Global Climate Change Obligations](#). *Legal Perspectives for Global Challenges*. 3. Preamble.

¹⁷¹ Footnote 170, Introduction.

¹⁷² Footnote 170, Principle 1.

¹⁷³ Footnote 170, Principle 7.

Box 5.5: Legal Bases of the Oslo Principles

The Oslo Principles are premised on the expert group's belief that the "amalgamation of legal sources"^a existing at the time the principles were adopted (i.e., before the 2015 Paris Agreement) obliges states to assess the environmental impact of their activities, address climate change, and reduce emissions, even in the absence of a specific treaty. This amalgamation covers the following:

- **International law and human rights.** This includes the "Principle of Human Dignity," a core human value throughout international and regional human rights law.^b States have a stringent duty to respect, protect, and fulfill human dignity, which requires that they act urgently to mitigate climate change (footnote b). Further, given the imminent threat that climate change poses to human life, states also have a duty to immediately curtail activities that contribute to climate change and to take positive measures to protect and promote the right to life.^c

The following rights and duties are also implicated: the right to property, in particular, the extent to which it meets the essential needs of "dignified human living;"^d the right to health, which extends to securing a healthy environment and preventing environmental degradation;^e the duty to adopt appropriate economic, environmental, and social policies to ensure access to adequate and nutritious food and prevent hunger;^f and the duty to provide for a clean and healthy environment conducive to human well-being.^g

- **Tort Law.** An act or omission will be unlawful if (i) it subjects the life, well-being, or property of others to a risk of damage; (ii) the risk is considerable; (iii) the potential damage is colossal; and (iv) the risk can be avoided without undue detriment to the party/parties causing that risk.^h The group of experts opined that obligations to mitigate climate change meet all these requirements.

Responding to arguments regarding relationship or proximity (between, for example, an enterprise in Germany and the people living in Bangladesh), the group asserted that this is not a serious obstacle. Even if the relationship requirement is interpreted narrowly, it remains just one of the relevant factors.ⁱ Besides, there are many people in the close vicinity whose interests will be jeopardized by the consequences of greenhouse gas (GHG) emissions (footnote i).

On the dangerousness of the activity, emissions from a global angle are obviously dangerous.^j However, it is arguable that the emissions brought about by each single actor (the majority of states) are not dangerous in this legal sense (footnote j). The group of experts opined, nevertheless, that even a small contribution to a very harmful outcome should, in any event, suffice for legal purposes.^k If, for example, 1 billion people will be seriously impaired in one way or another (some will lose their life; others will no longer have access to water or will fall ill, whereas again others will "only" face damage to property), a minor contribution to the global evil may be sufficient for the imposition of a legal duty (footnote k). The extent of the risk of harm to others affects the extent of the burden or duty to avoid injury (footnote k). Oslo Principle 11 thus states that no country or enterprise is relieved of its obligations even if its contributions to total GHG emissions are small.

^a Expert Group On Global Climate Obligations. 2015. *Commentary to the Oslo Principles on Climate Change Obligations*. Section 4.2, p. 15.

^b Footnote a, section 4.3, p. 16.

^c Footnote a, section 4.3, p. 21.

^d Footnote a, section 4.3, p. 22.

^e Footnote a, section 4.3, p. 23.

^f Footnote a, section 4.3, p. 25.

^g Footnote a, section 4.3, p. 27.

^h Footnote a, section 4.4, p. 31.

ⁱ Footnote a, section 4.4, p. 35.

^j Footnote a, section 4.4, p. 36.

^k Footnote a, section 4.4, p. 37.

when not in use, and eliminating excessive power consumption where possible (footnote 173). Further, states and enterprises must generally avoid new activities that create excessive GHG emissions, unless they take countervailing measures.¹⁷⁴ Principle 8 does recognize an exception to this general rule: if the relevant activities can be shown to be indispensable in light of prevailing circumstances, e.g., if undertaken in the least developed countries (footnote 174). Developed and developing countries, as well as enterprises, must implement GHG reduction measures that entail costs if the costs will be compensated by future savings or financial gains.¹⁷⁵

Principle 14 states that the obligations of states are common but differentiated. Least developed countries do not have a legal obligation to reduce GHG emissions at their own expense.¹⁷⁶ If a country's level of GHG emissions is close to the permissible quantum, it is not obliged to reduce its emissions to the permissible quantum if doing so would create undue hardship.¹⁷⁷ This calculus requires consideration of the country's historical GHG contributions, its capabilities in terms of its wealth, its needs, its dependence on fossil fuel, and its access to renewable energy (footnote 177).

The permissible quantum of GHG emissions will decrease as time progresses.¹⁷⁸ Every above-permissible-quantum country is required to reduce GHG emissions within its jurisdiction or control to the permissible quantum within the shortest time feasible.¹⁷⁹ Should this country fail to fulfill this obligation even if it has taken all steps reasonably available, it must provide financial or technical means to below-permissible-quantum countries to achieve the reduction of GHG emissions that the responsible above-permissible-quantum country has failed to achieve.¹⁸⁰

Principle 20 declares that states must make their best efforts to bring about lawful and appropriate trade consequences for states that fail to comply with their obligations.¹⁸¹ Neither high cost nor the lack of financial means can alone excuse a state's failure to meet its obligations to achieve GHG reductions.¹⁸² They also do not constitute a defense against legal sanctions that may be imposed as a consequence of such failure (footnote 182). To avoid such trade consequences, a state must show excessive hardship or extraordinary circumstances beyond its control that have prevented it from meeting its obligations (footnote 182).

On the part of enterprises, they must assess their facilities and properties to evaluate (i) their vulnerability to climate change, (ii) the financial effect of future climate change on the enterprises, and (iii) the enterprises' efforts to increase their resilience

¹⁷⁴ Footnote 170, Principle 8.

¹⁷⁵ Footnote 170, Principle 9.

¹⁷⁶ Footnote 170, Principle 15.

¹⁷⁷ Footnote 170, Principle 16.

¹⁷⁸ Footnote 170, Principle 17.

¹⁷⁹ Footnote 170, Principle 13.

¹⁸⁰ Footnote 170, Principle 18.

¹⁸¹ Footnote 170, Principle 20.

¹⁸² Footnote 170, Principle 23.

to future climate change.¹⁸³ This information must be publicly disclosed. Before committing to plans to build any major new facilities, enterprises must conduct environmental impact assessments, which must include an analysis of the proposed facility's carbon footprint.¹⁸⁴ Enterprises in the banking and finance sectors should take into account the GHG effects of any projects they consider financing.¹⁸⁵

G. 2016 World Declaration on the Environmental Rule of Law

The International Union for Conservation of Nature World Declaration on the Environmental Rule of Law (World Declaration) was made by a group of experts from the World Commission on Environmental Law at the International Union for Conservation of Nature World Environmental Law Congress in April 2016.¹⁸⁶ The group drafted the World Declaration to build environmental rule of law as the legal foundation for environmental justice.¹⁸⁷ It highlights the role of judges and courts in strengthening the environmental rule of law, characterizing their role as “essential” through the effective application of laws, and through fair and independent decision-making (footnote 187).

Like other progressive instruments, the World Declaration links the environment to economic development. It recognizes the close relationship between human rights and environmental conservation and protection, and the significance of ecological integrity toward achieving human well-being and tackling poverty (footnote 187).

The World Declaration consists of four parts:

- **Foundations of the Environmental Rule of Law.** The environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law.¹⁸⁸ It is premised on key governance elements including, but not limited to: clear, strict, enforceable, and effective laws, regulations, and policies that are efficiently administered; respect for human rights, including the right to a safe, clean, healthy, and sustainable environment; measures to ensure effective compliance with laws, regulations, and policies (e.g., adequate criminal, civil, and administrative enforcement, and liability for environmental damage); access to information, public participation in decision-making, and access to justice; environmental auditing and reporting, together with other effective accountability, transparency, ethics, integrity, and anti-corruption mechanisms; and use of the best available scientific knowledge.¹⁸⁹

¹⁸³ Footnote 170, Principle 27.

¹⁸⁴ Footnote 170, Principle 29.

¹⁸⁵ Footnote 170, Principle 30.

¹⁸⁶ International Union for Conservation of Nature. 2016. *World Declaration on the Environmental Rule of Law*. 26–29 April.

¹⁸⁷ Footnote 186, Preamble.

¹⁸⁸ Footnote 186, Section I, p. 2.

¹⁸⁹ Footnote 186, Section I, pp. 2–3.

- **General and Emerging Substantive Principles.** The World Declaration lays out 13 principles that promote the achievement of environmental justice through environmental rule of law. The list is not to be construed as exhaustive.¹⁹⁰ The 13 principles are as follows:

- Principle 1* – the obligation of each state, public or private entity, and individual to protect nature.
- Principle 2* – the right of each human and other living being to the conservation, protection, and restoration of the health and integrity of ecosystems; and the inherent right of nature to exist, thrive, and evolve.
- Principle 3* – the right of each human, present and future, to a safe, clean, healthy, and sustainable environment.
- Principle 4* – taking legal and other measures to protect and restore ecosystem integrity and to sustain and enhance the resilience of social-ecological systems.
- Principle 5* – the principle of in dubio pro natura (i.e., in cases of doubt, all matters before courts, administrative agencies, and other decision makers shall be resolved in a way most likely to favor the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment).
- Principle 6* – the duty of any natural or legal person or group of people, in possession or control of land, water, or other resources, to maintain the essential ecological functions associated with those resources and refrain from activities that would impair such functions.
- Principle 7* – the principle of intragenerational equity (i.e., the fair and equitable sharing of the benefits of nature, efforts, and burdens).
- Principle 8* – the principle of intergenerational equity (i.e., the present generation must ensure that the health, diversity, ecological functions, and beauty of the environment are maintained or restored to provide equitable access to the benefits of the environment by each successive generation).
- Principle 9* – the incorporation of gender equity into all policies, decisions, and practices.
- Principle 10* – the participation of minority and vulnerable groups.
- Principle 11* – the duty to respect the indigenous and tribal peoples' rights over, and relationships with, their traditional and/or customary lands and territories, with their free, prior, and informed consent to any activities on or affecting their land or resources being a key objective.
- Principle 12* – the principle of non-regression (i.e., states, subnational entities, and regional integration organizations shall not allow or pursue actions that have the net effect of diminishing

¹⁹⁰ World Commission on Environmental Law. [Environmental Rule of Law](#).

the legal protection of the environment or of access to environmental justice).

Principle 13 – the principle of progression (i.e., states, subnational entities, and regional integration organizations shall regularly revise and enhance laws and policies in order to protect, conserve, restore, and ameliorate the environment, based on the most recent scientific knowledge and policy developments).

- **Means of Implementation of the Environmental Rule of Law.** This section provides a non-exhaustive list of mechanisms to help build the procedural and substantive components of the environmental rule of law at the national, subnational, regional, and international levels.¹⁹¹ These mechanisms include monitoring and reporting systems, anti-corruption measures, environmental assessments, addressing environmental crimes in the context of other types of crime (e.g., money laundering, corruption, and organized crime), enabling public interest dispute resolution, and strengthening the independence and capacity of courts in the effective application and interpretation of environmental law.
- **Appeal to the World Community.** States, subnational governments, regional integration organizations and other relevant international organizations, legislators, civil society, and the private sector are urged to contribute to the building, maintenance, and promotion of the environmental rule of law, as part of their shared responsibility to the present and future generations.¹⁹²

H. 2016 Charter of the Global Judicial Institute on the Environment

The Global Judicial Institute on the Environment (GJIE) was founded on 29 April 2016 in Rio de Janeiro, Brazil. Its mission is to support the role of courts and tribunals in applying and enforcing environmental laws and in promoting the environmental rule of law and the fair distribution of environmental benefits and burdens.¹⁹³

The need for continued opportunities—led by judges and for judges—for education; capacity building; collaboration; and exchange of information, practices, and experiences, led to the establishment of GJIE.¹⁹⁴ Article III of the Charter specifies GJIE's objectives:

¹⁹¹ Footnote 186, Section III, pp. 4–5.

¹⁹² Footnote 186, Section IV, p. 5.

¹⁹³ World Environmental Law Congress. *Charter of the Global Judicial Institute for the Environment*. Art. 2. The Charter established the Global Judicial Institute for the Environment, but subsequent institutional documents referred to the institute as the Global Judicial Institute on the Environment (italics supplied). See, e.g., the *Statute of the Global Judicial Institute on the Environment*, established under Arts. 60 and 79 of the Swiss Civil Code and registered in Geneva, Switzerland in 2017.

¹⁹⁴ World Environmental Law Congress. *Charter of the Global Judicial Institute for the Environment*. Preamble.

- Provide research, analysis, and publications on environmental adjudication, environmental dispute resolution, court practices and procedures, court administration, legal claims and actions, judicial remedies, and environmental justice, including access to environmental information, public participation in environmental decision-making, and access to justice.
- Strengthen the capacity of judges in administration and resolution of cases and disputes related to the environment.
- Provide a forum for convening international, regional, national, and subnational judges, court officials, and judicial institutions, to create partnerships for collaboration and information exchange on environmental law issues.
- Pursue such other objectives as consistent with its mission and Charter.

At present, the GJIE is directed by an Interim Governing Committee, composed of 12 senior judges from a number of countries, chosen from the GJIE founding members.¹⁹⁵

I. 2018 Principles on the Climate Obligations of Enterprises

The Principles on the Climate Obligations of Enterprises (Enterprises Principles) were a follow up to the Oslo Principles, which had focused on state obligations in the context of climate change. The Enterprises Principles, on the other hand, focus on investors and enterprises.¹⁹⁶ They were drafted by a group of international experts (on international, environmental, tort, human rights, and company law), and reflect the group's understanding of the law as it stands or will likely develop.¹⁹⁷

Similar to the Oslo Principles, the Enterprises Principles are based on an amalgamation of legal sources—in this case, international law, human rights law, tort law, environmental law (international conventions, domestic legislation, case law, and legal doctrine), and numerous codes of conduct or governance.¹⁹⁸

The Enterprises Principles state five kinds of obligations for enterprises:

- reduction of GHG emissions from enterprises' activities (Principles 2–8, 12–16);
- reduction of GHG emissions from enterprises' products and services (Principles 9–11);
- consideration of suppliers' GHG emissions (Principle 17);
- procedural obligations on disclosure and impact assessment (Principles 18–24); and
- incorporation of enterprises' performance by financiers and investors in their banking and investment strategy (Principles 25–30) (footnote 198).

¹⁹⁵ Global Judicial Institute on the Environment. [Interim Governing Committee](#).

¹⁹⁶ Expert Group on Climate Obligations of Enterprises. 2018. [Principles on Climate Obligations of Enterprises](#). *Legal Perspectives for Global Challenges*. 5.

¹⁹⁷ Climate Principles for Enterprises. [About](#).

¹⁹⁸ T. Challe. 2018. [Principles on the Climate Obligations of Enterprises: Guest Blog](#). *Climate Law Blog*, Sabin Center for Climate Change Law, Columbia Law School. 23 January.

In general, enterprises should reduce the GHG emissions of their own activities to the same extent as the country or countries in which those activities take place (footnote 197). Therefore, the burden will primarily be carried by enterprises in developed countries (footnote 197). Global enterprises (in particular multinationals listed on the major stock exchanges) have a further-reaching responsibility to reduce GHG emissions.¹⁹⁹

Enterprises must also ascertain and take into account the emissions of their suppliers, to the extent reasonably and feasibly possible.²⁰⁰ The phrase “take into account” gives enterprises some leeway to tailor the obligation in accordance with their particular circumstances, i.e., an assessment on a case-to-case basis.²⁰¹ Challe (2018) explains this as a duty to comparably assess the emissions of suppliers as against alternative suppliers (footnote 198). The results of the assessment must be given serious and genuine weight (footnote 201).

Investors must also ascertain and take into account the emissions of potential investees and whether they comply with their obligations under both the Enterprises Principles and the Oslo Principles.²⁰² They may invest in a non-complying entity, on the condition that they provide a justification for doing so (e.g., the need to achieve an adequate return and/or lack of satisfactory alternatives) (footnote 198). Investment in enterprises engaged in energy generation from excessively emitting fossil fuels requires a compelling justification (footnote 202).

J. Climate Action 100+ Initiative

Climate Action 100+ is a 5-year investor initiative to ensure the world’s largest corporate GHG emitters take critical action to align with the goals of the Paris Agreement.²⁰³ It was launched in December 2017, and aims to fulfill the commitment made in the 2014/15 Global Investor Statement on Climate Change which states that “...as institutional investors and consistent with our fiduciary duty to our beneficiaries, we will work with the companies in which we invest to ensure that they are minimizing and disclosing the risks and maximizing the opportunities presented by climate change.”²⁰⁴

Climate Action 100+ focuses on companies that are key to low carbon transition, and considered to be systemically important GHG emitters (footnote 203). The 161 focus companies selected account for over 80% of corporate GHG emissions, based on 2018 emissions data (footnote 203). These companies belong to sectors including oil and gas, utilities, mining and metals, transportation, industrials, and consumer products.²⁰⁵

¹⁹⁹ Footnote 196, p. 4; and footnote 198.

²⁰⁰ Footnote 196, Principle 17.

²⁰¹ Footnote 196, p. 161.

²⁰² Footnote 196, p. 9; and footnote 198.

²⁰³ Climate Action 100+. *Climate Action 100+ 2019 Progress Report*. p. 11.

²⁰⁴ Climate Action 100+. *Investors*.

²⁰⁵ Footnote 203, p. 21.

Climate Action 100+ requires investors to sign the Climate Action 100+ Sign-on Statement. The Sign-on Statement aims to secure commitments from the boards and senior management to

- implement a strong governance framework which clearly articulates the board's accountability and oversight of climate change risk and opportunities;
- take action to reduce GHG emissions across their value chain, consistent with the Paris Agreement's goal of limiting global average temperature increase to well below 2°C above preindustrial levels; and
- provide enhanced corporate disclosure in line with the final recommendations of the Task Force on Climate-related Financial Disclosures and, when applicable, sector-specific Global Investor Coalition on Climate Change Investor Expectations on Climate Change, to enable investors to assess the robustness of companies' business plans against a range of climate scenarios, including well below 2°C, and improve investment decision-making (footnote 204).

Currently, more than 450 investors from six continents, collectively managing more than \$40 trillion in assets under management, have signed the Climate Action 100+ Sign-on Statement (footnote 204).

Climate Action 100+ released a progress report in September 2019. The report indicates the status of each of the following areas:

- **Climate governance.** While 77% of companies have clear board responsibility for climate, less than 8% of companies have climate policy positions that are consistent with those taken by the industry associations of which the companies are members.²⁰⁶
- **Climate action.** Around 70% of companies have set long-term quantitative targets for reducing GHG emissions, but only 9% of companies have targets that are aligned with emissions reductions pledged by governments as part of the Paris Agreement (i.e., nationally determined contributions [NDCs]) (footnote 205).
- **Climate disclosure.** Only 40% of companies undertake and disclose climate scenario analysis.²⁰⁷

²⁰⁶ Footnote 203, p. 20.

²⁰⁷ Footnote 203, p. 23.

Renewable energy. Aerial shot of the drilling station and well testings station at Supreme Energy, Muara Laboh Geothermal Power Project site (Indonesia). The country has the world's biggest geothermal potential, estimated at 29,000 megawatts. Maximizing geothermal energy is critical to Indonesia's renewable energy and climate change mitigation goals (photo by Gerhard Jörén/ADB).





PART SIX

KEY TAKEAWAYS

The development of international climate law broadly suggests two emerging strands. First is an interdependent human-rights-centric approach where environmental and climate-related claims are anchored to universally acknowledged human rights (i.e., greening existing human rights).¹ Second is an approach where international climate law is independently norm-generating. These strands are not mutually exclusive. The first approach may have even bolstered the second, as the second approach only came into fore over the last decade. Key takeaways are discussed in detail against this backdrop.

Human rights norms can be interpreted through a climate change lens, and vice versa. Judges are especially able to directly triangulate climate change-related causes of action with the traditional human rights framework if the latter is reflected in constitutionally protected rights. Courts in South Asia, for example, have clearly tied state obligation to address climate change with constitutional rights (e.g., the right to life and the right to human dignity).² This approach involves interpreting fundamental rights (i) as extending to a right to a clean and healthy environment, and (ii) in light of international human rights and environmental law principles.³

Even outside constitutional interpretation, however, judges can still domesticate international human rights norms and standards in climate change cases. Monist states are able to do this in an uncomplicated fashion. International law is considered automatically part of domestic law and no express legislative act is required.

¹ United Nations, General Assembly, *Report of the Special Rapporteur (to the United Nations Human Rights Council) on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/37/59 (24 January 2018).

² See e.g., *Leghari v. Federation of Pakistan*, PLD 2018 Lahore 364.

³ Paragraph 12 of the Court's judgment in *Leghari v. Federation of Pakistan* (footnote 2) states, "Fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14)[...] read with constitutional principles of democracy, equality, social, economic and political justice[...] include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intragenerational equity[...] and [the] public trust doctrine. Environment and its protection [have] taken a center stage in the scheme of our constitutional rights. It appears that we have to move on. The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., Climate Change."

Paragraph 21 of the same judgment states in part, "Climate [j]ustice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resources."

For dualist states, the process is less straightforward. International law is not self-executing; it must be incorporated or transformed (usually by an enabling legislative act) to be formally considered part of domestic law. Still, national courts have ways to apply international law norms in their judgments, even if these norms have not yet been incorporated into domestic law. The Bangalore Principles⁴ on the domestic application of international human rights law indicate that national courts may have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of (i) removing ambiguity or uncertainty from national constitutions, legislation, or common law,⁵ or (ii) where the domestic law has a gap or is incomplete.⁶

Certainly, courts in Asia and the Pacific have applied international human rights treaties as interpretative tools in different (non-climate-related) types of litigation. The following are examples of such cases:

- **Bangladesh:** *Bangladesh National Women's Lawyers Association Vs. Government of Bangladesh & Ors*⁷ – This is a case involving sexual harassment of women at the place of work or study. There was no domestic law on the matter. Bangladesh has acceded to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Supreme Court held, “The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law. [...] Our courts will not enforce those Covenants (i.e., ICCPR, ICESCR, and CEDAW), as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III [of the Constitution], particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.”

⁴ *The Bangalore Principles*, Bangalore, India, 24–26 February 1988. The Bangalore Principles is the outcome document of the 1988 Bangalore Judicial Colloquium. The high-level colloquium was attended by Judge Ruth Bader Ginsburg (United States); Recorder Anthony Lester, QC (United Kingdom); Justice Michael D. Kirby, AC, CMG (Australia); Justice P. N. Bhagwati and Justice M. P. Chandrakantaraj Urs (India); Tun Mohamed Salleh Bin Abas (Malaysia); Justice Rajsoomer Lallah (Mauritius); Chief Justice Muhammad Haleem (Pakistan); Deputy Chief Justice Mari Kapi (Papua New Guinea); Justice P. Ramanathan (Sri Lanka); and Chief Justice E. Dumbutshena (Zimbabwe).

⁵ Footnote 4, Principle No. 7.

⁶ Footnote 4, Principle No. 4.

⁷ *Bangladesh National Women's Lawyers Association Vs. Government of Bangladesh & Ors*, Supreme Court of Bangladesh, Petition No. 5916 of 2008 (14 May 2009).

- **India:** *Vishaka & Ors v. State of Rajasthan & Ors.*⁸ – This case resulted from a gang rape of a publicly employed social worker during the course of her employment. It sought to establish the enforcement of constitutional rights relating to women in the workplace. The fundamental rights invoked were the right to equality, the right to non-discrimination, the right to practice one's profession, and the right to life. In addition, the petitioners invoked Articles 11⁹ and 24¹⁰ of CEDAW. India is a state party to CEDAW.

The Supreme Court ruled, “The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”

- **Malaysia:** *Lee Lai Ching v Lim Hooi Teik*¹¹ – The issue was whether a person could be compelled to undergo a DNA test against his will to determine paternity of a child. Malaysia had no specific provision of statute to order DNA testing, but has acceded to the Convention on the Rights of the Child (CRC).

The High Court of Malaya, Pulau Pinang, ruled that the defendant could be compelled to undergo a DNA test on the basis of the CRC standard of “best interests of the child.” Invoking Article 7 of the CRC, which states that a child has the right to know and be cared for by his or her parents, the High Court held that the subject of the case has the right to determine whether the defendant is his father. Malaysia did express reservations to Article 7 of the CRC when it acceded to the treaty (i.e., that Article 7 shall be applicable only if it is in conformity with the constitution, national laws, and national policies of Malaysia). However, the High Court found Article 7 applicable, as it did not contradict and in fact was in conformity with domestic laws and policies.

These cases indicate that courts in Asia and the Pacific seem amenable to the use of international human rights norms (even if not formally incorporated into domestic law) as interpretative aids to resolve various disputes. This willingness strongly suggests the same approach to climate litigation. As mentioned previously, climate change implicates a lot of human rights, including but not limited to the rights to life, health, food security, an adequate standard of living, culture, and education. A human-rights-centric approach to adjudication

⁸ *Vishaka & Ors. v. State of Rajasthan & Ors.*, (1997) 6 SCC 241.

⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979, *United Nations Treaty Series*, Vol. 1249, No. 20378, p. 13. Art. 11 states in part, “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.”

¹⁰ Footnote 9, Art. 24 states, “States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”

¹¹ *Lee Lai Ching v Lim Hooi Teik* [2013] 4 MLJ 272.

of domestic climate change cases opens the door to a rich trove of international principles, and “cross-pollination” of doctrines across jurisdictions.

Climate litigation in dualist states may be based on the Paris Agreement even if the agreement has not been incorporated in municipal law.

In theory, international law (including treaties) operates in the international sphere. Thus, legal obligations under the Paris Agreement in principle take effect at the international level, unless incorporated in municipal law. There may be instances, however, in the interim stage between ratification and incorporation, when the Paris Agreement may provide some legal grounding for a cause of action before national courts.

In the leading case of *Minister of State for Immigration and Ethnic Affairs v Teoh*, the High Court of Australia ruled that ratification of a convention provides the basis for a legitimate expectation, absent indications to the contrary, that the executive branch of government will act in conformity with the convention.¹² The case involved a determination by Australia’s immigration authorities that Teoh was not eligible for resident status because he had a criminal record. The assailed Federal Court decision held that the immigration authorities’ power had been improperly exercised because they failed to make appropriate investigations into the hardship that could be experienced by Teoh’s wife and her children were he refused resident status. The decision was based on Article 3.1 of the CRC, which provides that “(i)n all actions concerning children ... the best interests of the child shall be a primary consideration.” While Australia had ratified the CRC, it had not yet incorporated its provisions into its national law by statute.

On appeal, the High Court of Australia ruled:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention and treat the best interests of the children as ‘a primary consideration.’ It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it. [...]

¹² *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

The existence of a legitimate expectation that a decision maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door.

But, if a decision maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.¹³

Lord Robert Carnwath (Justice of the Supreme Court of the United Kingdom [retired]) notes that the Teoh approach “may have particular resonance in the context of the Paris Agreement, where the emphasis within a global pact is on national commitments to be supported by domestic measures.”¹⁴

Nationally Determined Contributions under the Paris Agreement may constitute legally binding unilateral declarations. Article 4.2 of the Paris Agreement requires states parties to (i) prepare and submit nationally determined contributions (NDCs), and (ii) pursue domestic mitigation measures. As discussed earlier, this is an obligation of conduct (an obligation to take relevant steps) and not an obligation of result. Nevertheless, NDCs—under a specific set of circumstances—may be considered unilateral declarations that are capable of creating legal obligations outside the treaty framework.¹⁵

Unilateral declarations are a source of law independent of treaties, customary law, and general principles of law. In the *Case Concerning Nuclear Tests (Australia v. France)*, the International Court of Justice stated that, “[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.”¹⁶ The Court continued, “[n]othing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since

¹³ Paragraphs 34, 36, and 37 of the Decision (footnote 12).

¹⁴ See *The Paris Agreement—A Judge’s Perspective*. Speech delivered during the Asia Pacific Judicial Conference on Environmental and Climate Change Adjudication. 29–30 October 2018. Nay Pyi Taw, Myanmar.

¹⁵ B. Mayer. 2018. [International Law Obligations Arising in Relation to Nationally Determined Contributions](#). *Transnational Environmental Law*. 7 (2). pp. 251–275.

¹⁶ *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253.

such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made” (footnote 16).

To create legal obligations, unilateral declarations must

- (i) be publicly made;¹⁷
- (ii) manifest the will to be bound, as shown by their content, the factual circumstances in which they were made, and the reactions to which they gave rise;¹⁸
- (iii) be made by an authority vested with the power to do so;¹⁹
- (iv) be stated in clear and specific terms;²⁰ and
- (v) not be in conflict with a peremptory norm of general international law (*jus cogens*).²¹

Unilateral declarations may be formulated orally or in writing,²² and may be addressed to the international community as a whole, to one or several states, or to other entities.²³ Pursuant to the principle of good faith, those interested in these unilateral declarations may rely on them and are entitled to require that the obligation thus created be respected.²⁴

In this context, academic and legal scholar Benoit Mayer²⁵ (2018) observes that some NDCs may be considered unilateral declarations.²⁶

NDCs are publicly made (and are in fact submitted to the United Nations Framework Convention on Climate Change [UNFCCC] secretariat). They are presumably made by the competent national authority. Judges may determine whether the NDCs conflict with a peremptory norm of international law by comparing the language

¹⁷ International Law Commission. 2006. *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto*. Principle 1.

¹⁸ Footnote 17, Principles 1 and 3.

¹⁹ Footnote 17, Principle 4.

²⁰ Footnote 17, Principle 7.

²¹ Footnote 17, Principle 8. A peremptory norm of general international law (*jus cogens*) is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See International Law Commission. 2019. *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)*. Draft Conclusion 2.

²² Footnote 17, Principle 5.

²³ Footnote 17, Principle 6.

²⁴ Footnote 16, para. 46.

²⁵ Professor Mayer is Assistant Professor at the Faculty of Law of the Chinese University of Hong Kong. He is an academic specializing in international governance of climate change.

²⁶ Footnote 15. Professor Mayer however notes, “Just as within a treaty, a distinction needs to be made between those provisions of a unilateral declaration which actually create legal obligations and those provisions which do not. To determine whether a provision creates an obligation, regard must be had to the content of the provision as well as its context. For example, the sections of [NDCs] which describe national circumstances or recount the steps that a state has already taken do not create any obligations.”

of the NDCs with a universally accepted list of *jus cogens* norms.²⁷ As to clarity and specificity, Article 4.8 of the Paris Agreement requires states to provide the information necessary for clarity, transparency, and understanding of their NDCs.

The core question therefore deals with whether NDC provisions manifest the state's will to be bound. The language used in the NDCs is critical to this analysis. For instance, some NDCs reflect a mandatory tone in relation to how a state's climate plan is to be effected. Professor Mayer notes that Macedonia's NDC includes a clear state commitment to refrain from building nuclear power plants.²⁸ Similarly, Brazil's NDC articulates the government's commitment "to implementing its [NDC] with full respect to human rights, in particular rights of vulnerable communities, indigenous populations, traditional communities and workers in sectors affected by relevant policies and plans, while promoting gender-responsive measures."²⁹

Professor Mayer asserts that the kind of commitment reflected in Brazil's and Macedonia's NDCs (i.e., dealing with internal issues) is unlikely to be invoked in interstate disputes (footnote 15). However, they may have implications for climate change issues before national courts (i.e., "obligations under international human rights law or international environmental law [arising from the NDC as a unilateral declaration] could arguably be raised before domestic jurisdictions").³⁰

States that have signed but have not ratified international conventions are still bound by the obligation of good faith. A number of states from Asia and the Pacific have signed, but not yet ratified, various human rights, environmental, and climate change treaties that have already entered into force. These treaties, states, and dates of signature are

- ICCPR – Nauru (12 November 2001), Palau (20 September 2011);
- ICESCR – Palau (20 September 2011);
- CEDAW – Palau (20 September 2011);
- Cartagena Protocol on Biosafety – Cook Islands (21 May 2001), Nepal (2 March 2001);
- United Nations Convention on the Law of the Sea (UNCLOS) – Afghanistan (18 March 1983), Bhutan (10 December 1982), Cambodia (1 July 1983); and
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization – Bangladesh (6 September 2011), Thailand (31 January 2012).

²⁷ The Annex to the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) enumerates a non-exhaustive list of peremptory norms: prohibition of aggression, prohibition of genocide, prohibition of crimes against humanity, basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, prohibition of torture, and the right of self-determination. See International Law Commission. 2019. *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)*.

²⁸ Macedonia's NDC, under the mitigation section, states, "Nuclear power plant shall not be constructed in the analyzed period." See Government of Macedonia. 2018. *First Nationally Determined Contributions*. Skopje. p. 3.

²⁹ Government of Brazil. 2016. *First Nationally Determined Contribution*. Brasília. p. 1.

³⁰ Footnote 15. Professor Mayer references, by analogy, the orders of 4 September 2015 and 14 September 2015 in *Leghari v. Federation of Pakistan*.

The lack of ratification means that these states are not yet legally bound by the text of these treaties. However, Article 18(a) of the Vienna Convention on the Law of Treaties imposes an interim obligation—a state that has signed but has not yet ratified a treaty, is obliged to refrain from acts that would defeat its object and purpose, until such state has made its intention clear not to become a party to the treaty.³¹ Consequently, the states enumerated in the previous paragraph are required to avoid acts that would defeat the treaties’ object and purpose.

However, not every act that departs from the text of the treaty, pending ratification, defeats its object and purpose. Otherwise, the treaty would in effect become *de facto* applicable even before the state signals its consent to be bound by it (via ratification).³² Defeating the object and purpose of a treaty is thus logically a higher threshold, compared with violations of the text of the treaty itself (footnote 32).

That “defeat” constitutes a higher bar relative to other thresholds mentioned in the Vienna Convention on the Law of Treaties also draws support from Article 19(c), which prohibits a state from formulating a reservation that is “incompatible with the object and purpose of the treaty.”³³ The stronger term “defeat” in Article 18 connotes actions of a much more severe nature than those merely “incompatible” with the treaty’s object and purpose under Article 19 (footnote 32).

Customary law may be a key tool in adjudicating climate change cases. A treaty binds only the states parties to it, and generally does not create either obligations or rights for a third party (non-party) state without the latter’s consent.³⁴ However, customary norms are binding on third party states independent of

³¹ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 18232, p. 331. Art. 18. N.B. Afghanistan, Cambodia, Nauru, and Nepal have signed but not yet ratified the Vienna Convention on the Law of Treaties. Bangladesh, Bhutan, the Cook Islands, Palau, and Thailand are not signatories. However, there is considerable scholarship supporting the theory that while Art. 18 was progressive development at the time the Vienna Convention on the Law of Treaties was drafted, it has since gained customary law status binding on all states. See M. Villiger. 2009. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Martinus Nijhoff. p. 252. Cited in C. Bradley. 2012. *Treaty Signature*. In D.B. Hollis, ed. *The Oxford Guide to Treaties*. Oxford: OUP. pp. 208–219; L. Boisson de Chazournes, A. La Rosa, and M. Mbengue. Article 18 of the 1969 and 1986 Vienna Conventions on the Law of Treaties. In O. Corten and P. Klein, eds. 2011. *The Vienna Convention on the Law of Treaties: A Commentary*. 1. Oxford: OUP. pp. 382–383; P. Palchetti. Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation? In E. Cannizzaro, ed. 2011. *The Law of Treaties Beyond the Vienna Convention*. Oxford: OUP. pp. 25, 26.

³² O. Dörr. 2012. *Article 18. Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry Into Force*.

³³ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, *United Nations Treaty Series*, Vol. 1155, No. 18232, p. 331. Art. 19 states, “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is *incompatible with the object and purpose of the treaty*.” (italics supplied)

³⁴ Footnote 33, Art. 34.

treaty law, even though they may deal with the same subject matter.³⁵ Courts may thus legitimately invoke customary norms in their climate change decisions, even if their states may not be parties to the treaties which (also) articulate these norms.

The primary question to consider is what norms have matured into customary status—that is, what norms satisfy the elements of customary law (state practice and *opinio juris*, or the subjective belief of states that the practice is required as a matter of legal obligation). In the realm of international environmental law, legal scholars and tribunals have identified the following, either as current or emerging customary norms: the duty to prevent transboundary harm and the associated duty to undertake an environmental impact assessment prior to engaging in activities that pose a potential risk of transboundary harm (see Box 6.1),³⁶ the duty to cooperate in good faith in the form of notification in cases of emergency,³⁷ the precautionary principle (see Box 6.2),³⁸ the polluter pays principle,³⁹ the obligation of reparation for environmental damage,⁴⁰ and the principle of sustainable development.⁴¹ Recently, there have also been suggestions that the duty to conduct a climate assessment before authorizing a proposed activity likely to contribute significantly to climate change, is emerging as a customary norm.⁴²

This list of norms is not intended to be exhaustive. Moreover, there is certainly still some debate about whether they are customary norms at all (and if so, the parameters of any particular norm). This report does not endorse any conclusion or recommendation, but leave this to judges to decide based on their own assessment of state practice and *opinio juris*. The cited references are intended to serve as a starting point for such assessments.

³⁵ Footnote 33, Art. 38 states, “Nothing in articles 34 (general rule regarding third states) to 37 (35: treaties providing for obligations for third States; 36: treaties providing for rights for third States; 37: revocation or modification of obligations or rights of third States) precludes a rule set forth in a treaty from *becoming binding upon a third State as a customary rule of international law, recognized as such.*” (italics supplied)

³⁶ United Nations, General Assembly, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment—Report of the United Nations Secretary-General*, A/73/419 (30 November 2018).

³⁷ P. Okowa. 2015. Principle 18: Notification and Assistance in Case of Emergency. In J. Viñuales, ed. 2015. *The Rio Declaration on Environment and Development*. Oxford University Press. p. 471. Cited in footnote 36, p. 10.

³⁸ For scholars arguing that the precautionary principle is a customary norm, see J. Cameron and J. Abouchar. The Status of the Precautionary Principle in International Law. In D. Freestone and E. Hey, eds. 1996. *The Precautionary Principle and International Law*. The Hague: Kluwer Law International. p. 30. For the opposite view, see P.W. Birnie and A.E. Boyle. 1992. *International Law and the Environment* (reprint 1994). Oxford: Clarendon Press. p. 98.

³⁹ S. Kravchenko, T. Chowdhury, and Md. Bhuiyan. 2012. *Principles of International Environmental Law*, Chapter 3. November. In S. Alam, et al., eds. *Routledge Handbook of International Environmental Law*. Abingdon, Oxon: Routledge.

⁴⁰ Footnote 36, para. 101.

⁴¹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep. 7 (25 September 1997). Per *separate opinion of Vice-President Weeramantry*, pp. 88–116.

⁴² B. Mayer. 2019. *Climate Assessment as an Emerging Obligation under Customary International Law*. *International and Comparative Law Quarterly*. 68 (2). pp. 271–308.

Box 6.1: The Prevention Principle in International Law

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

^a *Trail Smelter Case (United States, Canada)*. 1938, 1941. *Reports of the International Arbitral Awards*. Volume III. p. 1905, et. seq.

^b See Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Principle 21; World Charter for Nature (WCN), Articles 13, 19, and 21; UNCLOS, Article 194; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), Preamble and Article 2; Convention on Biological Diversity (CBD), Preamble and Article 3; Rio Declaration on Environment and Development (Rio Declaration), Principles 2, 14, 18, and 19; United Nations Framework Convention on Climate Change (UNFCCC), Preamble.

^c Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In *Yearbook of the International Law Commission*. 2001. Volume II, Part 2. para. 97. See also Resolution 62/68, Annex.

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

^e See Earth Charter, Principle 6 (d); IUCN Draft Covenant, Articles 6, 14, and 41; Centre international de droit compare de l'environnement, Draft International Covenant on the Human Right to the Environment (CIDCE Draft Covenant), Articles 4 (2)–(4).

^f *Corfu Channel Case*, Judgment of April 9th 1949, ICJ Reports 1949, pp. 4 and 22; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para. 101.

^g See L.A. Duvic-Paoli and J.E. Viñuales. Principle 2: Prevention. In J.E. Viñuales, ed. 2015. *The Rio Declaration on Environment and Development: A Commentary*. Oxford University Press. pp. 107, 120 and 121.

^h *Ibid.*, p. 118.

Source: United Nations, General Assembly, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment—Report of the United Nations Secretary-General*, A/73/419 (30 November 2018). para. 11, p. 7.

Money talks: businesses and investors are becoming climate and environmental norm entrepreneurs. Norm entrepreneurs are people interested in changing social norms.⁴³ They introduce and endorse disruptive acts that lead other people to consider “new templates of collective action, by adverting to issues, or even creating them, using discourses that name, shame, reinterpret, and/or dramatize and problematize the incumbent norms.”⁴⁴

⁴³ C. Sunstein. 1996. *Social Norms and Social Roles*. Coase-Sandor Institute for Law & Economics Working Paper Series. No. 36. Chicago: University of Chicago.

⁴⁴ A. Mendez and D. Patrick Houghton. 2020. Sustainable Banking: The Role of Multilateral Development Banks as Norm Entrepreneurs. *Sustainability*. 12 (3). p. 972.

Box 6.2: The Precautionary Principle in International Law

The precautionary principle stipulates that States are required to adopt a precautionary approach when taking decisions or in regard to potential omissions which may harm the environment. Such a duty remains intact irrespective of the absence of scientific certainty as to the existence or extent of such risk. While the principle as formulated in Principle 15 of the Rio Declaration reflects other critical principles, such as the effective implementation of international environmental law, the legal basis of precaution as a principle is a matter of some controversy and debate. However, the exercise of precaution in this respect is expressed in other foundational instruments of international environmental law,^a regional instruments,^b texts drafted by civil society,^c and rulings of the International Tribunal for the Law of the Sea.^d

^a See World Charter for Nature, Art. 11(b); Vienna Convention for the Protection of the Ozone Layer, Preamble; International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990, Preamble; Convention on Biological Diversity, Preamble; United Nations Framework Convention on Climate Change, Art. 3(3); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, Preamble; Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Preamble and Art. 3; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), Arts. 10(6) and 11(8); Stockholm Convention on Persistent Organic Pollutants, Preamble, Arts. 1 and 8(7)(a).

^b See Treaty on the Functioning of the European Union, Art. 191(2); Convention for the Protection of the Marine Environment of the North-East Atlantic, Art. 2(2)(a).

^c See IUCN Draft Covenant, Art. 7; 2015 Oslo Principles on Global Climate Change Obligations, paras. 1(a-b); Centre international de droit comparé de l'environnement, Draft International Covenant on the Human Right to the Environment (CIDCE Draft Covenant), Arts. 3(1-2).

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

Source: United Nations, General Assembly, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment—Report of the United Nations Secretary-General*, A/73/419 (30 November 2018), para. 12, p. 8.

If norm entrepreneurs are successful, they will produce “norm bandwagons” and “norm cascades” (footnote 43). According to legal scholar and academic Cass Sunstein, norm bandwagons occur “when the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval. Norm cascades occur when societies are presented with rapid shifts toward new norms.”⁴⁵

Business-driven climate and environmental norms have emerged over the last decade. For example, the Equator Principles provide guidelines to participating financial institutions regarding environmental and social impacts of potential projects, allowing them to withhold or grant financing in accordance with the principles. On the intergovernmental plane, multilateral development banks have integrated environmental safeguards in their operations and lending decisions.⁴⁶ In December 2019, 10 multilateral development banks presented their joint

⁴⁵ Footnote 43, pp. 9–10. Professor Sunstein is the Robert Walmsley University Professor at Harvard Law School. He specializes in constitutional law and environmental law, among other fields of law.

⁴⁶ See, e.g., Asian Development Bank. [Environment Safeguards](#).

Paris Alignment approach. This approach aims to support climate resilience and assist clients in developing long-term pathways (including financial flows) in accordance with the objectives of the Paris Agreement.⁴⁷ These multilateral development banks are expected to support global climate action investments in the amount of \$175 billion by 2025 (footnote 47).

Significant changes are also being made in the private sector, such as in the oil and gas sector. In 2017, 62% of ExxonMobil's shareholders (including major investment firm Blackrock) voted in favor of a climate change disclosure resolution, against the management's wishes.⁴⁸

The resolution would have ExxonMobil disclose the business impact of technological advances and global climate change policies. It states that the company "should analyze the impacts on its oil and gas reserves and resources under a scenario in which reduction in demand results from carbon restrictions and related rules or commitments adopted by governments consistent with the globally agreed upon 2-degree [Celsius] target." It further states that "[t]his reporting should assess the resilience of the company's full portfolio of reserves and resources through 2040 and beyond, and address the financial risks associated with such a scenario."

The resolution is advisory (i.e., non-binding), but shareholders can choose to vote against board directors who are not responsive to investor demands.⁴⁹ Similar shareholder resolutions were adopted at Occidental Petroleum and PPL, a large utility holding company (footnote 48).

In 2017, the investor-spearheaded Climate Action 100+ Initiative backed an activist shareholder group to compel Royal Dutch Shell to establish targets for reducing carbon emissions.⁵⁰ Only 6% of those eligible to vote supported the plan, but Shell subsequently stated a long-term "ambition" to cut its carbon dioxide emissions by half by 2050 (footnote 50). Shareholders still criticized this "ambition," as it did not have binding targets.⁵¹ A year later (December 2018), Shell announced its intention to set, on a rolling annual basis, specific Net Carbon Footprint targets for shorter-term periods (3 or 5 years), starting from 2020 and running to 2050.⁵² Significantly, these targets are linked to executive pay, subject to a shareholder vote at the 2020 Annual General Meeting (footnote 52).

⁴⁷ V. Bennett. 2019. [Multinational Development Banks Present their Paris Alignment Approach](#). *European Bank for Reconstruction and Development*. 10 December.

⁴⁸ S. Mufson. 2017. [Financial Firms Lead Shareholder Rebellion against ExxonMobil Climate Change Policies](#). *Washington Post*. 1 June.

⁴⁹ E. Lewis. 2017. [Shareholders Force ExxonMobil to Plan for a World with Paris Agreement's Emissions Restrictions](#). *World Resources Institute*. 20 June.

⁵⁰ A. Raval and A. Mooney. 2018. [Money Managers: The New Warriors of Climate Change](#). *Financial Times*. 27 December.

⁵¹ BBC. 2018. [Royal Dutch Shell Ties Executive Pay to Carbon Reduction](#). 3 December.

⁵² [Joint Statement between Institutional Investors on Behalf of Climate Action 100+ and Royal Dutch Shell plc \(Shell\)](#). 3 December 2018.

In January 2020, Microsoft committed to be carbon negative and cut its carbon footprint by more than half by 2030.⁵³ It also announced an ambitious pledge to remove from the environment, by 2050, all the carbon the company has emitted—either directly or by electrical consumption—since it was founded in 1975 (footnote 53). These reductions will account for both Microsoft’s direct emissions and the emissions of its entire supply and value chain (footnote 53). Microsoft will publish an annual Environmental Sustainability Report to track its progress (footnote 53).

These business- and investor-driven norms complement academic efforts to define the responsibility of business enterprises (e.g., the United Nations Guiding Principles on Business and Human Rights, the Oslo Principles on Climate Change Obligations, and the Principles on the Climate Obligations of Enterprises). However, these norms have the added benefit of quickly driving business response due to (i) financial repercussions on the bottom line, and (ii) threats of stockholder action. The financial risk of these investments is certainly staggering—The Economist Intelligence Unit (2015) estimated that present-day losses in manageable assets at risk due to climate change could go from \$4.2 trillion to \$43 trillion from now until the year 2100.⁵⁴

Recovery from the COVID-19 pandemic presents an opportunity for “the great reset.”

Governments, financial institutions, and businesses need to make important decisions as they gear up to restart economic activities.⁵⁵ One of the top queries is whether to continue with business as usual, or, in the alternative, to integrate climate change considerations more meaningfully in business processes, fiscal incentives, and bailout packages.



This crisis offers us a once-in-a-lifetime opportunity to rebuild our economy in order to withstand the next shock coming our way: climate breakdown. Unless we act now, the climate crisis will be tomorrow’s central scenario and, unlike COVID-19, no one will be able to self-isolate from it.

Source: A. Bailey et al. 2020. The World Must Seize This Opportunity to Meet the Climate Challenge. *The Guardian*. 5 June.

⁵³ B. Smith. 2020. [Microsoft Will Be Carbon Negative by 2030](#). *Official Microsoft Blog*. 16 January.

⁵⁴ The Economist Intelligence Unit. 2015. [The Cost of Inaction: Recognising the Value at Risk from Climate Change](#). Cited in A. Raval and A. Mooney. 2018. [Money Managers: The New Warriors of Climate Change](#). *Financial Times*. 27 December.

⁵⁵ K. Whiting. 2020. [How the World Can ‘Reset’ Itself After COVID-19—According to These Experts](#). *World Economic Forum*. 3 June.

Some governments use aid packages to exact stronger climate commitments from private companies.⁵⁶ For instance, one of the conditions the Government of France imposed on Air France's €7 billion (\$10.8 billion) COVID-19 aid package was a ban on short-haul domestic air travel (defined as applying to routes where trains offer a journey time of two and a half hours or less).⁵⁷

Economic stimulus packages are effective vehicles to incorporate international climate norms—including Paris Agreement objectives—in public and private decision-making processes. Indeed, current and former heads of central banks around the world have stated:

[As] we consider the next stage of recovery [from COVID-19], we must look beyond the immediate crisis and think more strategically about how we do it. [...]

Acting early will help to smooth the transition and avoid a sharp and disorderly adjustment. To meet the goals of the Paris [A]greement requires a whole economy transition: every business, bank and financial institution will need to adapt. The pandemic has shown that we can change our ways of working, living and travelling, but it has also shown that making these adjustments at the height of a crisis brings enormous costs. To address climate breakdown, we can instead take decisions now that reduce emissions in a less disruptive manner. That requires us to be strategic. To build back better.

This will only happen if financial decisions, including those made by businesses, investors, banks and governments, take the climate crisis into account. The economic recovery plans being developed today offer the chance to build a sustainable, competitive new economy.⁵⁸

⁵⁶ U. Irfan. 2020. [How South Korea, France, and Italy are Using the COVID-19 Response to Fight Climate Change](#). Vox. 8 June.

⁵⁷ D. Briginshaw. 2020. [Air France Ordered to Curb Competition with Rail in France](#). *International Railway Journal*. 1 May.

⁵⁸ A. Bailey et al. 2020. [The World Must Seize This Opportunity to Meet the Climate Challenge](#). *The Guardian*. 5 June.



Photo by Xaykhame Manilasit/ADB.

Mangrove ecosystems. Mangroves grow along the beach of Tarawa, Kiribati. Mangroves help fight the effects of climate change by protecting shorelines and trapping carbon emissions (photo by Eric Sales/ADB).





PART SEVEN

CONCLUSION

The nature of climate change warrants a more in-depth look into the important role of international law in domestic adjudication. Climate change law—perhaps more than any other field of law—intersects with numerous branches of public and private law.

In writing this report, ADB seeks to provide a handy tool that can be used by judges in Asia and the Pacific to determine

- (i) which international instruments and principles are applicable to their states;
- (ii) in case of conventional law, how applicability is impacted by treaty status (i.e., as the treaty relates specifically to their states);
- (iii) the interplay between climate law and other fields of international law; and
- (iv) the various ways (direct and indirect) that international legal norms and principles may be used to adjudicate climate change disputes.

Domestic courts, however, do not only apply international law. The cross-pollination across jurisdictions shows that they also “create,” or at least inform, the evolution of international law. This symbiotic relationship augurs well for the crucial contribution of national courts to global climate governance—that is, linking international obligations of conduct with national obligations of results.¹

¹ A.J. Saiger. 2020. Domestic Courts and the Paris Agreement’s Climate Goals: The Need for a Comparative Approach. *Transnational Environmental Law*. 9 (1). pp. 37–54.



International Climate Change Legal Frameworks

Climate Change, Coming Soon to A Court Near You—Report Four

In 2020, the Paris Agreement is the pinnacle of international law on climate change. It orchestrates global climate action over the coming decades. Countries agreed to limit global warming to well below 2°C above preindustrial times, closer to 1.5°C. Humankind will only achieve this temperature goal if we domesticate our international climate commitments. Judges have proven to be instrumental in holding their governments accountable for their climate pledges. Report Four of this four-part series explores the nature of the Paris Agreement, its history, and the framework of international instruments and international legal principles that support global and domestic climate action.

About the Asian Development Bank

ADB is committed to achieving a prosperous, inclusive, resilient, and sustainable Asia and the Pacific, while sustaining its efforts to eradicate extreme poverty. Established in 1966, it is owned by 68 members—49 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.



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