Principles, Standards and Voluntary Commitments in International Environmental Law

Introduction

This chapter will examine three sets of legal developments that characterize normative processes and law-making dynamics in international environmental law (IEL), namely: the emergence and growing prominence of environmental principles; the adoption of environmental standards through multilateral environmental treaties, but also, and increasingly, through the work of non-state actors and international organizations; and recourse to voluntary commitments. Although each of these developments presents distinctive features, they overall share common traits that contribute to the delineation of IEL as a legal discipline, namely a more varied typology of norms and law-making processes, the involvement of a wider range of actors in the formation and application of international norms, and the progressive blurring of the distinction between hard and soft law. This phenomenon is not unique to IEL. Similar trajectories can, in fact, be discerned in other branches of international law and regulation, particularly those most exposed to the pressures of economic and social globalization. However, they occupy a prominent role in the field of environmental law where they reflect the attempt to cope with the complexity of regulating environmental problems and with the multilevel and multi-layered framework of global environmental governance.

While IEL is not a separate or self-contained branch of international law, the special features of environmental problems have demanded new and specific approaches to international environmental regulation, not only in terms of substantive content, but also and especially at the level of law-making processes, conceptual structures and methodologies. Two main trends, in particular, can be discerned that characterize modern environmental law-making at the international level. The first concerns the fact that while states remain the primary authors of IEL, their role and influence in the law-making process has changed over time. Most international environmental treaties are now promoted, negotiated and adopted under the auspices of international organizations, often with the involvement, as participants or observers, of NGOs and other private groups. Moreover, outside and beyond

---

2 Patricia Birnie, Alan Boyle and Catherine Redgwell, International Law & the Environment (OUP 2009) 2.
4 Daniel Bodansky, Jutta Brunnée and Ellen Hey, ‘Mapping the Field’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (OUP 2010) 5.
treaties, non-state actors, businesses and civil society are increasingly acting as ‘norm entrepreneurs’, exerting an important role as the promoter and generator of an ever-wider array of non-binding, yet influential, normative instruments. The second trend relates to the diversification of modalities and patterns for the generation of international environmental norms. What we discern is not only an increasing recourse to soft law, but also a blurring of the boundaries between soft and hard law, through the emergence of legal developments whose very nature and normativity do not quite fit with the standard definitions of law.

This chapter connects the analysis of developments in relation to environmental principles, environmental standards and recourse to voluntary commitments, with the broader discussion concerning the emergence of novel and more dynamic forms of international environmental law-making. Reasons of space have not allowed an exhaustive and comprehensive discussion of each of these developments. Therefore, the analysis concentrates on those aspects which are more illustrative of the evolution of the legal framework in this field and of the relevant legal issues.

Environmental Principles

Overview

The emergence of specific principles related to the environment has become a prominent and well-established feature in the architecture and development of IEL. Often codified in landmark international declarations and other soft-law documents, environmental principles are increasingly incorporated in the text of international and regional treaties, referred to in UN General Assembly resolutions, and other binding acts of international organizations and frequently find their way into international judicial and arbitral decisions. Their prolific growth over the past decades goes together with the evolution and expanding scope of IEL, reflecting its progressive level of maturity as a discipline.

There are different reasons explaining the increasing recourse to principles in the field of IEL. In part, these are largely similar to the factors that spurred the recourse to more open-ended and less stringent normative structures in IEL law-making, including the complexity and polycentricity of environmental problems, and the need for standards that can adapt more easily to the evolution of scientific knowledge. Environmental principles are also better suited for compromises and balancing

---


7 Stephen J Toope, ‘Formality and Informality’, in Bodansky, Brunnée and Hey (n 4) 107.

8 Nicolas de Sadeleer, Environmental Principles: From Political Slogan to Legal Rules (OUP 2002).
among competing interests, and therefore more easily conducive to reach consensus in a multipolar and divided international community. But their prominence and popularity are also linked to their symbolic character. Scotford notes how principles have a sort of ‘populist appeal’, while at the same time also reflecting deeper ethical dimensions and moral weight. They reflect the aspirations and ideals of society with respect to the environment; and in that sense they fit with the purposive nature of environmental law, helping to identify the goals to be pursued by environmental policies and legislation.

Despite their relevance and central presence in environmental discourses and legal scholarship, a number of questions still surround these principles. The first question relates to their identification and qualification. The label ‘environmental principles’ refers to a variegated and open-ended set of different international principles and normative concepts. Some international environmental principles are rooted in well-established concepts of general international law that have, over time, gained a specific environmental dimension. An example is the ‘no-transboundary harm principle’, the origin of which can be traced back to the general principles of good neighbourliness and sic utere tuo. While its early manifestations were linked sovereignty and territorial integrity, the principle was reformulated from an environmental perspective in the 1972 Stockholm Declaration, which connected it to the more comprehensive principle of prevention, and extended its reach to include areas beyond national jurisdiction. Since then, the principle has subsequently gained the status of a customary rule of international law, and recently formed the legal basis for reparation claims for significant transboundary environmental damage.

Another principle rooted in early judicial decisions is the principle of cooperation, affirmed in the Lac Lanoux arbitration and now a fundamental principle of environmental protection and transboundary environmental risk management. In a transboundary context, cooperation operates together with the requirements of notification and consultation, environmental impact assessment and the principle of reasonable and equitable use of shared resources. The 2001 ILC Articles on Prevention of Transboundary Harm from Hazardous Activities underscore the link between the principle/duty of cooperation and prevention. Furthermore, Principle 27 of the 1992 Rio Declaration

---

10 De Sadeleer (n 8).
12 Lake Lanoux (France v Spain) (1957) 12 RIAA 281.
13 Birnie, Boyle and Redgwell (n 2) 176.
adds a global dimension to the principle through the idea of co-operation ‘in good faith and in a spirit of partnership’.

Environmental concerns have also contributed to re-define classic understandings of state sovereignty over natural resources. Accordingly, while sovereignty remains the foundational principle governing states’ rights and duties in relation to natural resources, its contours have been shaped by the emergence of concepts and principles reflecting objectives of sustainability and equity, such as common concern, sustainable use of natural resources, and benefit sharing.

Alongside these well-established principles of international law applicable to the environment, an array of environmental principles subsequently emerged, particularly in the wake of the 1972 Stockholm Declaration and the rise of a more marked environmental awareness. In this first stage of IEL development, the Stockholm Declaration offered a significant contribution to the subsequent affirmation of many environmental principles, laying down the underlying ideas and concepts which were then expressed in more explicit normative terms in the 1992 Rio Declaration. The most important principle of the Stockholm Declaration is Principle 21, which represents the cornerstone of IEL and lays the foundation of the prevention principle. Bringing forward the idea of prevention, Principle 21 marks a radical shift from the early curative and reactive perspective towards a preventative and anticipatory approach to environmental harm and risk. Compared to the no-harm principle, it embodies a more comprehensive duty of regulation and prevention of environmental harm, and is much more fundamentally grounded on growing concerns for environmental protection and natural resource management, rather than on traditional logics of sovereignty and territory.

During the 1990s, a second wave of environmental principles and concepts emerged and/or consolidated within the context of the 1992 Rio Declaration and the pursuit of a sustainable development agenda. The 1992 UN Conference on Environment and Development (UNCED) and its landmark Rio Declaration contributed to the official launch of sustainable development as the overarching ideal for the development of policy and law related to the environment and its connection with development. The Rio Declaration includes several substantive and procedural environmental principles which represent the key components for the implementation and realization of sustainable development, as well as the conceptual foundations of IEL. Besides the classic environmental

---

principles of no harm/prevention, liability, and different versions of precaution and polluter pays, the Rio Declaration also brings together a number of principles reflecting aspirations of equity, sustainability, and poverty eradication, applicable within domestic legal orders and/or inter-state relations. These are—to name just a few—inter-generational equity, common but differentiated responsibilities, cooperation and prevention of transfer and relocation of hazardous and environmentally harmful activities and substances,19 sustainable production and consumption.20 It also sets forth a number of procedural principles aimed at enabling the integration of environmental concerns into decision-making processes relating to the planning and implementation of development projects, such as the integration principle, the principle/requirement of environmental impact assessment, and the good governance principles of transparency (access to information), public participation and access to justice, that put forward a more inclusive approach to environmental governance and the management of natural resources.21

The decades following the Stockholm Declaration are also characterised by the growing recognition of the global and collective dimension of environmental problems and need for international cooperation to address common environmental concerns. At the conceptual level this is reflected in the progressive consolidation of principles, such as CBDR and international global cooperation, and concepts such as common concern or common heritage of mankind, that express an ideal of international cooperation which goes beyond the transboundary context and that is directed at furthering the common interests of all humanity and life on the planet.

Alongside the Rio Declaration, environmental principles are contained in other soft law documents and initiatives that contribute to consolidating the conceptual and principled basis for an ‘environmental rule of law’. These include the World Charter for Nature, the Earth Charter (a civil society/bottom-up document eventually endorsed by IUCN and few states) and the IUCN Declaration on the Environmental Rule of Law. At present, the Global Pact for the Environment22 embodies a further and more normatively ambitious endeavour around environmental principles, laying down the basis for the potential adoption of a legally binding instrument to be concluded under the aegis of the UN. It includes both some well-established environmental principles, and a number of other principles, concepts and aspirations that have over time consolidated and gained increased consensus, such as the long-debated idea of a right to an ecologically sound environment, or the principles of

21 On the idea of public participation in international environmental law see further Chapters 6 and 7 of this Handbook.
non-regression and resilience. Overall, one message that can be taken from this brief overview is that environmental principles do not constitute a definitive and exhaustive list, but rather, are an open conceptual category with flexible boundaries which are suited to adapt and evolve to encapsulate and address the evolving concerns, aspirations, objectives and understanding of the international community in relation to the environment.

**Normative Character and Legal Status of Environmental Principles**

Discussion about the legal status, role and function of environmental principles has abounded in international environmental legal scholarship, reflecting the confusion and uncertainty which exists regarding the principles’ normative character and legal effects. This uncertainty is in part related to the vague and indeterminate language of the principles, which leads to disagreement as to whether they actually embody legal obligations. As Scotford notes, environmental principles ‘are first and foremost statements of policy’ representing goals of environmental protection and sustainable development; they ‘reflect courses of action adopted to secure or that tend to secure a state of affairs conceived to be desirable’. Another aspect to consider is that many of the principles have been generated through non-conventional means, rather than through the established law-making processes, such as technical guidelines or recommendation of international institutions, as in the case of prior informed consent and the polluter pays principle, or the work of legal scholars, as for the emerging principle of non-regression. Their inclusion in soft law documents and declarations further contributes to place the accent on their non-binding nature, leading to discussion on whether and to what extent a given environmental principle has eventually acquired the status of customary international law.

One way to understand the legal nature of the principles is to juxtapose them with ‘legal rules’. According to Bodansky, while rules ‘define precisely what conduct is permissible or impermissible’, principles ‘operate primarily to channel future decision-making’; they do not directly govern behaviour, but represent normative standards ‘whose application depends on the exercise of judgment or discretion’. Beyerlin situates environmental principles among the so-called ‘twilight norms’ of modern international environmental law, including those concepts ‘that do not necessarily set out clearly the legal consequences that follow automatically from the presence of all stipulated facts’. However, he also highlights that they do not constitute a homogeneous category and that of all these

---


concepts declared to be ‘principles’, ‘some of them may vaguely point to common policy goals or may be understood as broad-ranging principles, while some others may even prove to be well-defined rules’. Therefore, a helpful differentiation would be to distinguish between ‘legal rules’, ‘principles’ and ‘concepts’ according their different degree of precision/ generality. Principles such as no transboundary harm, prevention, cooperation, the procedural requirements of environmental impact assessment, are closer to legal rules. While retaining a certain degree of indeterminacy and allowing discretion as to their concrete application to specific circumstances, they are nevertheless capable of providing a clear direction with respect to required conduct. Some scholars tend to include the precautionary principle in this category. Conversely, concepts such as common concern of humankind, or the CBDR principle are more vague; they do not imply a specific rule of conduct for states, although – as further discussed later—this does not mean that they are legally irrelevant or totally lacking any normative impact.

A related question concerns the formal legal status of environmental principles and whether they fit into one of the formal sources of international law under Article 38 (1) of the Statute of the International Court of Justice (ICJ Statute). Principles, such as no-harm and prevention have notably consolidated into customary norms of international law. With respect to precaution, the ITLOS Seabed Disputes Chamber in its Advisory Opinion on Responsibilities and Obligations in Area, noted the emergence of ‘a trend making this approach part of customary international law’. However, apart from those principles explicitly recognised as part of general international law by international courts, the customary nature of environmental principles is for most part still at the level of scholarly debate. Environmental principles also gain a firmer legal basis when they are included in treaties (especially if situated in the operative part of those treaties), although this does not necessarily make them legally binding rules, non-compliance with which entails responsibility for breach. Finally, the question of whether environmental principles can be included within the general principles of international law was raised by Cançado Trinidade in its separate opinion in the 2010 Pulp Mills on the River Uruguay case, but the ICJ did not ultimately engage with this point. Nevertheless, it can

---

26 Ibid.
28 Beyerlin, (n 25) 440.
29 Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 201, p. 10 [135].
30 For a view as to whether the recognition of a principle as customary law would actually enhance its effect, see Bodansky (n 23) chapter 9; also discussion in this chapter below.
be argued that environmental principles are not totally separate from general principles of international law and there is numerous evidence of close interconnections, reciprocal influences and patterns of cross-fertilization between the two categories.\textsuperscript{33}

\textit{Role, Function and Normative Relevance of Environmental Principles}

While analysis of the legal status and degree of prescriptiveness of environmental principles provides useful insights, their normative significance can only be understood by taking a more comprehensive approach—that is, an approach which includes an examination of their functions and actual influence on state practice, the negotiation of international treaties and the decisions of international courts. In other words, the legal relevance of environmental principles does not solely depend on their grounding in formal sources of international law or on their rule-like clarity and precision.\textsuperscript{34} A paradigmatic example is provided by sustainable development, the legal status of which and its capacity to embody legally binding rules has generated considerable debate and contrasting opinions. Nevertheless, its normative significance is undeniable. Not only has it been included in numerous international environmental instruments and multilateral environmental treaties, but it has influenced international state practice, international courts and tribunals’ jurisprudence and contributed significantly to shaping environmental discourse both domestically and at the international level. As noted by Dupuy, concepts such as sustainable development or precaution ‘should be viewed in terms of their normative potential rather than the formal perspective of their legal status’.\textsuperscript{35}

Environmental principles play an important role in articulating the collective aspirations of the international community in relation to the environment and in that sense, they provide the conceptual framework to generate legal solutions to address environmental problems. They have an important impact on the development and application of IEL, particularly in the context of treaties and within judicial reasoning. One of the primary ways in which principles influence the development of IEL is through their role in treaty negotiations.\textsuperscript{36} For example, the principle of CBDR and the concept of common concern have provided the conceptual basis for the articulation of international obligations in the context of treaty regimes in the field of climate change and biodiversity. CBDR has exerted a significant impact on treaty practice, particularly through the configuration of differentiated commitments in international regimes, such as in the field of climate change and the protection of the

\begin{thebibliography}{99}
\bibitem{34} Boyle (n 31), 131-34.
\bibitem{35} Pierre-Marie Dupuy, ‘Formation of Customary International Law and General Principles’ in Bodansky, Brunnée and Hey (n 2)
\bibitem{36} Bodansky (n 24) 203.
\end{thebibliography}
ozone layer. Treaties also help to clarify in more substantive terms the meaning and content of environmental principles, and represent the main channel through which those principles are converted into legal rules.

The second dimension through which environmental principles exert their normative influence is through court decisions and judicial reasoning, particularly when they act as interpretative tools to resolve conflicts of norms or to reconcile competing interests. Sustainable development had a pivotal role in guiding judicial decisions in cases such as the Gabčikovo-Nagymaros Project, Pulp Mills, Iron Rhine and Indus Waters Kishenganga, in which the pursuit of economic development projects conflicted with environmental concerns. The principles can also serve as interpretative aids in the application of existing treaty provisions and of customary rules of international law. In the Pulp Mills case, for instance, the ICJ accepted that ‘a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute’. Furthermore, when more broadly accepted in states’ practice, principles may provide a framework or a standard against which to assess the conducts of states and re-define their existing obligations vis-à-vis the protection of the environment. For example, in its Advisory Opinion on the Area, the ITLOS Seabed Disputes Chamber considered the precautionary approach as ‘an integral part of the general obligation of due diligence of sponsoring states’.

Finally, and more generally, aside from their practical relevance and their impact on the development and evolution of IEL, environmental principles also help to define the identity of IEL as a discipline, and to preserve its coherence both internally—between different regimes of environmental protection—and externally between the objectives of international environmental regimes and other international law regimes. In a context of growing globalization and competition among different legal regimes, principles represent a valuable tool to ‘overcome the negative side-effects of fragmentation’.

**Environmental Standards**

---

37 1978 Montreal Protocol on Substances that Deplete the Ozone Layer.
39 Pulp Mills on the River Uruguay (n 32).
40 Award in the Arbitration regarding the Iron Rhine (‘IJzeren Rijn’) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands (2005) 27 RIAA 35.
42 See Barral (n 18).
43 Pulp Mills on the River Uruguay (n 32) [164].
44 Responsibilities and Obligations in the Area (n 29) [131].
45 Fajardo (n 33) 45.
Environmental standards have been traditionally negotiated and adopted by states through the conclusion of international treaties, and subsequently implemented domestically through national legislation and regulations (direct regulation). This section focuses, instead, on a different type of standards—namely those elaborated through the involvement of a heterogeneous ensemble of private and public actors, including non-state actors, such as inter-governmental and non-governmental organizations, multilateral banks, industry and business associations. Reflecting the broader phenomenon of informal and transnational law making, these standards are usually incorporated in a wide range of non-binding normative instruments, including, *inter alia*, certification and labelling frameworks, voluntary codes of conducts, guidelines, sets of principles and recommendations. The vast majority of standards usually target the private sector—including businesses, corporate actors, or specific industry sectors—although in some cases they also address a wider spectrum of stakeholders, including governments and public bodies. Environmental standards are generally non-binding, and are not necessarily prescriptive or regulatory but aim to influence behaviours through a varied mix of economic incentives rather than by relying on deterrence-based enforcement mechanisms.\(^{46}\) Adherence to them is presumably voluntary, although in practice it is often indirectly coerced by a number of internal and external pressures,\(^ {47}\) such as the need to pre-empt or defuse mandatory regulation, maintain competitiveness in the market, meet industry association membership requirements or satisfy the demands of customers and investors. In some cases, adherence and compliance with them is sometimes a condition to enter into supply chain contracts with multinational corporations,\(^ {48}\) or in contracts for project financing and loans by financial institutions.\(^ {49}\)

International standard-setting initiatives started to gain salience particularly during the 1990s, in concomitance with parallel domestic trends towards more flexible, cooperative and ‘responsive’ approaches to regulation, including self-regulatory and voluntary mechanisms.\(^ {50}\) From a regulatory perspective, they represent a response to the dissatisfaction with traditional command and control regulation and the perceived failure of classic state-authored rules and top down intergovernmental approaches to incentivize commercial and corporate sustainable practices.\(^ {51}\) Their international and global dimension is, however, also linked to globalization processes, and the need for harmonized

\(^{46}\) Jason Morrison and Naomi Roth-Arriaza, ‘Private and Quasi Private standard Setting’ in Bodansky, Brunnée and Hey (n 2) 498.


\(^{51}\) Morrison and Roth Arriaza (n 46).
common frameworks to facilitate trade and reduce transaction costs arising from the proliferation of technical rules at the national and regional level. A further important impetus towards the development of standards and voluntary codes of conduct aimed at promoting sustainable businesses practices arose with the 1992 Rio Earth Summit and its emphasis on public-private partnerships and the positive role of the private sector in the pursuit of sustainable development.

In the environmental field, recourse to standards reflects the need for more flexible and adaptable regulatory tools better capable to take into account the evolution of scientific knowledge, and to enable the rapid adoption of detailed and technical rules in complex and sensitive areas where it may be difficult to achieve political consensus or for which slow and cumbersome treaty procedures are poorly suited. They often intervene in areas or issues where formal international regulation is either lacking or insufficient. Moreover, their elaboration can benefit from the collaboration, inputs and expertise of different stakeholders, including government actors, as well as industry and NGOs. Yet, while these normative processes might, in principle, be more inclusive in terms of the actors and interests involved, in practice, the under-representation of certain sectors in the drafting process of certain private standards have also made them more vulnerable to criticism regarding their legitimacy and democratic support.

Overall, what emerges is a system of global or transnational environmental governance characterized by a dynamic mix and interaction of public and private normative mechanisms, and by a progressive blurring of the boundaries between public and private and between the domestic and the international, in the processes of formation and implementation of the relevant norms.

**Typologies of Standards**

Standards related to environment and sustainability are very diverse in terms of actors and addressees, as well as in relation to objectives and substantive content. This section will broadly distinguish between standards developed by private and quasi private actors, and those created within the framework of international organizations. However, this is not always a clear-cut distinction, and in some cases, environmental standards emerge from collaboration through networks of private and public actors.

---

52 Ibid.
55 Roth-Arriaza (n 50) 141.
56 McIntyre (n 48).
Private and Quasi-private Standards

Over the past few decades, private or quasi-private international agencies and organizations have developed a vast variety of environmental standards, covering different areas of global production. Such standards are often associated with certification and labelling schemes to attest the product or organization’s compliance with the standards. In that sense, they embody a typical information-based approach to environmental protection, attempting to create economic incentives by channelling consumers demand towards more sustainable products and services.

The International Organization for Standardization (ISO) is one of the first and most recognised international standard-setting bodies. ISO was founded in 1946 with the aim to develop international standards to facilitate international trade in goods and services. Historically focused on product specifications and technical engineering standards, ISO subsequently moved into the environmental arena through the elaboration of process oriented and performance standards. Of particular relevance are the ISO 14000 environmental management standards (EMS) aimed at providing guidance to organizations and industries on the establishment and implementation of an environmental management policy. While ISO’s membership is formally composed of only national standards bodies, its standards are designed through a consensus-based process, which aims to involve input and expertise from different categories of stakeholders and interests from around the world. In practice, concerns have been raised about the low representation of NGOs and other societal interests in the composition of national standard bodies, compared to the dominant presence of businesses and industries. Arguably, this not only undermines the standard’s legitimacy and transparency but also raises concerns about a substantive watering down of the standards to the lowest common denominator. Adherence to and compliance with ISO standards, including the EMS standards, can be certified by a third-party certification body. This is however, voluntary, unless mandated by national law for specific products or sectors. Moreover, ISO14001 standards are limited in that they only demonstrate that an EMS system is in place and do not prescribe criteria to assess performance levels. It has been argued that this undermines the standard’s credibility in terms of its actual impact on improving environmental performance. Internationally, the relevance of ISO standards has been enhanced by the reference to ‘relevant international standards’ in the World Trade Organization (WTO) provisions of the Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). In particular, Article

57 See for example, ISO 9000 Quality Management series.
58 Roth-Arriaza (n 50).
2(4) of the TBT agreement has been interpreted as implicitly referring to ISO standards, thereby creating a presumption of their consistency with WTO law.

While ISO standards are developed through a process that involves both government bodies and the private sector, other environmentally-oriented standards have instead emerged as purely private initiatives of NGOs, or through private partnerships between NGOs and relevant industry bodies. The most well-known are the Forest Stewardship Council (FSC) and the Marine Stewardship Council (MSC). Both were spurred out of the need to halt unsustainable practices in the exploitation and management of globally relevant natural resources, and to compensate for the lack of robust international legal frameworks addressing those challenges. The setting-up of FSC in 1994 was an initiative of World Wildlife Fund and other non-governmental organizations and stakeholders in the forest and timber sectors. It sought to make up for the absence of intergovernmental consensus over an international agreement on forests, by relying on a private market-driven approach based on the creation of a global certification system to orient consumers and producers towards products and supplies coming from properly managed forests. The FSC certification and labelling scheme is based on 10 principles and more detailed criteria to be used for the certification of forests around the world. These cover issues ranging from conservation and environmental impact, to the social aspects of workers’ rights and the community dimension of forest management. Inspired by FSC’s success, the MSC was set up through a collaboration between WWF and Unilever to establish a certification and labelling scheme for fisheries. Since 1997 it has the status of an independent charitable organization. Both the FSC and the MSC rely on third-party certification: they do not themselves issue the certificates but rely on independent certification bodies to perform the assessment on the basis of their pre-set standards and criteria.

Over the years, other private certification schemes were created in other sectors. A key feature of these schemes is the existence of verification procedures designed to verify that the regulated entities (e.g. certificate holders) actually meet the stated standards. The presence of independent systems of verification aim to strengthen the certification programmes’ legitimacy and credibility, distinguishing these from other businesses/ corporate initiatives entirely based on self-reporting and self-verification, with limited or no outside monitoring. As a down-side, these schemes can be prohibitively expensive for small companies and businesses. In practice, the effectiveness of these environmental standards depends on the level of consumer demand for certified products and the

---

widespread acceptance by relevant industries and trading partners along the supply-chain. This has, in turn, created some tension between the stringency of the standards and the need to reach a high uptake by relevant industry operators.62

At the same time, however, private standards as well as other environmental standards and voluntary codes of conduct examined in this section cannot be regarded as a substitute for robust international and domestic regulatory systems.63 Indeed, research indicates that private standards and certification schemes benefit significantly from their incorporation into public policy and legislation, and their effectiveness is linked to the existence of a strong regulatory framework at the international and the domestic level.64

Self-regulatory Initiatives

Literature on private environmental standards tends to include also voluntary codes of conduct and other self-regulatory initiatives developed by transnational corporations, industry sectors and business associations. These can be cross-sectoral, such as the International Chamber of Commerce (ICC) Business Charter for Sustainable Development,65 or the Coalition for Environmentally Responsible Economies (CERES) principles developed through a partnership between civil society groups, investors and companies to promote investments in environmentally responsible corporations.66 Others are instead focussed on specific sectors of activities, such as the Responsible Care programme, which is addressed to chemical industries.67 In the financial sector, a prime example is represented by the Equator Principles (EPs), a set of voluntary guidelines developed by financial institutions to implement procedures for the assessment of environmental and social risks of large-scale development projects and to minimise their negative impacts the environment, the climate and affected communities.68 The financial institutions adhering to the EPs commit to implementing them in their internal policies and procedures for financing projects and require them to refuse project finance or corporate loans for projects that do not meet the EPs’ requirements.

62 Ibid, 164.
63 Morrison and Roth-Arriaza (n 46).
Overall, one limitation of these private codes is that they lack a proper third party verification system; therefore, compliance relies entirely on self-evaluation and reporting. Moreover, these voluntary codes lack, at least formally, a robust system of sanctions for non-compliance. In theory, compliance is boosted by potential practical consequences, such as the withdrawal of certification by or of membership of the relevant industry association. However, evidence seems to show that these consequences are not always consistently applied.69

Standards Developed by International Organizations

International organizations have also been increasingly involved in the elaboration and adoption of environmental and sustainability standards, often through engagement or collaboration with private actors and institutions. These initiatives are generally conceived as complementary to existing international legislation in the field, or as filling the gaps left by existing, but vague, treaty provisions; in some cases, they have paved the way for further formal development into treaties. For example, the 1987 UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade70 and the date FAO International Code of Conduct on the Distribution and Use of Pesticides71 laid down best practices in the management and export of chemicals, including a voluntary procedure of prior informed consent, which became the basis for the subsequent adoption of the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2000 Stockholm Convention on Persistent Organic Pollutants. Another example of interaction between soft and hard law is the 1995 FAO Code of Conduct for Responsible Fisheries.72 The Code is the result of the work by several different groups, including FAO members, the fishing industry and NGOs and is addressed to Governments as well as to industries and fishing communities. Although the Code is voluntary, several of its provisions come from binding international law instruments, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, and these form an integral part of the Code.

International financial institutions and multilateral development banks have also engaged in the development of environmental standards as part of a process aimed to reverse criticism raised by the

69 Morrison and Roth-Arriaza (n 46) 524.
71 Adopted by FAO Conference at its 23rd session by Conference Resolution 10/85 in 1985; it was then revised in 1989 to introduce the prior informed consent procedure (FAO Conference Resolution 6/89). Since then it has been further updated and revised, and in 2013 its title was changed to The International Code of Conduct on Pesticide Management.
adverse social and environmental impacts of certain internationally funded development projects. An example is International Finance Corporation (IFC) Sustainability Framework, which provides a set of environmental and social performance standards for borrowers.\textsuperscript{73} Adopted in 2006, it was updated in 2012 to include pressing challenges such as climate change, supply-chain management, and business and human rights. In 2018, the World Bank launched its Environmental and Social Framework (ESF),\textsuperscript{74} including a Policy for Investment Project Financing that applies to the Bank, and ten Environmental and Social Standards applicable to borrowers, covering pressing concerns such as non-discrimination, participation and climate change. These frameworks are relevant in that they often represent requirements for the approval and financing of projects. Moreover, both the IFC and the World Bank envisage accountability or grievance mechanisms to address and respond to the various concerns of project-affected parties, including concerns about compliance with environmental and social policy standards.\textsuperscript{75}

\textbf{Voluntary Commitments}

Broadly speaking, voluntary commitments form part of the wider phenomenon of voluntary approaches to environmental protection. The concept presents some overlap with voluntary codes of conduct examined in the previous section, and may also include initiatives such as the partnership approach promoted under the United Nations Global Compact,\textsuperscript{76} at least to the extent that their adoption is not legally mandated and they are not enforced through formal sanctions. Brown Weiss distinguishes voluntary commitments from other legal forms in that ‘they are not made pursuant to a consensus instrument to which the parties have agreed. They are not negotiated. They are generally independent of the commitments of other parties, though they may be in part conditioned upon similar actions by others…’.\textsuperscript{77} At the international level, voluntary commitments can be made by individual countries (i.e. states) as well as by a variety of non-state actors. An example is the 2009 Copenhagen Accord which, even though not formally adopted as a binding legal instrument, received the informal endorsement of several countries, which made voluntary pledges towards emission reductions.\textsuperscript{78} A

\textsuperscript{73} The Sustainability Framework is available at: https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/sustainability+framework accessed 27 June 2020.


\textsuperscript{76} See https://www.unglobalcompact.org accessed 27 June 2020.


\textsuperscript{78} Ibid.
similar approach has been formalised in the 2015 Paris Agreement, although the Nationally Determined Contributions formulated by states parties are not properly ‘voluntary’ but form part of the institutionalised commitments adopted by states as a result of their ratification of the agreement.

More specifically, however, voluntary commitments also refer to a particular set of initiatives emerging in connection with the launch of the Sustainable Development Goals (SDGs) and the 2030 Agenda for Sustainable Development in 2015, mandated by the Rio+20 Conference in 2012. The Rio+ outcome document describes them as ‘commitments voluntary entered…by all stakeholders and their networks to implement concrete policies, plans, programmes, projects and action to promote sustainable development and poverty eradication’. The document also calls for the establishment of an UN internet-based registry providing information about these commitments in a transparent and publicly accessible manner. As a result, a number of initiatives have been established within the UN in order to solicit and publish voluntary commitments made by states and other entities on various challenges related to sustainable development. These include, among others, the UN Sustainable Development Knowledge Platform, the Sustainable Energy for All and, more recently, the UN Ocean Conference for the implementation of SDG 14 on conservation and sustainable use of oceans, seas and marine resources. Building upon the idea of global partnerships for sustainable development, the emphasis on voluntary commitments conveys the idea of a global, multi-layered and cooperative multi-stakeholder approach to sustainable development in which regulatory and intergovernmental frameworks coexist with voluntary and bottom up actions to pursue sustainable development and fulfil the SDGs. However, they cannot be considered as a substitute for government responsibilities and negotiated norms and requirements. While they can play an important role in ‘bottom-up empowerment’ and in catalysing actors and resources in order to pursue a common sustainable development agenda, their effectiveness can be undermined by the lack of robust central oversight, and a consistent framework for the tracking and reporting of progress. In that respect, issues of accountability, enforcement, progress accounting and effectiveness remain outstanding challenges.

79 UNGA Res. 70/1 Transforming our world: the 2030 Agenda for Sustainable Development (25 September 2015).
80 UNGA Res. 66/288 The future we want (27 July 2012) [283].
84 Brown-Weiss (n 77).
Conclusion

IEL is increasingly characterised by the emergence of more diffuse and decentralised ways of law-making, and by a complex interplay between soft and hard law. Non-binding rules may progressively converge and generate consensus around internationally accepted standards, and eventually influence international practice and behaviour, independently of their legal status. The instruments and developments examined in this chapter show the adaptive capacity of IEL as well as its resilience. Principles, standards and voluntary commitments are not displacing formal international law-making and institutions, but operate alongside them, in a process of interaction and reciprocal support. While they are arguably ‘sui generis’ categories of instruments when examined from the formal perspective of the sources of international law, they are not necessarily less effective than traditional international law. Although the legal binding nature of a norm and its grounding on formal sources still remain the primary test for its legal ‘reality’ and effectiveness, there are other techniques that can be used to assess the efficiency of a norm. As it has been noticed, ‘in the field of the environment, the law takes on new roles…: it incites, accompanies and guides expected behavioural changes; it legitimizes new situations, and contributes to the elaboration of a politically accepted language. All normative means are useful to this end’.

---

86 See McIntyre (n 3).
88 Ibid, 10.