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# The Globalisation and Harmonisation of Environmental Law: An Australian Perspective

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## *Abstract*

Environmental law is becoming increasingly globalised and harmonised between legal systems. The first section of this article explains how environmental law has become more globalised as a result of, first, the increasing number, scope, content and application of environmental laws, both internationally and domestically, and, secondly, an expansion in the number, role and influence of international institutions focused on the environment. The second section identifies the means by which environmental law is harmonised, including through international law influencing domestic law, domestic law influencing international law, and the sharing and adoption of domestic laws between countries. The final section of the article considers how the globalisation and harmonisation of environmental law will be facilitated in the future, including the establishment of global environmental governance institutions; improved cooperation to reduce overlap in multilateral environmental agreements; greater coordination between international environmental institutions; and the growing synthesis of environmental law with other areas of law.

## **I. Introduction**

As the views of our planet from space make dramatically clear, nature does not acknowledge or respect the boundaries with which we have divided our planet. As important as these boundaries are for the management of our own political affairs and relationships, they are clearly transcended by the unitary nature of the natural systems on which our lives and well-being depend.<sup>1</sup>

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<sup>1</sup> Maurice F Strong, 'Eco '92: Critical Challenges and Global Solutions' (1991) 44(2) *Journal of International Affairs* 287, 298.

In this passage, Maurice Strong poses the challenge confronting humankind: environmental problems are global and demand a global response. However, international law alone cannot solve global environmental problems. Political boundaries dictate that the response to these problems must primarily be implemented by each country within the international community. International law may have an important catalytic effect and may establish norms of conduct, but without implementation of such rules and norms at domestic or municipal level, it will be ineffective in achieving the goals of environmental protection. Conversely, domestic laws will be ineffective in addressing transboundary environmental impacts without overarching international laws. A symbiotic relationship exists between international and domestic laws, the harmonisation of the two legal regimes being advantageous and necessary to both.

In this article, we examine the globalisation and harmonisation of environmental law that has occurred and that is likely to continue to occur. In section II, we summarise ways in which there has been a growth of international environmental law, of domestic environmental laws of countries throughout the world, and of international institutions, resulting in the globalisation of environmental law. In section III, we discuss the ways in which there has been a harmonisation between international environmental law and domestic environmental law, as well as between the domestic environmental laws of countries. Harmonisation has occurred by international law influencing domestic law, domestic law influencing international law, and the sharing and adoption of domestic laws between countries. In section IV, we predict that the process of globalisation and harmonisation of environmental law will continue, facilitated by three initiatives. These are the need for more effective global environmental institutions for greater governance; reduction of overlap of multilateral environmental agreements ('MEAs') and improved coordination of the activities of international organisations; and synthesis of international environmental law with other areas of environmental law.

## **II. *Property Rights, Natural Resources and Carbon***

There has been an increase in the number, scope, content and application of environmental laws, both internationally and domestically. There has also been an expansion in the number, role and influence of international institutions focused on environmental law. Together, these factors have resulted in the globalisation of environmental law.

### **A. *International law***

The globalisation of international environmental law is manifested in at least four ways. First, there has been an increase in the number of MEAs, as well as an increase in the scope of issues and topics addressed by international

environmental law.<sup>2</sup> Prior to the 1970s, international law dealt with environmental issues on a sectoral basis. Specific international responses were developed to address particular problems, such as pollution of the sea by oil from shipping.<sup>3</sup> On the few occasions that claims arising from damage or potential damage to the environment went before international courts and tribunals, rulings were based upon either the international law principle of state responsibility for injurious acts caused to another state, or failure to comply with certain terms of bilateral agreements that dealt with the use of natural resources.<sup>4</sup>

The 1972 Stockholm Conference on the Human Environment was a catalyst for the development of a wide range of international responses to global and regional environmental problems. In the wake of the Stockholm Conference, several new global treaties were adopted to address the dumping of waste at sea,<sup>5</sup> pollution from ships,<sup>6</sup> protection of wetlands of international importance,<sup>7</sup> international trade in endangered species,<sup>8</sup> and protection of world cultural and natural heritage.<sup>9</sup> The *United Nations Convention on the Law of the Sea*<sup>10</sup> was also negotiated.

Second, over the past few decades, there has been a dramatic increase in the number of countries that participate in negotiations and become parties to MEAs. This increased participation is partly a product of increased awareness and concern about environmental problems and the need for solutions throughout the countries. It is also partly a product of the use of consensus negotiating procedures, which have a greater potential for securing general acceptance of negotiated texts.<sup>11</sup> In a world of nearly 200 states with disparate interests, and particularly sharp differences on environmental issues between developed and

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<sup>2</sup> D K Anton, 'Treaty Congestion in Contemporary International Environmental Law' in Shawkat Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 651, 652–3.

<sup>3</sup> *International Convention for the Prevention of Pollution of the Sea by Oil*, opened for signature 12 May 1954, 327 UNTS 3 (entered into force 26 July 1958).

<sup>4</sup> See, eg, *Trail Smelter Arbitration (United States of America v Canada) (Award)* [1941] 3 RIAA 1905, 1965; *Bering Sea Fur Seals Fisheries Arbitration (Great Britain v United States)* (1893) Moore's International Arbitration 755; *Lac Lanoux Arbitration (France v Spain)* (1957) 12 RIAA 281; 24 ILR 101.

<sup>5</sup> *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, opened for signature 29 December 1972, 1046 UNTS 120 (entered into force 30 August 1975).

<sup>6</sup> *International Convention for the Prevention of Pollution from Ships*, opened for signature 2 November 1973, 12 ILM 1319 (entered into force 2 October 1983).

<sup>7</sup> *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Convention*').

<sup>8</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*').

<sup>9</sup> *Convention Concerning the Protection of World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

<sup>10</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

<sup>11</sup> See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2009) 13.

developing states, such techniques have been essential when dealing with global environmental problems. The 1992 Rio Conference on Environment and Development ('UNCED') and the negotiation of the Conventions on Biological Diversity,<sup>12</sup> Climate Change<sup>13</sup> and Ozone Depletion<sup>14</sup> had unprecedented numbers of country participants.<sup>15</sup>

Third, international law is now addressing environmental issues and topics at a higher or overarching level of policy and in a cross-sectoral, interdisciplinary manner. Like national environmental law, much of international environmental law is now concerned not only with regulating environmental problems, such as prevention or mitigation of pollution, but also with promoting conservation and sustainable use of natural resources and biological diversity more broadly. This is perhaps a consequence of the broad participation by states in the negotiation of MEAs. Unlike the first MEAs, which had a narrow focus on specific transboundary issues, more recent MEAs adopt a holistic approach to environmental protection and recognise the interdependence of humanity and the natural world.<sup>16</sup> For example, the *Convention on Biological Diversity* evinces the broad nature of objectives which characterises much of contemporary international environmental law: 'The objectives of this Convention ... are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.'<sup>17</sup>

The use of overarching framework treaties, such as the UNFCCC, which set out broad principles but provide for detailed rules to be elaborated through regular meetings of the parties, has given the international law-making process a dynamic character, allowing successive protocols to be negotiated. Such treaties provide a principled basis for progressive action to be taken by the parties as scientific knowledge expands and as the international community's priorities evolve.<sup>18</sup> Instruments that began as bare outline agreements — such as the *Vienna Convention* or the UNFCCC — have become complex systems of detailed and sophisticated law.

A downside to the increasing breadth of environmental issues addressed by international law and the increasing number of country participants in treaty drafting is increasing levels of compromise, resulting in the use of vague, general terms in some written instruments. The definition of 'forest' in the *Kyoto*

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<sup>12</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

<sup>13</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 207 (entered into force 21 March 1994) ('UNFCCC'); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 ILM 22 (entered into force 16 February 2005) ('*Kyoto Protocol*').

<sup>14</sup> *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988) ('*Vienna Convention*').

<sup>15</sup> Birnie, Boyle and Redgwell, above n 11, 13.

<sup>16</sup> See, eg, *Biodiversity Convention* preamble; Birnie, Boyle and Redgwell, above n 11, 8.

<sup>17</sup> *Biodiversity Convention* art 1.

<sup>18</sup> Birnie, Boyle and Redgwell, above n 11, 13.

*Protocol* is an example of such a vague term; it defines ‘forest’ as an area of more than 0.5–1.0 hectares with a minimum tree crown cover of 10 to 30 per cent, with ‘tree’ defined as a plant with the capability of growing to be more than two to five metres tall.<sup>19</sup> Within this range, however, parties can choose their own specific standards. Concerns have been raised that the minimum level of tree crown cover is too low, so that degradation leading to substantial reductions in standing stocks of carbon will be allowed to continue without causing deforestation within the meaning of the treaty.<sup>20</sup>

Further difficulties arise when international courts are called upon to interpret ambiguous treaty terms and requirements of highly indeterminate norms of customary international law and apply the law to the facts of a case. In the *Gabčíkovo-Nagymaros* case, for instance, the International Court of Justice recognised the difficulty in identifying the specific obligations that arise from the need to take into account the overarching emerging norms of customary international law.<sup>21</sup>

Fourth, although international environmental law has historically focused mainly on interstate relations, it has a growing impact on the domestic relations of nation states.<sup>22</sup> International environmental law increasingly provides mechanisms and procedures for supervising the domestic implementation of and compliance with treaties.<sup>23</sup> It facilitates and promotes cooperation between states, and constitutes a process of international governance and regulation.<sup>24</sup>

## **B. Domestic law**

There has also been a globalisation of domestic environmental law. Even more so than at the international level, there has been an increase in the number of environmental laws in each country, as well as an increase in the scope and

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<sup>19</sup> Conference of the Parties, UNFCCC, *Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001*, UN Doc FCCC/CP/2001/13/Add.1 (21 January 2002) annex para 1(a).

<sup>20</sup> Nophea Sasaki and Francis E Putz, ‘Critical Need for New Definitions of “Forest” and “Forest Degradation” in Global Climate Change Agreements’ (2009) 2 *Conservation Letters* 226.

<sup>21</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 68.

<sup>22</sup> The shift from the historical focus of international law on matters impacting interstate relations towards matters with greater domestic implications can be seen in biodiversity treaties. Earlier treaties dealing with interstate matters include the *Ramsar Convention* (1971), concerning areas of international importance including for migratory birds, the *World Heritage Convention* (1972), addressing internationally important sites, and *CITES* (1973), concerning international trade in endangered species. In contrast, the *Biodiversity Convention* (1993) requires member states to preserve biodiversity within their state, an obligation with no international component: see, eg, art 6, requiring member states to ‘[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity’.

<sup>23</sup> For example, the clean development mechanism, joint implementation, and emissions trading were established under the *Kyoto Protocol* to enable countries to comply with their emissions reduction targets. Under art 7, countries are required to submit annual greenhouse gas inventories to demonstrate compliance with the *Kyoto Protocol*.

<sup>24</sup> Birnie, Boyle and Redgwell, above n 11, 9.

content of issues and topics addressed by environmental law.<sup>25</sup> The increased number, scope and reach of environment laws mean that more people in the world are affected by environmental laws. Virtually all people, natural or corporate, urban or rural, landed or not, rich or poor, are regulated to some degree by environmental laws.

The increase in environmental laws generates demand for new and expanded environmental and resource management agencies to administer and enforce the environmental laws.<sup>26</sup> Enforcement of environmental law, including by environmental litigation, generates a demand for courts and tribunals with specialist environmental expertise and jurisdiction. The decisions of these environmental courts and tribunals in turn develop environmental jurisprudence.<sup>27</sup>

There is more replication of environmental laws across the countries of the world as countries look externally for guidance. Different countries each look to international and other national environmental laws to guide drafting of their own national environmental laws and adopt the principles and approaches outlined in international law.<sup>28</sup> Countries also share information and expertise, and assist each other in drafting effective national environmental laws. Reference to, and adoption of, international and other national environmental laws has led to increasing similarity in the approaches taken by national governments in the development of national environmental laws and policies

### **C. Global institutions**

The globalisation of environmental law has also been enhanced by the expanding role of non-state actors.<sup>29</sup> There has been a growth in international institutions responsible for administering MEAs, including the United Nations specialised agencies and programs such as the United Nations Environment Programme ('UNEP'), the United Nations Development Programme ('UNDP') and the Food and Agriculture Organisation of the United Nations ('FAO'), which have played a leading role in setting lawmaking agendas, providing negotiating forums and expertise, as well as assisting countries in implementing international environmental law and in capacity building. Regional bodies, such as the United

<sup>25</sup> Justice Brian J Preston, 'Environmental Law 1927–2007: Retrospect and Prospect' (2007) 81 *Australian Law Journal* 616 surveys the growth in environmental law in Australia over the last 80 years.

<sup>26</sup> George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) 9–12, 91–3.

<sup>27</sup> For a description of the operation of the first specialist, superior environmental and planning court in the world, see Justice Brian J Preston, 'Operating an Environment Court: the Experience of the Land and Environment Court of New South Wales' (2008) 25 *Environmental and Planning Law Journal* 385, 386, 389, 407–8. See also Justice Brian J Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396.

<sup>28</sup> Ben Boer, 'The Rise of Environmental Law in the Asian Region' (1999) 32 *University of Richmond Law Review* 1503, 1509.

<sup>29</sup> Jeffrey L Dunoff, 'From Green to Global: Toward the Transformation of International Environmental Law' (1995) 19 *Harvard Environmental Law Review* 241, 243, 295–300.

Nations Economic Commission for Europe ('UNECE') and the European Union ('EU') have contributed significantly to the development and implementation of MEAs. Transnational corporations, industry associations and development banks, such as the World Bank and the Asian Development Bank, have helped drive the development of common standards and some nascent environmentally sound business practices throughout the developing world, particularly with respect to environmental impact assessment.<sup>30</sup>

Environmental issues have been addressed by a growing number of international courts and tribunals in the last 15 years.<sup>31</sup> As the topics addressed by international agreements grow or become more numerous and broaden, the obligations of countries under such agreements are defined with more specificity and the number of countries that are party to such agreements increases, the need for bodies competent in adjudicating international environmental disputes also grows.<sup>32</sup> Since the International Court of Justice was established in 1964, a number of other judicial and quasi-judicial institutions have been set up. These institutions include dispute settlement mechanisms established under *UNCLOS*<sup>33</sup> and the *Marrakesh Agreement*,<sup>34</sup> and various international human rights courts, such as the European Court of Human Rights, the American Court of Human Rights and the International Court for the Settlement of Investment Disputes, each with competence to deal with environmental matters.<sup>35</sup> These institutions provide an important source of international law, since they have developed a jurisprudence that is influential and, in certain circumstances, binding on states.<sup>36</sup>

### III. Harmonisation

Harmonisation does not involve the loss of individual identity of each legal regime. Harmony involves the pleasing and consistent arrangement of disparate parts. In music, for example, harmony involves the simultaneous combination of notes, such as a chord. The chord is a pleasing combination but it still comprises distinctive notes. The goal of harmonisation of international and domestic responses for environmental protection is to bring about a consistent, combined approach while recognising that the responses at international level and domestic level may be disparate.

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<sup>30</sup> Boer, above n 28, 116–17.

<sup>31</sup> Philippe Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (Paper presented at the OECD Global Forum on International Investment, Paris, 27–28 March 2008) 1, 5–6.

<sup>32</sup> Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 9, 27–56.

<sup>33</sup> Arts 186–191; see also annex 7.

<sup>34</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*').

<sup>35</sup> Sands, above n 31, 5.

<sup>36</sup> Gillian Triggs, 'International Law in Practice' in Justin T Gleeson and Ruth C A Higgins (eds), *Constituting Law: Legal Argument and Social Values* (Federation Press, 2011) 184, 190.

Harmony can be created by international law influencing domestic law, domestic law influencing international law, and the sharing and adoption of domestic laws between countries throughout the world.

## **A. Influence of international law on domestic law**

To be effective, there is a need for international law to be implemented domestically in each country throughout the world. One purpose, or at least effect, of some international agreements is to harmonise national laws, either globally or regionally.<sup>37</sup> This can be achieved when international law is implemented domestically by each of the ordinary three organs of a state: the executive, the legislature and the judiciary.

### **1. The response of the executive**

#### **(a) Entering international agreements**

The executive of a country's government may ensure harmony by sponsoring, negotiating, signing and ratifying international agreements that are relevant to environmental protection. Such executive action ensures that aspects of environmental protection are established as international rules or norms of conduct, and it also ensures a united, global response. *Agenda 21*, the plan for achieving sustainable development at local, national and global level adopted at UNCED, recognises the essential importance of the participation in, and contribution of, all countries to treaty making in relation to the environment:<sup>38</sup>

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

However, *Agenda 21* notes that many of the existing legal instruments and agreements have been developed without adequate participation and contribution, particularly of developing countries.<sup>39</sup> A case in point is *CITES*, an instrument to which, for a considerable time, only one-half of the nations of the world had become signatories.<sup>40</sup> This lack of unity within the international community contributed to enforcement problems with *CITES*, including the

<sup>37</sup> Birnie, Boyle and Redgwell, above n 11, 10.

<sup>38</sup> Report of the United Nations Conference on Environment and Development, *Agenda 21*, UN Doc A/CONF.151/26 (Vol 1) (12 August 1992) annex II ('*Agenda 21*') preamble para 1.1.

<sup>39</sup> *Agenda 21* para 39.1(c). See also paras 39.3(a), 39.3(c), 39.9. The reasons for developing country non-participation include earlier lack of provisions for financing and financial mechanisms and inadequate commitment to technology transfer to offset the economic restrictions otherwise involved; see Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (Clarendon Press, 1992) 6.

<sup>40</sup> In 1988, 15 years after *CITES* was concluded, there were only 95 state parties. In 2012 there were 176 state parties.



inability of customs officials to identify protected species, the unfamiliarity among parties of each other's customs laws and the lack of harmonisation of domestic wildlife legislation with that of the international community.<sup>41</sup>

The entry into international conventions by a country is also important domestically. As is explained below, provided the rules of international law do not conflict with pre-existing domestic laws, the entry into international treaties by a country can lay the foundation for other arms of government to incorporate rules of international law into the domestic law of that country. Incorporation may occur via express statutory adoption by the legislature, but can also occur by judicial decision-making.

**(b) Integration of international law into domestic decision-making**

The executive can ensure harmony by exercising its discretionary powers for government, including in its administrative decision-making, by having regard to, as a matter of policy, international rules and norms. *Agenda 21* emphasises the importance of the integration of environmental concerns and responsibilities into domestic decision-making.<sup>42</sup> The *Biodiversity Convention* requires relevant matters in relation to biological diversity to be integrated into domestic planning and decision-making.<sup>43</sup> To this end, Australia, for instance, has sought to integrate the principles established under the *Biodiversity Convention* into executive and administrative decision-making processes. The preparation of national strategies for the conservation of biological diversity and endangered species was a vital first step.<sup>44</sup> These strategies will need to be translated into policy guidelines to structure the exercise of discretionary power by executive and administrative decision-makers in relation to biological diversity and endangered species, populations and ecological communities.

An example of the integration of international norms and rules into domestic law can be seen by countries adopting national strategies for sustainable development. In partial fulfilment of its promise entered into upon signing the various instruments of UNCED,<sup>45</sup> Australia finalised the National

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<sup>41</sup> Anne Batchelor, 'The Preservation of Wildlife Habitat in Ecosystems: Towards a New Direction under International Law to Prevent Species' Extinction' (1988) 3 *Florida International Law Journal* 307, 331–2. For a more recent analysis of these enforcement problems, see Elisabeth M McOmber, 'Problems in Enforcement of the Convention on International Trade in Endangered Species' (2002) 27 *Brooklyn Journal of International Law* 673, 696–9.

<sup>42</sup> *Agenda 21* paras 8.15, 38.36, 38.38.

<sup>43</sup> See, eg, *Biodiversity Convention* arts 6(b), 10(a), 14(b).

<sup>44</sup> Examples include the Australian Endangered Species Advisory Committee, 'An Australian National Strategy for the Conservation of Australian Species and Communities Threatened with Extinction' (Australian National Parks and Wildlife Service, 1992); and Australian and New Zealand Environment and Conservation Council, 'National Strategy for the Conservation of Australia's Biological Diversity' (Department of the Environment, Sport and Territories, 1996) 4, 22–6, which was Australia's first biodiversity conservation strategy and provided a national approach to biodiversity conservation from 1996 to 2009; and the subsequent strategy, Natural Resource Management Ministerial Council 2010, 'Australia's Biodiversity Conservation Strategy 2010–2030' (Australian Government, Department of Sustainability, Environment, Water, Population and Communities, October 2010) 31, 68, 77–8.

<sup>45</sup> *Agenda 21* para 8.7.

Strategy for Ecologically Sustainable Development ('ESD'). The ESD strategy was launched in December 1992 and has been adopted by the Commonwealth and each of the states and territories in Australia.<sup>46</sup> The ESD strategy is a form of inter-governmental agreement that records the public policy commitment of each of the governments and its agencies to implement the measures agreed to in the strategy. It includes as appendices a summary of the intergovernmental agreement on the environment, the *Rio Declaration* and a guide to *Agenda 21*.<sup>47</sup> There has been an incorporation of these international and national soft law instruments as policies by the governments of the Commonwealth and the states and territories. This process of incorporation has been consolidated by soft law principles becoming statutory requirements in Australia, as discussed below in relation to the *Rio Declaration* and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Courts and tribunals which undertake merits review of administrative decisions of the executive in relation to the environment can also integrate international environmental law and principles in their merit decision-making. The principles of ESD, for instance, have been considered and applied in many decisions of the Land and Environment Court of New South Wales.<sup>48</sup>

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<sup>46</sup> Ecologically Sustainable Development Steering Committee, *National Strategy for Ecologically Sustainable Development* (December 1992) Department of Sustainability, Environment, Water, Population and Communities <<http://www.environment.gov.au/about/esd/publications/strategy/intro.html>>.

<sup>47</sup> Ibid apps A, B and C, referring to *Report of the United Nations Conference on Environment and Development*, UN Doc A/Conf.151/26 (Vol 1) (12 August 1992) annex I ('*Rio Declaration*') and *Agenda 21*.

<sup>48</sup> Justice Brian J Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 *Asia Pacific Journal of Environmental Law* 109. For case examples see *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, where Stein J found it unnecessary to decide whether the principles of ecologically sustainable development were incorporated into domestic law, instead finding that the principles applied as a matter of common sense: at 281, 282; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, where principles of ecologically sustainable development were considered: at 252–62; *Port Stephens Pearls Pty Limited v Minister for Infrastructure and Planning* [2005] NSWLEC 426 (15 August 2005), where the precautionary principle was discussed and consent for a pearl farm development was made conditional upon the establishment of a monitoring regime that would detect emerging adverse impacts and enable the appropriate authority to require them to be addressed if and when they emerged: at [54]–[58]; *Telstra Corporation Limited v Hornsby Shire Council* (2006) 146 LGERA 10 where the principles of ecologically sustainable development, particularly the precautionary principle, were discussed and explained in detail: at 35–51; *Hakim v Canada Bay Council* [2008] NSWLEC 118 (20 March 2008), where a proposed waste disposal facility was found to be inconsistent with the principles of ecologically sustainable development: at [1]–[3], [68]–[72]; *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48 (21 March 2010), where the precautionary principle was found to apply and to require a step-wise, adaptive management approach to the development of a limestone quarry with potential impacts on cave-dwelling fauna: at [177], [189]; *Ironstone Community Action Group v Minister for Planning* [2012] NSWLEC 195 (10 November 2011), where a precautionary approach consistent with the precautionary principle was adopted in imposing conditions to prevent and mitigate environmental harm by an open cut coal mine: at [6], [113], [145], [154].

**(c) Enforcement of international and domestic laws**

The executive of each country can also ensure the enforcement of rules of international law, both internationally and domestically. It has been observed time and again that without enforcement, rules of international law are ineffective. Environmental policies must be transformed into action.<sup>49</sup>

One of the principal reasons for the historical ineffectiveness of *CITES* was the lack of harmonisation of domestic laws with international law. Schonfeld notes that:

where some parties adopt laws sufficient to provide a deterrent effect and exhibit a willingness to enforce them, illegal trade is often shifted to countries where the laws and enforcement are not as strong. Since the problem of over-exploitative wildlife trade is a global one that requires an international effort, successful implementation of *CITES* and a reduction of the illegal market cannot be achieved unless domestic wildlife laws are harmonised.<sup>50</sup>

The effective enforcement of domestic environmental laws that incorporate and build upon international environmental law requires that there be adequate domestic institutions, such as competent environmental agencies to administer the laws, effective police and prosecutors to investigate and bring enforcement proceedings, mechanisms to enable citizens to bring enforcement proceedings if government is reluctant to enforce the law<sup>51</sup> and effective courts that have the capacity and authority to uphold and enforce environmental laws and remedy breaches of the laws.

**2. The response of the legislature**

The legislature of a country can promote harmony by ensuring that domestic law conforms to the state’s obligations under international law. Different obligations arise from different kinds of provisions of environmental agreements, and the individual legal systems of states also determine the manner in which international law can form part of the domestic legal system.

**(a) The monism/dualism distinction**

In a legal system where the dualist doctrine is followed, a domestic court can only use international law if there is some law (either statutory or common law)

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<sup>49</sup> See, eg, Kathryn S Fuller, Ginette Hamley and Sarah Fitzgerald, ‘Wildlife Trade Law Implementation in Developing Countries: The Experience in Latin America’ (1987) 5 *Boston University International Law Journal* 289, 309; John B Heppes and Eric J McFadden, ‘The Convention on International Trade in Endangered Species of Wild Fauna and Flora: Improving the Prospects for Preserving our Biological Heritage’ (1987) 5 *Boston University International Law Journal* 229, 237–41.

<sup>50</sup> Alan H Schonfeld, ‘International Trade in Wildlife: How Effective is the Endangered Species Treaty?’ (1985) 15 *California Western International Law Journal* 111, 156.

<sup>51</sup> The European Union *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) (*‘Aarhus Convention’*) sets out rules to improve enforcement of environmental law, including by enhancing the public’s access to justice.

by which international law is admitted into the domestic law. The dualist doctrine sees the two systems of international law and domestic law as different, unconnected systems with different domains of action and regulation. International law is a law between sovereign countries. Domestic law applies within a country and regulates the relations of its citizens with each other and with the executive of that country. According to dualist doctrine, neither order has the power to create or alter the rules of the other.<sup>52</sup>

Under a legal system adhering to the monist doctrine, there is no rigid separation between domestic and international law. International law is considered to have primacy in both the national and global spheres. This position flows from the assumption that the nation state's sovereignty over its own territory and citizens derives its meaning from the international community's recognition of its national boundaries and competence. This national sovereignty would not exist without the recognition of international law. The derivative character of the domestic legal system thus ensures its subordination to the normative superiority of international law.<sup>53</sup>

The key distinction between monism and dualism lies in the identification of primacy in the event of conflict between a rule of international law and domestic law. Monism requires international law to prevail, whereas dualism requires domestic law to prevail.<sup>54</sup>

The dualist doctrine has traditionally been applied in countries such as Australia. However, even within dualism, there is a difference of opinion as to the nature of the act of incorporation that is required; whether it must always be a legislative act or whether it could also be a judicial act. The choice depends upon whether a transformation approach or an incorporation or adoption approach is embraced. Since transformation is a legislative means of introducing international law into the domestic legal system, it is addressed in this section. Incorporation, a judicial method of giving force to international law, is addressed in the response of the judiciary section below.

### **(b) The transformation approach**

The transformation approach rejects any role for the rules of international law unless the rule has been expressly incorporated by statute into domestic law. The transformation approach is most often applied by courts in determining the status, at domestic level, of conventional international law (that is, sourced from treaties). Some courts have held that a treaty or convention will never have legal significance in domestic courts, especially if it affects private rights, until statutorily promulgated.<sup>55</sup>

<sup>52</sup> Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 32.

<sup>53</sup> *Ibid* 32–3; see also Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, 1991) 172.

<sup>54</sup> G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint from the Rule of Law' (1957–II) 92 *Hague Recueil* 5, 70–85; McHugh, above n 53, 172.

<sup>55</sup> *The Parlement Belge* (1879) 4 Pd 129, 149–50; *Re Californian Fig Syrup Company's Trademark* (1888) 40 Ch D 620, 627; *Attorney-General (Canada) v Attorney-General (Ontario)*

The transformation approach does not operate in countries that have a provision equivalent to art 6(2) of the *United States Constitution*, which states that treaties made under the authority of the United States ‘shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution of laws of any State to the contrary notwithstanding.’ The President of the United States, with the advice and consent of the Senate, is empowered to enter into treaties, provided that two-thirds of the Senate concurs.<sup>56</sup> Providing the treaty is self-executing, it automatically becomes part of the United States domestic law upon entry into the treaty by the person on behalf of the United States.<sup>57</sup> A self-executing treaty is one that is clearly, by its wording, able to be implemented without legislation.<sup>58</sup>

Certain international environmental laws expressly require countries to adopt international rules and norms into domestic law. Article 14 of the *Biodiversity Convention*, for instance, obliges states to ‘[i]ntroduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects’.<sup>59</sup>

Even so-called ‘soft law’ instruments sometimes purport to require the transformation of domestic law to account for international environmental law principles. For example, Principle 11 of the *Rio Declaration* provides that ‘states shall enact effective environmental legislation’. *Agenda 21* emphasises the need to provide an effective legal and regulatory framework:

- 8.13 Laws and regulations suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action, not only through ‘command and control’ methods, but also a normative framework for economic planning and market instruments ...
- 8.14 To effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound, social, ecological, economic and scientific principles. It is equally critical to develop workable programs to review and enforce compliance with the laws, regulations and standards that are adopted.

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[1937] AC 326, 347–8; *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1939] NZLR 107, 120; [1941] AC 308, 324, 325–7; *Simsek v MacPhee* (1982) 148 CLR 636, 641–2; *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 655, 691; *J H Rayner Ltd v Department of Trades* [1990] 2 AC 418, 432; (1989) 3 WLR 969, 980.

<sup>56</sup> Article 2(2) of the *Constitution of the United States*.

<sup>57</sup> *Foster and Elan v Neilson* (1829) 27 US (2 Pet) 253, 314; *Asakura v Seattle* (1924) 265 US 332, 341; *Sei Fujii v State of California* (1952) 242 P 2 D 617, 619–21.

<sup>58</sup> Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (Oxford University Press, 2005) 418.

<sup>59</sup> See also *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 2256 UNTS 119 (entered into force 17 May 2004) art 3; *Aarhus Convention* art 3(1); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 57 (entered into force 5 May 1992) art 4(4).

- 8.15 The enactment and enforcement of laws and regulations (at the regional, national, state/provincial or local/municipal level) are also essential for the implementation of most international agreements in the field of environment and development, as illustrated by the frequent treaty obligation to report on legislative measures.
- ...
- 8.18 Governments and legislators, with the support, where appropriate, of competent international organisations, should establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organisations with a recognised legal interest.

Domestic legislative action will always be necessary where the conventional international law requires parties to perform a particular act within their domestic jurisdiction in order to implement the convention. Most international conventions on the environment are of this type. They contain obligations of result and leave it to the parties to decide on appropriate legislative and executive action necessary to implement convention requirements. The consequence is that express statutory adoption is required by the domestic legislature of each country that is a party to the convention.

The response of Australia to obligations of result in international treaties to which it is a party has been to statutorily adopt the principles in these conventions when it enacted, most recently, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'). Treaties given domestic legal force under this Act include the *World Heritage Convention*, which requires member states to identify and delineate cultural and natural heritage within their territory and protect, conserve, present and transmit this heritage to future generations by adopting 'a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes';<sup>60</sup> the *Ramsar Convention*, requiring parties to designate suitable areas for inclusion on a list of wetlands of international importance, 'formulate and implement their planning so as to promote the conservation of the wetlands included in the List' and 'promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not';<sup>61</sup> *CITES*, requiring parties to 'take appropriate measures to enforce the provisions of the Convention including by penalising trade in the species listed thereunder';<sup>62</sup> the *Biodiversity Convention*, requiring contracting parties to '[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity';<sup>63</sup> as well as the bilateral migratory bird treaties between

<sup>60</sup> Arts 3, 4, 5; EPBC Act pt 3 div 1 sub-div A, pt 15 div 1.

<sup>61</sup> Arts 2, 3, 4; EPBC Act pt 3 div 1 sub-div B, pt 15 div 2.

<sup>62</sup> Art 8(1); EPBC Act pt 13A.

<sup>63</sup> Art 6(a); EPBC Act pt 3 div 1 sub-divs AA, C, pt 13.

Australia and Japan, China and Korea, requiring each government to take protective measures in respect of the birds listed thereunder.<sup>64</sup> Exceptionally, the terms of a statute may provide that domestic law applies subject to international law. For example, the *Great Barrier Reef Marine Park Act 1975* (Cth) provides that the Act, ‘has effect subject to the obligations of Australia under international law, including obligations under any agreement between Australia and another country or countries’.<sup>65</sup>

### 3. The response of the judiciary

#### (a) Incorporation approach

The incorporation or adoption approach is a means of implementing international law that is available to the judiciary. It is a less extreme form of dualism. According to this approach, the rules of international law may become part of domestic law, without any requirement of statutory admission, provided they are not in conflict with any domestic statute or the rule of law.<sup>66</sup> The way in which such rules become part of domestic law is by domestic courts embracing rules of international law as part of the domestic common law. The domestic courts look to the rules of international law as a source of guidance for the statement and development of the domestic common law.<sup>67</sup> Through these mechanisms, international law becomes binding on the domestic courts of a country in the sense and to the extent that it has been received and enforced by domestic courts.<sup>68</sup>

The incorporation approach is said to be particularly applicable to rules of customary international law. In the past, courts gave common law status to a rule of international law that attained the status of generally being accepted by countries as a rule of international conduct, provided that there was no prior, incompatible statute or judicial rule. Before such rules will be recognised domestically, the rule must have obtained the position of general acceptance by

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<sup>64</sup> *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment*, opened for signature 6 February 1974, 1981 ATS 6 (entered into force 30 April 1981) art III; *Agreement between the Government of Australia and the Government of the People’s Republic of China for the Protection of Migratory Birds and their Environment*, opened for signature 20 October 1986, 1988 ATS 22 (1 September 1988) art IV; *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds*, opened for signature 6 December 2006, 2007 ATS 24 (13 July 2007) art 5; see also the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 3 div 1 sub-div D, pt 13 div 2.

<sup>65</sup> *Great Barrier Reef Marine Park Act 1975* (Cth) s 65.

<sup>66</sup> *Chung Chi Cheung v The King* [1939] AC 160, 167–8; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 553; M Akehurst, *A Modern Introduction to International Law* (George Allen and Unwin, 5<sup>th</sup> ed, 1984) 46.

<sup>67</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, 189–90 (Merkel J).

<sup>68</sup> *Compania Naviera Vascongado v SS Christina* [1938] AC 485, 497, 502; *Chung Chi Cheung v The King* [1939] AC 160, 167–8; *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271, 295; *Polites v The Commonwealth* (1945) 70 CLR 60, 80–1; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 554, 577, 579; *Jago v Judges of the District Court of NSW* (1988) 12 NSWLR 558, 569, 582.

nations as a rule of international conduct.<sup>69</sup> This means there must be, first, a generality of practice, which need not be universal but should not be opposed by a vast majority of states on grounds of principle<sup>70</sup> and, secondly, *opinio juris*, which is ‘a general practice accepted as law’.<sup>71</sup> This involves a psychological element which is a sense of legal obligation, as opposed to mere usage of a particular practice out of courtesy, morality or fairness.<sup>72</sup>

Some academic commentators have suggested that a number of principles of international environmental law may have attained the position of general acceptance by nations as a rule of international conduct — that is, they now are rules of customary international law.<sup>73</sup> One example is that nation states have a responsibility to ensure that activities within their jurisdictional control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.<sup>74</sup> It has also been suggested that certain principles of ecologically sustainable development may have acquired the status of rules of customary international law.<sup>75</sup>

If such principles of international environmental law have become rules of customary international law, domestic courts can embrace these principles as part of the domestic common law under an incorporation approach. In this way, these rules become binding on the domestic courts and become part of domestic law.

Some legal systems require that customary international law be incorporated into national law through legislation or executive order.<sup>76</sup> Other legal systems view customary international law as automatically part of the legal order and enforceable by judges without legislative action. The Constitutions of Italy, Germany and the Netherlands, for instance, all contain provisions

<sup>69</sup> *R v Keyn* (1876) 2 Ex D 63, 202–3; *Commercial and Estates Co of Egypt v Board of Trade* (1925) 1 KB 271, 283; *Compania Naviera Vascongado v SS Christina* [1938] AC 485, 497; *Chung Chi Cheung v The King* [1939] AC 160, 168; *Valetis v The Commonwealth* (1945) 70 CLR 60, 80–1; *Naim Molvin, Owner of MV ‘Asya’ v The Attorney General for Palestine* [1948] AC 351, 369; *Trendex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 553–4, 567–9; Brownlie, above n 52, 6–12; Steven M Schneebaum, ‘The Enforceability of Customary Norms of Public International Law’ (1982) 8 *Brooklyn Journal of International Law* 289, 301.

<sup>70</sup> Brownlie, above n 52, 8.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Birnie, Boyle and Redgwell, above n 11, 109, 137, 143, 160, 339–40, 401, 486, 491, 493; Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2003) 254.

<sup>74</sup> See Principle 21 of the *Declaration of the United Nations Conference on the Human Environment* (Stockholm, 16 June 1972) (‘*Stockholm Declaration*’) and Principle 2 of the *Rio Declaration*, which reflect the principle upheld in the *Trail Smelter Arbitration (United States v Canada) (Award)* [1941] RIAA 1905, 1965 and the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, 242.

<sup>75</sup> Sands, above n 73, 254; Separate Opinion of Vice President Weeramantry in *Gabcikovo-Nagymaros (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 104.

<sup>76</sup> This was the approach of German national courts prior to 1949: I A Shearer, ‘The Relationship Between International Law and Domestic Law’ in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 38.



expressly stipulating that rules of customary international law are part of the municipal law of the state and enjoy precedence over domestic legislation.<sup>77</sup> Article 25 of the *German Constitution* states that, '[t]he general rules of public international law form part of federal law. They take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory'.<sup>78</sup>

Indeed, it is sometimes said that the incorporation approach should be restricted in its application only to customary international law and that the transformation approach applies to conventional international law. McHugh casts doubt on this conclusion, instead suggesting that conventional as well as customary international law may be incorporated into domestic law. International law 'provides a body of legal principles available for the judicial formulation of the common law rule'.<sup>79</sup> The caveat applied by McHugh, as well as others, is that a court will not incorporate a rule of conventional or customary international law that is inconsistent with an existing rule of domestic, statutory or common law.<sup>80</sup>

In Australia, it is clear that treaties are not directly incorporated into Australian law and that, instead, some form of transformation of the international law is required.<sup>81</sup> There was debate about whether this position was altered through the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*.<sup>82</sup> In this case, provisions of a treaty were found to give rise to a legitimate expectation at common law that the treaty obligations would be taken into account by government decision-makers. The High Court found that an unincorporated convention to which Australia was a party, the *Convention on the Rights of the Child*,<sup>83</sup> could not be relied on as a limitation on the exercise of an administrative discretion.<sup>84</sup> The High Court stated that 'a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law'.<sup>85</sup> However, the High Court held that ratification of the *Convention on the Rights of the Child* raised a legitimate expectation that the decision-maker would take account of that Convention.<sup>86</sup>

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<sup>77</sup> Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) 65.

<sup>78</sup> *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany].

<sup>79</sup> McHugh, above n 53, 175.

<sup>80</sup> *Ibid.* See also *Attorney-General (Canada) v Attorney-General (Ontario)* [1937] AC 326, 347–8; Brownlie, above n 52, 41; F A Mann, 'The Enforcement of Treaties by English Courts' (1958) 44 *Transactions of the Grotius Society* 29, 31–2.

<sup>81</sup> *Chow Hung Ching v The King* (1949) 77 CLR 449.

<sup>82</sup> (1995) 183 CLR 273 ('*Teoh*').

<sup>83</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>84</sup> Shearer, above n 76, 57.

<sup>85</sup> *Teoh* (1995) 183 CLR 273, 287.

<sup>86</sup> *Ibid.* Following the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, where four of the judges criticised the decision in *Teoh* (1995) 183 CLR 273, it is not clear whether the provisions of an unincorporated treaty can be relied on as a limitation on the exercise of an administrative discretion.

**(b) Statutory interpretation to promote consistency and harmony**

There is also considerable scope for the judiciary to construe domestic statutory law so as to adopt an interpretation that is consistent with international law. Ratification of a treaty alone will not make the treaty part of domestic law;<sup>87</sup> however, it may still affect domestic law. Several guiding principles are used by the courts in determining the application and influence of international law on domestic legislation and the *Australian Constitution*.

First, where legislation is intended to give effect to international agreements, weight is to be given to the construction that the international community would attribute to the relevant instrument or concept. This means that, as far as possible, expressions used in international agreements should be construed in a uniform and consistent manner by domestic and international courts.<sup>88</sup>

Second, where legislative provisions adopt the words of a treaty, subject to any contrary intention of the legislature, those provisions should be interpreted using the interpretive principles that are applied to the treaty.<sup>89</sup> The interpretive principles are contained in arts 31 and 32 of the *Vienna Convention*. Article 31(1) states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 provides for recourse to be had to supplementary materials in cases of ambiguity and where a particular meaning would lead to an absurd or unreasonable result. In *Applicant A v Minister for Immigration and Ethnic Affairs*,<sup>90</sup> McHugh J and Brennan CJ held that the courts should interpret art 31 in a holistic manner with the text of the treaty being given primacy, but also looking to the context, object and purpose of the provision. Brennan CJ added that ‘it is erroneous to adopt a rigid priority in the application of interpretive rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach’.<sup>91</sup>

<sup>87</sup> D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7<sup>th</sup> ed, 2011) 43; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 303; *Teoh* (1995) 183 CLR 273, 286–7.

<sup>88</sup> *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406, 421.

<sup>89</sup> *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, 159; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265; *Gerhardy v Brown* (1985) 159 CLR 70, 124; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305; *Todhunter v United States of America* (1995) 57 FCR 70, 76–7; *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640, 675–6; *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110, 112–13; *Morrison v Peacock* (2002) 210 CLR 274; *Minister for Immigration and Multicultural Affairs v WABQ* (2002) 121 FCR 251, 256; *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, 326–8; *Gulf Air Company GSC v Fattouh* (2008) 251 ALR 183, 190–1. Some legislation provides that a particular word, phrase or provision has the same meaning as it has in an international convention or a treaty: see, eg, *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

<sup>90</sup> (1997) 190 CLR 225.

<sup>91</sup> *Ibid* 231.

The principles of interpretation in the *Vienna Convention* have been considered by Australian domestic courts in determining environmental disputes. In *Commonwealth v Tasmania (Tasmanian Dam Case)* several members of the High Court found that the provisions of the *Vienna Convention* reflect existing practice and so were referred to in the interpretation of the *World Heritage Convention* even though that Convention had not entered into force prior to the *Vienna Convention*.<sup>92</sup> In *Greentree v Minister for the Environment and Heritage*,<sup>93</sup> the appellants argued that the *Ramsar Convention* required a precise description of boundaries of a wetland under the EPBC Act. As provided by art 31 of the *Vienna Convention*, the Federal Court took into account subsequent practices and agreements of contracting parties as parts of the context of the *Ramsar Convention*. This material showed that there were no requirements for a precise description of the boundaries of a wetland, or for its mapping, for there to be a valid designation.<sup>94</sup>

Third, it is a generally accepted, common law principle of interpretation that domestic legislation is presumed to be and is to be construed by domestic courts to be consistent with international law.<sup>95</sup> Similarly, the High Court is willing to look to international materials to inform, confirm and strengthen its interpretation of the *Australian Constitution*.<sup>96</sup> Ratification of a treaty will make the treaty relevant to interpretation, even though it may not have been given effect by legislation.<sup>97</sup> This is particularly important where there is ambiguity in a statute purporting to give effect to an international agreement. In this scenario the court will adopt the interpretation that best facilitates the operation of the agreement.<sup>98</sup> This rule of statutory interpretation means that where a statute is clearly inconsistent with a rule or rules of international law, the courts must give effect to the statute regardless.<sup>99</sup> However, courts will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms

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<sup>92</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 (per Gibbs CJ, 93; Brennan J, 222). In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, Kirby J noted that art 32 of the *Vienna Convention* was similar to s 15AB of the *Acts Interpretation Act 1901* (Cth).

<sup>93</sup> (2005) 144 FCR 388.

<sup>94</sup> (2005) 223 ALR 679, 687, 688. See also *Booth v Bosworth* (2001) 114 FCR 39, 53–6; *Morrison v Peacock* (2002) 192 ALR 173, 176–9.

<sup>95</sup> *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363; *Polites v The Commonwealth* (1945) 70 CLR 60, 68, 69, 74, 79, 81; *R v Secretary of State for the Home Department; Ex parte Phansopkar* (1976) QB 606, 626; *R v Secretary of State for the Home Department; Ex parte Bhajan Singh* [1976] QB 198, 207; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 204; *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 6, 41–56; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, 384; *Zhang v Zemin* (2010) 79 NSWLR 513, 535; Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 515; Brownlie, above n 52, 40.

<sup>96</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162; Triggs, above n 36, 198.

<sup>97</sup> *Teoh* (1995) 183 CLR 273, 287.

<sup>98</sup> *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2012) 291 ALR 314, 345.

<sup>99</sup> *Polites v Commonwealth* (1945) 70 CLR 60.

unless such an intention is clearly manifested by unmistakable and unambiguous language.<sup>100</sup>

There is also legislative provision for courts to take into account international agreements in interpreting domestic law in Australia. Section 15AB of the *Acts Interpretation Act 1901* (Cth) permits courts interpreting a provision of a Commonwealth Act to take into account any international agreement referred to in the Act, in order to confirm the meaning of the provision or to determine the meaning of the provision where it is ambiguous or obscure, or where the ordinary meaning leads to a result that is manifestly absurd or unreasonable. The agreement can be referred to even where no reference is made to the agreement in the statute and even when the statute was enacted before ratification of the agreement.<sup>101</sup>

Therefore, within the permissible parameters of statutory construction, the judiciary has the capacity to avoid conflict between international law and domestic law. Judges have available techniques to enable them to reconcile, rather than accentuate, any divergence. In so doing, they can avoid the problem, central to the dualist doctrine, that rules of international law will not be incorporated into domestic law if they are in conflict with prior domestic laws. Thus, international law may be an indirect source of domestic law, primarily through the use of international law by the courts to interpret statutes, to develop the common law, and in the area of administrative law.<sup>102</sup>

### (c) Source of guidance in the development of common law

Courts in Australia have increasingly referred to international law in the development of the common law, particularly where the common law is uncertain or ambiguous.<sup>103</sup> In *Mabo v Queensland (No 2)*,<sup>104</sup> Brennan J (Mason CJ and McHugh J concurring) said, with reference to the *International Covenant on Civil and Political Rights*,<sup>105</sup> that '[t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law'.<sup>106</sup> Most notably, in *Minister for Immigration and Ethnic Affairs v Teoh*, the joint judgment of Mason CJ and Deane J (with whom Gaudron J relevantly agreed) declared that the provisions of a ratified, but non-implemented, treaty could be used as a 'legitimate guide in developing the common law'.<sup>107</sup>

<sup>100</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492.

<sup>101</sup> Pearce and Geddes, above n 87, 87 citing *Barry R Liggins Pty Ltd v Comptroller General of Customs* (1991) 32 FCR 112. Similarly, at common law, reference may be made to international agreements even when the agreement is not referred to in the Act and the Act was enacted before ratification of the agreement: Pearce and Geddes, above n 87, 87.

<sup>102</sup> Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 210; Triggs, above n 36, 195.

<sup>103</sup> Mason, above n 102, 222.

<sup>104</sup> (1995) 183 CLR 273.

<sup>105</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>106</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42.

<sup>107</sup> *Teoh* (1995) 183 CLR 273, 288.

Whether a particular treaty provision or rule of customary international law can be used by the courts to develop the common law will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose it is intended to serve and its relationship to existing principles of domestic law.<sup>108</sup>

**(d) Implementing, developing and enforcing domestic environmental law**

Domestic courts can implement and enforce domestic environmental law that incorporates international environmental law. Domestic courts can also flesh out and build upon international legal principles to make them work at a national level.<sup>109</sup>

This can be seen in the enforcement and elaboration by domestic courts of the precautionary principle, one of the principles of ESD. The precautionary principle is included in a number of international agreements and domestic statutes,<sup>110</sup> but case law has been critical in giving it force and explaining its practical environmental consequences. In the case of *Telstra v Hornsby Shire Council*,<sup>111</sup> the applicant had appealed to the Land and Environment Court of New South Wales seeking approval for development of a mobile phone base station. The objectors to the development argued that a precautionary approach was needed due to alleged adverse health and safety impacts caused by the emission of radiofrequency electromagnetic energy from the base station. The Court recognised that the precautionary principle is included in numerous domestic statutes and policy documents and had been considered in previous Land and Environment Court decisions, but that further exploration of its meaning and application was needed. The Court drew on decisions of other jurisdictions and academic literature to explain how the principle would operate in practice.<sup>112</sup>

The precautionary principle continues to be developed through judicial decisions in domestic courts. It has been applied and considered in numerous decisions involving potential threats to endangered species. In *Environment East Gippsland Inc v VicForest*,<sup>113</sup> the Victorian Supreme Court referred to the decision in *Telstra* and found that the requirements of the Victorian Code of Practice for Timber Production meant that timber harvesters must comply with

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<sup>108</sup> Ibid.

<sup>109</sup> Joel B Eisen, 'From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law' (1999) 32 *University of Richmond Law Review* 1435, 1459.

<sup>110</sup> See, eg, *Montreal Protocol on Substances that Deplete the Ozone Layer* ('*Montreal Protocol*'), opened for signature 16 September 1987, 1522 UNTS 29 (entered into force 1 January 1989) preamble; Report of the United Nations Conference on Environment and Development, UN Doc A/Conf 151/26 (Vol 1) (12 August 1992) ('*Rio Declaration*') Principle 15; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391; *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(a).

<sup>111</sup> (2006) 146 LGERA 10 ('*Telstra*').

<sup>112</sup> *Telstra* (2006) 146 LGERA 10, 38–51.

<sup>113</sup> (2010) 30 VR 1.

the precautionary principle during harvesting, having regard to results of ongoing monitoring and research conducted during operations.<sup>114</sup> In another Victorian case, *My Environment Inc v VicForests*,<sup>115</sup> which involved potential impacts of clearing on an endangered species, the application of the precautionary principle was further discussed.<sup>116</sup> The obligation to comply with the precautionary principle was stated to be coupled with a requirement to consider the advice of relevant experts and relevant research in conservation, biology and flora and fauna management at all stages of planning and operations.<sup>117</sup> Through such judicial decisions, the precautionary principle in Australia has been developed from its abstract legal and policy formulations to a rule applied with practical environmental protection consequences.

## **B. Influence of domestic law on international law**

Domestic law and policy can also have an influence on international law. It does this in at least five different ways.

First, at any meeting of the international community, representatives of nation states bring their domestic perspectives to bear in discussing international issues and events. For example, at Conferences of the Parties to the UNFCCC, countries all have their own domestic agendas that influence the stance they take at the climate change meetings. Parties organise themselves into alliances or negotiating blocs based on common domestic agendas and interests, or cultural, economic or geographical affinities.<sup>118</sup> Negotiating coalitions include The Group of 77 and China, the African Group, the Alliance of Small Island Developing States ('AOSIS'), the Least Developed Countries ('LDCs'), the Organisation of Petroleum Exporting Countries ('OPEC'), the EU, the Umbrella Group (consisting of Australia, Canada, Iceland, Japan, New Zealand, Norway and the Russian Federation) and the BASIC countries (Brazil, South Africa, India and China).<sup>119</sup>

The influence of domestic policy and law on the development of international law was obvious at the Copenhagen Climate Change Conference in 2009, when groups of countries had opposing negotiating positions regarding what to do after the first commitment of the *Kyoto Protocol* expired in 2012. The EU, which by that time already had an established emissions trading scheme and had pledged to reduce its emissions by at least 20 per cent below 1990 levels by 2020, pushed for strong emission reduction targets, implemented primarily through domestic measures, while the United States and the Umbrella Group wanted only modest emission reduction targets and unrestricted use of market-

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<sup>114</sup> At 7, 45.

<sup>115</sup> [2012] VSC 91 (14 March 2012).

<sup>116</sup> *Ibid* [260]–[335], [340].

<sup>117</sup> *Ibid* [90].

<sup>118</sup> Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004) 33.

<sup>119</sup> *Ibid* 33–48.

based mechanisms, including emissions trading.<sup>120</sup> The EU's position had been influenced largely by its experience with regional and domestic emissions trading and use of the *Kyoto Protocol's* market-based, flexible mechanisms, including the Clean Development Mechanism.

The countries with emission targets under the *Kyoto Protocol* (including the Umbrella Group, but excluding the EU) were generally unwilling to accept a new round of emissions targets under a new treaty unless the other major emitters (namely the BASIC countries and the United States) accepted legal commitments as well. The BASIC countries (primarily China and India) opposed the adoption of a new protocol addressing their own emissions. In contrast, other developing countries, including AOSIS and the LDCs, were in support of a new treaty that would be more comprehensive in coverage by including the United States and the BASIC countries.<sup>121</sup>

Nevertheless, the Copenhagen Accord reflected a slight shift in the negotiating position of the BASIC countries in line with their emerging domestic policies on climate change. For the first time, the major developing countries agreed to reflect their national emission reduction targets in an international instrument and to report on their greenhouse gas inventories to the UNFCCC.<sup>122</sup> Inevitably, therefore, at Copenhagen, domestic issues influenced the outcomes of international law.

Second, concepts and principles from domestic law are used by countries' representatives in negotiating international law. An example is the precautionary principle. The precautionary principle (*Vorsorgeprinzip*) had its origins in German law.<sup>123</sup> The precautionary principle in particular is considered the most important principle of German environmental policy and was widely used to justify Germany's response to acid rain in the 1980s.<sup>124</sup> The precautionary principle in German law includes the following concepts: research is essential for early detection of environmental danger; when there is a threat of irreversible damage, action should be taken before there is full understanding of the nature, extent and causes of the likely damage and proof of damage is not required for action to be taken; technological development should be made to reduce the discharge of pollutants; and the state must contribute to the introduction of cleaner technologies and processes into the private sector.<sup>125</sup>

The precautionary principle was first formally acknowledged internationally in the preamble to the 1985 *Vienna Convention for the Protection*

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<sup>120</sup> Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104 *American Journal of International Law* 230, 232.

<sup>121</sup> *Ibid* 233.

<sup>122</sup> *Ibid* 240.

<sup>123</sup> Sonja Boehmer-Christiansen, 'The Precautionary Principle in Germany: Enabling Government' in Timothy O'Riordan and James Cameron (eds), *Interpreting the Precautionary Principle* (Earthscan, 1994) 31, 33.

<sup>124</sup> *Ibid* 39.

<sup>125</sup> *Ibid* 37.

of the Ozone Layer,<sup>126</sup> in which the parties acknowledged the ‘precautionary measures’ that had already been undertaken at both the national and international levels in relation to the protection of the ozone layer. Building on this recognition, in 1987, the parties to the *Montreal Protocol on Substances that Deplete the Ozone Layer*<sup>127</sup> agreed to take ‘precautionary measures’ to control global emissions of their own depleting substances and noted the ‘precautionary measures’ already undertaken at national and regional levels in relation to the emission of chlorofluorocarbons.<sup>128</sup>

The need for a ‘precautionary approach’ was also recognised in the sequence of conferences on the North Sea, to which Germany was a party.<sup>129</sup> The precautionary principle was referred to in the second North Sea conference Ministerial Declaration (the London Declaration) in 1987<sup>130</sup> and in the Third North Sea Conference of Ministerial Declaration in 1990.<sup>131</sup> This process led to the inclusion of the precautionary principle in the 1992 *Convention on the Protection of the Marine Environment of the North-East Atlantic*.<sup>132</sup>

The precautionary principle was included in Principle 15 of the *Rio Declaration*, which stated that ‘[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities’.

Third, the experience of countries in implementing international environmental law at a domestic level informs the development of later international law. This can occur in the negotiation and agreement of subsequent international conventions that build upon and learn from the experience of parties in implementing previous international agreements. Thus, for example, the *Biodiversity Convention* is a more sophisticated MEA, including many more institutions and mechanisms for implementation and financing, than earlier conventions on wildlife.

Fourth, when participating in meetings of the conference of the parties under MEAs, countries can use their experience in the implementation of environmental laws at domestic level to formulate resolutions of the conference of the parties and the plans and programs under the MEAs. Representatives of the parties, particularly those with expertise, can participate in working groups, standing committees and other institutional organisations established under MEAs. They beneficially bring to bear their knowledge and expertise acquired at the domestic level.

<sup>126</sup> Opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988).

<sup>127</sup> Opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989).

<sup>128</sup> *Ibid* paras 6, 8.

<sup>129</sup> Sands, above n 73, 269; N de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules* (Oxford University Press, 2002) 94.

<sup>130</sup> *Second North Sea Conference Ministerial Declaration 1987* (1988) 27 ILM 835 arts VII, 15(i), 16(i).

<sup>131</sup> *Third North Sea Conference Ministerial Declaration* (1990) I *Yearbook of International Environmental Law* 658, 662–73.

<sup>132</sup> Opened for signature 22 September 1992, 32 ILM 1869 (entered into force 25 March 1998) art 2(ii)(a).



Finally, domestic environmental law can influence the decisions of international courts and tribunals. As Triggs notes, in the early 20<sup>th</sup> century, the International Court of Justice and other international adjudicative bodies invoked principles common to most legal systems to fill voids in international law.<sup>133</sup> An example is the *Trail Smelter Arbitration*,<sup>134</sup> where, in the absence of any international law on trans-boundary pollution, the common law of nuisance was referred to in the tribunal's finding that no state has the right to use or permit the use of its territory so as to cause injury to another state.

### **C. Influence between domestic law and nation states**

Harmonisation can also occur through cross-fertilisation of laws, policies and practices between countries. This can occur between legislatures, executives and judiciaries of countries.

Drafters of environmental legislation directly borrow concepts, approaches and language from countries where environmental laws and policies are already well developed.<sup>135</sup> This occurs particularly for international consultants (often lawyers), funded by organisations such as UNEP, UNDP, the World Bank, the IUCN or other aid organisations, hired to assist in legislative drafting for institutional capacity building.<sup>136</sup> The development of environmental law in the Asia-Pacific region in particular has been promoted considerably by the involvement of a number of international regional organisations that have assisted in the development of international environmental laws and policies for governments, as well as the review and reform of legislation.<sup>137</sup> The *Nepalese Environment Protection Act* of 1996, for example, was drafted with the assistance of the Environmental Law Centre of the IUCN.<sup>138</sup>

Another example is UNEP's Partnership for the Development of Environmental Law and Institutions which has been operating in Africa for 10 years, drafting and implementing legal frameworks in 13 African countries.<sup>139</sup> The program is sponsored by the governments of Belgium, Germany, Switzerland, Luxemburg and The Netherlands.<sup>140</sup>

Executive governments of countries may also share their knowledge and experience in the formulation of policies and in the implementation and enforcement of environmental law. For example, various strategies for sustainable development or for conservation of biological diversity developed by

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<sup>133</sup> Triggs, above n 36, 187.

<sup>134</sup> (*United States of America v Canada*) (Award) [1941] 3 RIAA 1905, 1965.

<sup>135</sup> Boer, above n 28, 1509.

<sup>136</sup> Ibid 1510.

<sup>137</sup> Ibid 1512.

<sup>138</sup> Ibid 1519.

<sup>139</sup> See generally UNEP, *UNEP Annual Report 2006* (2006), 24 <[http://www.unep.org/pdf/annualreport/UNEP\\_AR\\_2006\\_English.pdf](http://www.unep.org/pdf/annualreport/UNEP_AR_2006_English.pdf)>.

<sup>140</sup> UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (June 2006) <[http://www.unep.org/delc/portals/119/UNEP\\_Manual.pdf](http://www.unep.org/delc/portals/119/UNEP_Manual.pdf)>.

countries such as Australia can be shared with other countries seeking to develop such strategies.

Cross-fertilisation of environmental law also occurs by domestic courts drawing on the environmental jurisprudence of other countries.<sup>141</sup> Australian courts have shown willingness to rely on overseas comparative approaches in developing and refining the common law and in constitutional interpretation.<sup>142</sup> A comparative approach is useful for standardising particular areas of law, for assisting in clarifying aspects of the law and for identifying the concepts and values that shape our own laws.<sup>143</sup> Such an approach is assisted by both a degree of expertise to evaluate the relevance of foreign decisions and self-confidence in one's own legal system to accommodate foreign ideas.<sup>144</sup>

An illustration of foreign jurisprudence being considered by a domestic Australian court is the decision of *Telstra*,<sup>145</sup> discussed earlier, where the Land and Environment Court of New South Wales referred to judicial decisions of other jurisdictions throughout the world on the precautionary principle, including the European Court of Justice, courts of New Zealand, India, the United Kingdom, the United States and Pakistan, as well as the International Court of Justice.<sup>146</sup>

Although the precautionary principle was found not to be activated on the facts of the case, the decision's articulation of the principle and explanation of the application of the principle have contributed to the growing jurisprudence relating to the precautionary principle. The Land and Environment Court's decision in *Telstra* has, in turn, been cited by courts of other jurisdictions when dealing with evidence of risk of environmental harm, including in Victoria,<sup>147</sup>

<sup>141</sup> Boer, above n 28, 1510. The increasing prevalence and importance of environmental courts and tribunals around the world has been documented in studies: see, eg, Pring and Pring, above n 26.

<sup>142</sup> Justice John Basten, 'International Influence on Domestic Law: Neither Jingoistic Exceptionalism nor Blind Servility' in Justin T Gleeson and Ruth CA Higgins (eds), *Constituting Law: Legal Argument and Social Values* (The Federation Press, 2011) 202.

<sup>143</sup> Justice S Kiefel, 'English, European and Australian Law: Convergence or Divergence' (2005) 79 *Australian Law Journal* 220, 227.

<sup>144</sup> Basten, above n 142, 210.

<sup>145</sup> (2006) 146 LGERA 10.

<sup>146</sup> Ibid 38–50 citing *Monsanto Agricoltura Italia v Presidenza del Consiglio dei Ministri* (European Court of Justice, Case C-236/01, 13 March 2003, unreported); *National Farmers' Union v Secretary Central of the French Government* (European Court of Justice, Case C-241/01, 2 July 2002, unreported); *Hungary v Slovakia, Re Gabčíkovo-Nagymaros Project (Danube Dam case)* [1997] ICJ Rep 7; *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II–3305; *Mahon v Air New Zealand Ltd* [1984] 1 AC 808; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715; *A P Pollution Control Board v Bayadu* AIR 1999 SC 812; *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751; *R v Secretary of State for Trade and Industry; Ex parte Duddridge* [1995] Env LR 151; *Zia v WAPDA* (1994) PLD SC 693; *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993); *Industrial Union Department AFL-CIO v American Petroleum Institute*, 448 US 607 (1980).

<sup>147</sup> See *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1, involving an action to restrain the logging of old growth forest in the valley of Brown Mountain Creek, which included several endangered fauna species. The Court found that the precautionary principle applied and required the completion of further field surveys and re-evaluations already underway with respect to management area provisions for a number of species: at 47–8; *Rozen v Macedon*

South Australia,<sup>148</sup> Queensland<sup>149</sup> and the Federal Court of Australia,<sup>150</sup> and in Australian and overseas journal articles.<sup>151</sup>

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*Ranges Shire Council* (2010) 181 LGERA 370, affirming a decision of the Victorian Civil and Administrative Tribunal in its application of the precautionary principle to limit dwelling densities: at 381–4; *MyEnvironment v VicForests* [2012] VSC 91 (14 March 2012), where the applicant sought to restrain the respondent's logging operations using variable retention harvesting in the Toolangi coupes of the Victorian Montane ash forests. The applicant claimed that the logging was unlawful because it would breach the precautionary principle as it posed a threat of serious or irreversible damage to the environment since a threatened species, the leadbeater's possum, was dependent on specific, confined areas in the ash forest habitat. The Court undertook the reasoning process for the application of the precautionary principle articulated in *Telstra*, but was ultimately not persuaded that the evidence demonstrated that variable retention harvesting of the forest would destroy essential habitat of the leadbeater's possum: at [260]–[336]. See also *Dual Gas Pty Ltd v Environment Protection Authority* [2012] VCAT 308 (29 March 2012), concerning a challenge to an approval for a combined-cycle gas turbine. The objectors contended that the precautionary principle required consideration of alternative projects and the option of no project, but this was not accepted: at [212], [218].

<sup>148</sup> *Thornton v Adelaide Hills Council* (2006) 151 LGERA 1, 12–13; *Rowe v Lindner (No 2)* [2007] SASC 189 (24 May 2007), [60].

<sup>149</sup> *Telstra Corporation Ltd v Cairns Regional Council* [2010] QPELR 128; [2009] QPEC 84 (29 September 2009), [21].

<sup>150</sup> *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* (2009) 165 LGERA 203, 229–30.

<sup>151</sup> Louise Baldwin, 'Mining in Greenhouses: a Precautionary Tale' (2006) *AMPLA Yearbook* 533; Nick Eastman, 'Public Fear and Precaution' (2006) 4(8) *Local Government Reporter* 109; Julie Lewis, 'Standing on Principle' (2006) 44(8) *Law Society Journal* 24; John Keogh, 'Legal Notebook: Recent Cases, Headline Issues and New Legislation' (2007) 1 *Australian and New Zealand Property Journal* 65; Rosemary Lyster, 'Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge' (2007) 24 *Environmental and Planning Law Journal* 281; Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 *Environmental and Planning Law Journal* 90; Jacqueline Peel, 'When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19 *Journal of Environmental Law* 103; Paul Vergotis, 'Turning Up the Heat: Applying Environmental Principles to Major Development Proposals' (2007) 59(10) *Keeping Good Companies* 613; Arla Marie Kerr, 'Untapped Potential: Administrative Law and International Environmental Obligations' (2008) 6 *New Zealand Journal of Public and International Law* 81; Jennifer McKay, 'Insubstantial, Tenuous and Vague Laws — The Achievement of Ecologically Sustainable Development by Water Supply Business CEOs' (2008) 36 *Australian Business Law Review* 432; Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32 *Melbourne University Law Review* 922; Jennifer Scott, Louise Hayward and Andrew Joyce, 'Climate Change Adaptation: Socialising the Science' (2008) 14 *Local Government Law Journal* 52; Chris Tollefson and Jamie Thornback, 'Litigating the Precautionary Principle in Domestic Courts' (2008) 19 *Journal of Environmental Law and Practice* 33; Mike Dolan and Jack Rowley, 'The Precautionary Principle in the Context of Mobile Phone and Base Station Radiofrequency Exposures' (2009) 117(9) *Environmental Health Perspectives* 1329; Gary Edmond, 'Merton and the Hot Tub: Scientific Convention and Expert Evidence in Australian Civil Procedure' (2009) 72 *Law and Contemporary Problems* 159; Scott Hickie, 'Managing Recreation, Conservation and Economy: A Critical Appraisal of the New South Wales Marine Parks Amendment Act 2008' (2009) 26 *Environmental and Planning Law Journal* 61; Andrew Macintosh, 'The Garnaut Review's Targets and Trajectories: A Critique' (2009) 26 *Environmental and Planning Law Journal* 88; David Parry, 'Ecologically Sustainable Development in Western Australian Planning Cases' (2009) 26 *Environmental and Planning Law Journal* 375; Linda Pearson and Peter Williams, 'The New South Wales Planning Reforms: Undermining External Merits Review of Land-Use Decision-Making?' (2009) 26 *Environmental and Planning Law Journal* 19; Rachael de Hosson, 'The Limits of Merits Review and the EPBC Act: Grey Nurse Sharks, Fisheries and the AAT' (2010) 27 *Environmental*

Another illustration of cross-fertilisation between domestic courts is the application of the public trust doctrine in environmental cases. The concept of the public trust has its roots in Roman law and was based on the idea that certain common resources, such as the air, waterways and forests, were held in trust by the state for the benefit and use of the general public.<sup>152</sup> The courts in common law countries have recognised the public trust doctrine and applied it to protect the environment and natural resources.<sup>153</sup> The public trust doctrine's power comes from the long-standing idea that some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them, and so the sovereign must steward them to protect such capture.<sup>154</sup>

A modern application of the public trust doctrine is in climate change litigation. In 2011 in the United States, a group of five teenagers, together with two non-governmental environmental organisations, commenced proceedings in the United States District Court for the District of Columbia seeking declaratory and injunctive relief to compel the Federal Government to protect the atmosphere as a resource that belongs to everyone.<sup>155</sup> The cause of action was violation of the public trust doctrine, which was claimed to impose a common law duty on the United States Government to protect and maintain certain natural resources for future public use and to hold these resources on trust for the benefit of all people. The Court rejected the plaintiff's claim, finding that the public trust doctrine is a matter of state, not federal, law.<sup>156</sup>

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*and Planning Law Journal* 223; Martin ZP Olszynski, 'Adaptive Management in Canadian Environmental Assessment Law: Exploring Uses and Limitations' (2010) 21 *Journal of Environmental Law and Practice* 1; Tarnya Fitzgibbon, 'Caution Ahead: Recent Judicial Consideration of the Precautionary Principle' (2011) 63(2) *Keeping Good Company* 98; Andrew Newman, 'Creating the Power for Renewal: Evaluation of New South Wales' Renewable Energy Planning Law Changes and Suggestions for Further Reform' (2012) 29 *Environmental and Planning Law Journal* 498; Katherine Owens, 'Strategic Regional Land Use Plans: Presenting the Future for Coal Seam Gas Projects in New South Wales?' (2012) 29 *Environmental and Planning Law Journal* 113.

<sup>152</sup> Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471; Justice Brian J Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2007) 9 *Asia Pacific Journal of Environmental Law* 109, 203.

<sup>153</sup> See, in Scotland, *Lord Advocate v Clyde Navigation Trustees* (1891) 19 *Rettie* 174; in Australia, *Re Sydney Harbour Collieries Co* (1895) 5 *Land Appeal Court Reports* 259; *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 *LGERA* 19; Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 12 *Environment and Planning Law Journal* 329; in the United States, *National Audubon Society v Department of Water and Power of the City of Los Angeles* (1983) 658 P 2d 709; in India, *M C Mehta v Kamel Nath* 1997 1 *SCC* 388; *T N Godavarman Thirumulphad v Union of India* CDJ 2005 SC 713; in Sri Lanka, *Bulankulama v Secretary, Minister of Industrial Development*, Application No 884/99, Supreme Court of Sri Lanka 643 (7 April 2000); and in Kenya, *Waweru v The Republic of Kenya* (2006) 1 *KLR (E&L)* 677.

<sup>154</sup> David Takacs, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' (2008) 16 *New York University Environmental Law Journal* 711, 718.

<sup>155</sup> *Alec L v Jackson* 11-cv-02235 (DDC 2012); 2012 WL 1951969 (DDC). See Felicity Barringer, 'Suit Accuses US Government of Failing to Protect Earth for Generations Unborn', *The New York Times* (New York) 4 May 2011.

<sup>156</sup> *Alec L v Jackson* 11-cv-02235 (DDC 2012); 2012 WL 1951969 (DDC), 3-4.

There has also been cross-fertilisation between domestic courts through capacity building programs for the judiciaries of countries throughout the world. UNEP established an ad hoc committee of judges, as recommended by the Johannesburg principles on the role of law and sustainable development, adopted at the Global Judges Symposium on Sustainable Development and the Role of Law in August 2002 in Johannesburg.<sup>157</sup> The UNEP Judges Program led to the *UNEP Training Manual on International Environmental Law*, the *UNEP Judges' Handbook on Environmental Law*, the *UNEP Guide to Global Trends in the Application of Environmental Law by National Courts and Tribunals*, the *UNEP Compendia of Summaries of Judgements in Environment Related Cases* and the *UNEP Judicial Training Modules on Environmental Law*. The Asian Development Bank has promoted capacity building programs for courts in the Asian region on environmental adjudication, including fostering an Asian Judges Network on the Environment.<sup>158</sup>

There is also a new initiative to establish an International Judicial Institute for Environmental Adjudication ('IJIEA'). The IJIEA is designed to facilitate education, training and dissemination of information between domestic courts across the world engaged in environmental adjudication.<sup>159</sup>

Courts have also engaged in bilateral and multilateral exchanges of sharing of knowledge and experience. For example, the Land and Environment Court of New South Wales and the Supreme Court of Thailand have had a twinning relationship facilitated by the Asian Environmental Compliance and Enforcement Network and USAID. Following establishment of the partnership, judges of the courts of justice of Thailand have undertaken exchange and training in the Land and Environment Court. The Thai Court has developed a draft legal framework on environmental adjudication and new draft rules on expert witnesses and on mediation for environmental adjudication.<sup>160</sup>

Another means by which environmental law can be developed and spread between countries is through international programs for improving court performance, such as the International Framework for Court Excellence.<sup>161</sup> The Framework was developed by an International Consortium for Court Excellence including the Australasian Institute of Judicial Administration, Federal Judicial Centre (USA), National Centre for State Courts (USA) and subordinate courts of Singapore, and assisted by the European Commission for the Efficiency of Justice and other organisations. The Framework provides a methodology for

<sup>157</sup> *The Johannesburg Principles on the Role of Law and Sustainable Development* (August 2002) UNEP <<http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=3115&DocumentID=25>>.

<sup>158</sup> Kala Mulqueeny et al, 'Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment' (2010) 3 *Journal of Court Innovation* 277.

<sup>159</sup> See Sheila Abed de Zavala et al, 'An Institute for Enhancing Effective Environmental Adjudication' (2010) 3 *Journal of Court Innovation* 1, 8–10.

<sup>160</sup> *Thai Court Develops New Rules on Environmental Adjudication* (2013) Asian Environmental Compliance and Enforcement Network <<http://www.aecen.org/stories/thai-court-develops-new-rules-environmental-adjudication>>.

<sup>161</sup> *The International Consortium for Court Excellence* (2013) <<http://www.courtexcellence.com>>.

assessing a court's performance against seven areas of court excellence and guidance for courts intending to improve their performance. The Framework can be implemented by domestic courts to improve the capacity and performance of national judicial institutions, including to resolve disputes about the environment. The Land and Environment Court of New South Wales was the first court in the world to implement fully the Framework.<sup>162</sup>

Finally, in addition to governments and international institutions, non-governmental and private initiatives are also playing an increasingly important role in the globalisation and harmonisation of environmental law. The growth of global trade and multinational corporate enterprises are increasing pressure for the harmonisation of environmental standards.<sup>163</sup> Many companies decide to adhere to the highest standards applicable to them in the various countries where they operate in order to simplify compliance and eschew negative publicity.<sup>164</sup> Due to the work of global non-governmental organisations, companies from the developed world can no longer engage in environmentally damaging practices in remote areas of the developing world without generating adverse publicity.<sup>165</sup>

The Equator Principles demonstrate the important influence that private enterprise can have on improving global environmental outcomes. The Equator Principles are private initiatives by certain banks around the world, establishing rules that these banks agree to follow before financing global development projects.<sup>166</sup> The Equator Principles require that environmental assessments be prepared to determine how environmental impacts can be minimised before the projects are funded. While this began as an initiative by some of the major banks in North America and Europe, it has now become a global initiative. To date, 78 financial institutions have adopted the principles.<sup>167</sup> Chinese environmental officials have endorsed them and in October 2008 the first major Chinese bank adopted them. Since then, banks from Columbia, Brazil, Mexico, the United States, South Africa, Togo, Nigeria, Egypt, Morocco, Bahrain, the Netherlands,

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<sup>162</sup> Justice Brian J Preston, 'Implementing the International Framework for Court Excellence: the Experience of the Land and Environment Court of New South Wales' (Paper presented at the Asia Pacific Courts Conference, Singapore, 4–6 October 2010); Land and Environment Court of New South Wales, *Annual Review 2009* (2009), 23–5 <[http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011721756/lecannrep09.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721756/lecannrep09.pdf)>; Land and Environment Court of New South Wales, *Annual Review 2010* (2010), 23–24 <[http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011721756/lec\\_annrev\\_2010.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721756/lec_annrev_2010.pdf)>; Land and Environment Court of New South Wales, *Annual Review 2011* (2011), 23–25 <[http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011721756/annual%20report%202011\\_2012.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721756/annual%20report%202011_2012.pdf)>; Land and Environment Court of New South Wales, *Annual Review 2012* (2012), 24–25 <[http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011721756/2012%20annual%20review.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721756/2012%20annual%20review.pdf)>; International Framework for Court Excellence <<http://www.courtexcellence.com/Resources/The-Framework.aspx>>.

<sup>163</sup> Robert V Percival, 'The Globalization of Environmental Law' (2009) 26 *Pace Environmental Law Review* 451, 456.

<sup>164</sup> *Ibid* 456.

<sup>165</sup> *Ibid* 459.

<sup>166</sup> *About the Equator Principles* (2011) Equator Principles <<http://www.equator-principles.com/index.php/about-ep/about-ep>>.

<sup>167</sup> *Members & Reporting* (2011) Equator Principles <<http://www.equator-principles.com/index.php/members-reporting>>.

France, Germany, Australia and Mauritius have signed on to the Equator Principles.<sup>168</sup>

#### **IV. Future Directions**

Globalisation and harmonisation of environmental law will continue to occur. The process will be facilitated by at least three initiatives.

First, there are calls for global environmental institutions for better governance. Prior to the Copenhagen Climate Conference in 2009, Chancellor Merkel of Germany and President Sarkozy of France, in a letter to the United Nations Secretary-General, called for an overhaul of environmental governance, and asked for the Climate Conference to progress the creation of a World Environment Organisation. Since then, environmental governance reform has been a key agenda item at UNEP meetings.<sup>169</sup> UNEP recommended to the Rio +20 conference in 2012 the establishment of a World Environment Organisation. Although the outcome document from the conference does not refer specifically to a World Environment Organisation, some general wording was adopted, stating that the parties decided to establish a ‘universal intergovernmental high-level political forum’, which would build on the work of the Commission on Sustainable Development and eventually replace the Commission.<sup>170</sup> This forum is intended to follow up on the implementation of sustainable development and avoid overlap with existing structures, bodies and entities.<sup>171</sup>

The growing complexity of international environmental dispute adjudication arrangements and the success of specialist environmental courts and tribunals at the domestic level<sup>172</sup> have prompted calls for the establishment of international judicial institutions for better environmental adjudication. Prior to the Rio Conference in 1992, environmentalists, scholars and lawyers began calling for an international court for the environment.<sup>173</sup> In recent years, the International Court for the Environment Coalition, led by Stephen Hockman QC, has developed a movement calling for the establishment of an international court for the environment.<sup>174</sup> Hockman argues that an international environmental court is necessary to develop jurisprudence on some of the fundamental unanswered issues in international environmental law, such as whether there is a general customary law obligation on states to protect and preserve the

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> *The Future We Want*, UN Doc A/CONF.216/L.1, Agenda Item 10 (19 June 2012) art 84.

<sup>171</sup> Ibid.

<sup>172</sup> Stephens, above n 32, 57.

<sup>173</sup> See, eg, Amedeo Postiglione, ‘A More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations’ (1990) 20 *Environmental Law* 321.

<sup>174</sup> *ICE Coalition: Creating an International Court for the Environment* <<http://icecoalition.com/>>. See also the International Court for the Environment Foundation, which was founded by Italian jurist Amedeo Postiglione <<http://www.icef-court.org/site/>>.

environment.<sup>175</sup> According to Hockman, the arrangements for such a court would include: an international convention on the right to a healthy environment; direct access to the court by NGOs, private parties and individuals as well as states; and a scientific body to assess technical issues.<sup>176</sup>

Calls for the establishment of an international environment court have met with a number of criticisms. Stephens argues that such an organisation could add a further layer of institutional complexity to the ‘patchwork’ of institutions already operating in international environmental law and that increased jurisdictional conflict could damage an already fragmented system.<sup>177</sup> Additionally, since environmental disputes tend to be intertwined with other matters, such as trade or human rights, an international adjudicative body comprised mainly of environmental experts may not attract a large caseload.<sup>178</sup> However, despite these challenges, an international court for the environment may be more able to address the likely growth in global environmental disputes in the future and to develop specialised international environmental jurisprudence.

Second, there is a need for greater cooperation to reduce overlap in the content and scope of MEAs and to improve coordination of the activities of international organisations. In the Johannesburg Plan of Implementation, arising from the World Summit on Sustainable Development 2002 in Johannesburg, there was a call for increasing effectiveness and efficacy through limiting overlap and duplication of activities of the international organisation within and outside the United Nations.<sup>179</sup>

In recent years, cooperation and information-sharing between international organisations has improved. One example is between the Secretariat of the UNFCCC and the Office of the High Commissioner for Human Rights (‘OHCHR’). In January 2009, the OHCHR published a report on the relationship between climate change and human rights.<sup>180</sup> In March 2009, the Human Rights Council adopted a resolution that noted the effects of climate change on the enjoyment of human rights and reaffirmed the potential of human rights obligations to inform and strengthen international and national policy-making. In that resolution, the Council welcomed the exchange of information between the OHCHR and the Secretariat of the UNFCCC.<sup>181</sup>

Another example is cooperation between the UNFCCC and the *Biodiversity Convention* on the issue of forest carbon sinks. For a number of

<sup>175</sup> Stephen Hockman, ‘The Case for an International Court for the Environment’ (2010) 3 *Journal of Court Innovation* 215.

<sup>176</sup> *Ibid* 223.

<sup>177</sup> Stephens, above n 32, 61.

<sup>178</sup> *Ibid*.

<sup>179</sup> *Johannesburg Plan of Implementation of the World Summit on Sustainable Development* 139(f) <[http://www.un.org/esa/sustdev/documents/WSSD\\_POL\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POL_PD/English/WSSD_PlanImpl.pdf)>.

<sup>180</sup> Report of the Office of the High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN GAOR, Human Rights Council, 10<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009).

<sup>181</sup> *Human Rights and Climate Change*, UNHRC Res 10/4, 10<sup>th</sup> sess, 41<sup>st</sup> meeting (25 March 2009) [4].



years the Conference of the Parties to the *Biodiversity Convention* had on its agenda the cross-cutting issue of biodiversity and climate change with a view to enhancing synergies between the Rio Conventions. Under this cross-cutting issue, a direct link was drawn between reducing emissions from deforestation in developing countries and the conservation and sustainable use of forest biodiversity.<sup>182</sup>

Third, it is likely that there will be a synthesis of international environmental law with other areas of international law, as it is impossible to address many of the legal issues posed by global environmental problems without also considering other areas, including private international law, human rights law, refugee law, international criminal law, and international trade law. All of these areas have environmental dimensions or affect the resolution of environmental problems.<sup>183</sup> Sands argues that since environmental law arguments will invariably involve arguments about other substantive areas of the law, international courts and tribunals require a body of judges with a mix of general and specialised expertise.<sup>184</sup>

One particular example of the inter-related nature of environmental law with other legal issues is environmental protection and human rights. Today, the protection of the environment and the promotion of human rights are increasingly seen as intertwined, complementary goals.<sup>185</sup> This has been recognised in international law materials and MEAs. Principle 1 of the *Stockholm Declaration* recognises the linkage between human rights and the environment, stating that: ‘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.’

Judge Weeramantry, former Vice President of the International Court of Justice, in 1997 wrote: ‘The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.’<sup>186</sup>

The international community might be some way from adopting a substantive right to a healthy environment,<sup>187</sup> but there is increasing jurisprudence on environmental matters impacting on human rights through cases brought under international human rights law instruments. Several decisions of the European Court of Human Rights have upheld rights under the

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<sup>182</sup> Joint Liaison Group of the Rio Conventions, *Forests: Climate Change, Biodiversity and Land Degradation* <[http://unfccc.int/resource/docs/publications/forest\\_eng.pdf](http://unfccc.int/resource/docs/publications/forest_eng.pdf)>.

<sup>183</sup> Birnie, Boyle and Redgwell, above n 11, 3–4; Sands, above n 31, 4.

<sup>184</sup> Sands, above n 31, 4.

<sup>185</sup> Anton and Shelton, above n 77, 119.

<sup>186</sup> Separate Opinion of Vice President Weeramantry in *Gabcikovo-Nagymaros (Hungary/Slovakia)* [1997] ICJ Rep 7, 91.

<sup>187</sup> The United Nations Human Rights Commission appointed a special rapporteur for human rights and the environment, whose 1994 final report included draft principles on human rights and the environment, but the Commission has never ratified these draft principles: see Takacs, above n 154, 725.

*European Convention on Human Rights*<sup>188</sup> that are related to the environment. For instance, in *Fadeyeva v Russia*,<sup>189</sup> the applicant lived in a council flat within a buffer zone between the largest iron smelter in Russia and a nearby town. She brought an action under art 8 of the ECHR claiming that the operation of the smelter in close proximity to her house threatened her right to respect for her home and private life since she was exposed to toxic emissions. The local court upheld her right to be reallocated a house in a different area; however, this did not occur. The European Court of Human Rights found that while the ECHR did not support a right to environmental protection as such, the applicant's right under art 8 had been violated because she was exposed to emissions in excess of prescribed safe limits and the relevant legislation identified the area she lived as unfit for habitation.<sup>190</sup> Additionally, the UNECE's *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*<sup>191</sup> provides for numerous procedural rights relating to environmental justice. Its preamble affirms that:

every person has the right to live in an environment adequate to his or her health or well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

This language is a significant step towards increasing recognition of the importance of the environment in human rights agreements.<sup>192</sup>

The procedural rights included in the *Aarhus Convention* relate to access to information, public participation in decision-making and access to justice in environmental matters. The rights have been referred to in numerous decisions of the European Court of Human Rights, as well as the European Court of Justice.<sup>193</sup>

<sup>188</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('ECHR').

<sup>189</sup> (European Court of Human Rights, Former First Section, Application No 55723/00, 9 June 2005).

<sup>190</sup> At [51], [68], [83]–[87]. See also *Lopez Ostra v Spain* (1994) 303-C Eur Court HR (ser A); *Okyay v Turkey* [2005] Eur Court HR 476.

<sup>191</sup> Opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*').

<sup>192</sup> See Alan Boyle, 'Human Rights or Environmental Rights?: A Re-assessment' (2007) 18 *Fordham Environmental Law Review* 471, 477. Upon ratification of the *Aarhus Convention*, the United Kingdom declared that this right was aspirational in character.

<sup>193</sup> See, eg, *Taskin v Turkey* [2004] Eur Court HR 621; [2006] 42 EHRR 50, where the European Court of Human Rights referred to the requirement under the *Aarhus Convention* that public participation be encouraged from the beginning of the procedure for a proposed development. The Court found that, where administrative authorities refuse or fail to comply with the decision of a domestic court, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose: at [98] and [124]; in *WWF-EPO v Council of the European Union* (European Court of Human Rights, Fourth Chamber, Application No T-264/04, 25 April 2007) the applicant was found to have no right of access to the content of an agenda item at a meeting of the so-called 'Article 133 Committee' entitled 'WTO — Sustainability and Trade after Cancun' because there were no minutes from the item of the meeting and a regulation made under the *Aarhus Convention* defining

Since human rights law has increasingly come to include environmental considerations, a likely avenue for developing a regime on access to justice in environmental matters on a global level would be thorough the mutual integration of international human rights and environmental law.<sup>194</sup>

The African and American regions have also recognised the importance of environmental human rights. The *African Charter on Human and People's Rights* guarantees that 'all people shall have the right to a general satisfactory environment favourable to their development'.<sup>195</sup> The *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* confirms that 'everyone shall have the right to live in a healthy environment'.<sup>196</sup>

There is also increasing focus on environmental human rights at the domestic level. During the preparations for the Stockholm Conference and increasingly thereafter, states began adopting constitutional provisions concerning the environment, often adopting rights language.<sup>197</sup> The constitutions of about 100 states now expressly recognise the right to a clean environment.<sup>198</sup> Environmental human rights are enshrined in the South African and Indian Constitutions. Article 21 of India's Constitution declares, '[n]o person shall be deprived of his life or personal liberty except according to procedure established by law'. While it does not explicitly provide for a right to a healthy environment, Indian courts have gone far to name environmental rights to bolster the fundamental right to life.<sup>199</sup> The Supreme Court has held that these rights include the right to protection and preservation of the environment, an ecological balance free from pollution of air and water, and sanitation.<sup>200</sup>

It is also likely that there will be harmonisation of international environmental law with refugee law, as studies predict that, over the coming decades, both sudden and gradual environmental disruptions, such as sea level rise and extreme weather events caused by climate change, will displace millions

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environmental information as information in 'material form' was found to be restricted to documents only and not information in the wider meaning of the word: at [76]–[77]. See also *Okay v Turkey* (2006) 43 EHRR 37, [52]; *Tatar v Romania* (European Court of Human Rights, Third Section, Application No 67021/01, 27 January 2009), [69], [118]; *Commission of the European Union v Ireland* (European Court of Justice, C-427/07, 16 July 2009).

<sup>194</sup> Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Brunnée and Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 681, 701.

<sup>195</sup> *African Charter on Human and Peoples' Rights*, adopted 27 June 1981, 21 ILM 58 (entered into force 21 October 1986) art 24.

<sup>196</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, signed 17 November 1988, 28 ILM 156 (entered into force 16 November 1999) art 11.

<sup>197</sup> Anton and Shelton, above n 77, 118.

<sup>198</sup> Sands, above n 73, 296.

<sup>199</sup> Takacs, above n 154, 735; Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14 *Environmental Law Review* 200.

<sup>200</sup> See, eg, *Virender Gaur v State of Haryana* (1995) 2 SCC 577, 580, 581; Intellectual Forum, *Tirupathi v State of AP* AIR 2006 SC 1350 [84].

of people.<sup>201</sup> Since these displaced people do not fall within the scope of the *Refugee Convention*<sup>202</sup> or the UNFCCC, scholars have proposed a new multilateral agreement concerning climate change refugees that draws on multiple areas of the law, including human rights, humanitarian, and international environmental law.<sup>203</sup> It is proposed that the treaty would set standards for the determination of climate change refugee status and guarantee human rights protections and humanitarian aid to climate change refugees.<sup>204</sup> This will create the need for improved institutional governance, because no existing international institution provides a comprehensive and coherent multilateral framework regulating state responses to such movement.<sup>205</sup>

## V. Conclusion

As the global character of environmental problems becomes more apparent, the law at domestic and international levels is responding. International environmental law has evolved into a sophisticated conglomerate of laws, principles and institutions that is increasingly becoming intertwined with domestic law. The growth of international environmental law and its incorporation into the domestic law of countries throughout the world have resulted in both the globalisation and the harmonisation of environmental law. There is an increasing similarity in the way countries approach environmental problems, in turn leading to increased cooperation at the international level.

International institutions have facilitated this process of globalisation and harmonisation by driving the development of environmental policies and spreading common standards throughout the world. This process will continue into the future as the international community considers new approaches to tackling environmental problems, such as environmental rights and the idea of an international court for the environment.

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<sup>201</sup> Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007) 56, 77; Norman Myers, 'Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century' (2002) 357 *Philosophical Transactions of the Royal Society B* 609.

<sup>202</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>203</sup> See, eg, Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349, 351; Angela Williams, 'Turning the Tide: Recognising Climate Change Refugees in International Law' (2008) 30 *Law and Policy* 502.

<sup>204</sup> Docherty and Giannini, above n 203, 373. There are concerns, however, that such a treaty could premise protection on individual status determination, which is unsuited to mass displacement scenarios, and that defining 'climate refugees' may harden the category and exclude some people from much-needed assistance: see Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 188.

<sup>205</sup> McAdam, above n 204, 216.