



INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW (ICEL) - JUNE 2019

ANALYSIS OF THE CONSENSUS RECOMMENDATIONS TO STRENGTHEN IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW UNDER UNGA RESOLUTION 72/277 “TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT”

(as agreed by the Ad Hoc Open-Ended Working Group in Nairobi on 22 May 2019)

Executive Summary

ICEL submits this Note to provide an analysis of the Recommendations by the ad hoc open-ended working group, based on consultations held in Nairobi between January and May 2019. The ad hoc open-ended working group considered the Report of the UN Secretary General on “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment” (A/73/419, 30 November 2018), pursuant to UNGA Resolution 72/277 (10 May 2018) “Towards a global pact for the environment.” The Recommendations, adopted by consensus, for consideration by the General Assembly, are reproduced below.

Thereafter, this Note provides (1) brief observations on the constructive work of the consultations, under the able Co-Chairs; (2) comments on the Objectives, which state the principles that serve as foundations for the Recommendations; (3) analysis of the several substantive recommendations; and (4) observations on the further work that now will be the focus of the UN General Assembly.

The Recommendations, taken as a whole, constitute a significant milestone towards achieving an enhanced framework of cooperation among States — and of coordination within the UN System — to strengthen the implementation of environmental law and support the full implementation of the 2030 Agenda for Sustainable Development, the mandate under Resolution 72/277, within a precise timeframe in the period 2019-2022. ICEL finds that the consensus is a positive step forward toward providing institutional and policy steps that are essential for the realization of the Sustainable Development Goals.

On the issue of solidifying established principles of international environmental law for enhancing the implementation of international environmental law, while recognizing the role of discussions on principles, there is no clear path forward. The same is true for the preparations of the UN high level meeting for the 50th commemoration of the creation of the UN Environment Programme by the United Nations Conference on the Human Environment in 2022.

This Note sets forth an independent assessment by a working group of expert members of the International Council of Environmental Law (ICEL).ⁱ Since 1969, when it was established in New Delhi, ICEL has advanced knowledge on international environmental law and the legal foundations for sustainable development. As an international non-governmental organization accredited to the UN Economic and Social Council since 1973, ICEL has shared its expertise with ECOSOC, UN Members States, and international organizations. ICEL’s members are senior environmental law experts drawn from all of the UN regions and all legal traditions: civil law, common law, socialist law, Islamic law, and customary law.

Recommendations, as agreed by the working group (22 May 2019)

1. Objectives guiding the recommendations:

- a) reinforce the protection of the environment for present and future generations
- b) uphold respective obligations and commitments under international environmental law of States members of the United Nations and members of specialized agencies
- c) contribute to the strengthening of implementation of international environmental law and environment-related instruments
- d) support the full implementation of the 2030 Agenda for Sustainable Development, as well as the outcome of the UN Conference on Environment and Development (Rio+20), including its paragraphs 88 and 89
- e) not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies

2. Substantive recommendations:

- a) reaffirms the role of the United Nations Environment Programme (UNEP) as the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment, and the role of the United Nations Environment Assembly (UNEA)
- b) calls for renewed efforts at all levels to enhance the implementation of existing obligations and commitments under international environmental law, stressing the importance of enhanced ambition regarding means of implementation, including the provision and mobilization of all types and sources of means of implementation, consistent with the Addis Ababa Action Agenda and the 2030 Agenda for Sustainable Development
- c) recognizes the role of discussions on principles of international environmental law for enhancing the implementation of international environmental law, also noting the ongoing work in the International Law Commission on general principles of law
- d) invites the scientific community to further their work on interconnected and crosscutting issues by sharing information among the leading scientific, technical and technological bodies that inform the work of Multilateral Environmental Agreements and environmental processes, as well encourages the scientific, technical and technological bodies to strengthen cooperation among themselves
- e) invites the governing bodies of the Multilateral Environmental Agreements, while preserving their independence and respective mandates, to increase their efforts to promote policy coherence across environmental instruments at all relevant levels and to consider identifying and addressing implementation challenges in their regimes, with a view to strengthening implementation at the national and international level
- f) invites the governing bodies and secretariats of Multilateral Environmental Agreements to enhance cooperation and collaboration among themselves within the scope of their respective mandates, as well as between them and UNEP and UNEA, building on work already done

- g) encourages the governing bodies of Multilateral Environmental Agreements and scientific, technical and technological bodies to exchange information and experiences, including with a view to considering the streamlining of reporting and/or monitoring processes
- h) encourages all that have not done so to consider ratifying Multilateral Environmental Agreements and to effectively implement them
- i) encourages States members of the United Nations and all members of the specialized agencies to strengthen, where needed, environmental laws, policies and regulatory frameworks at the national level, as well as the capacities across all sectors for the effective implementation of international environmental law, including the administrative and justice sectors in accordance with national legal systems, while acknowledging the importance of international cooperation in supporting and complementing national actions
- j) encourages States members of the United Nations and all members of the specialized agencies to mainstream environment into sectoral policies and programs at all levels, including into national development and sustainable development plans, to enhance the implementation of international environmental law and applicable environment-related instruments
- k) encourages active and meaningful engagement of all relevant stakeholders at all levels in the different *fora* related to the implementation of international environment law and environment-related instruments
- l) explores further ways for States members of the United Nations and all members of the specialized agencies to support and make full use of the Fifth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V) adopted by the fourth session of the United Nations Environment Assembly, in order to foster the environmental rule of law and advance the implementation of environmental law at all levels
- m) encourages the United Nations Environment Program, as Chair of the Environment Management Group (EMG) and in collaboration with the members of the Group, to continue to strengthen system-wide inter-agency coordination on environment and to call for active involvement and support of all EMG members for the implementation of system-wide strategies on the environment

3. Consideration of further work:

The working group recommends that the General Assembly:

- a) Circulates the above-mentioned recommendations and make them available to States members of the United Nations and members of Specialized Agencies and the Governing Bodies of Multilateral Environment Agreements for their consideration and action, as appropriate
- b) Forwards these recommendations to the United Nations Environment Assembly for its consideration, and to prepare, at its fifth session in February 2021, a political declaration for a UN high level meeting subject to voluntary funding, in the context of the commemoration of the creation of UN Environment Programme by the United Nations Conference on the Human Environment held in Stockholm from 5-16 June 1972, with a view to strengthening the implementation of international environmental law, and international environmental governance in line with paragraph 88 of the “Future we Want”.

**Note on the Recommendations of the Ad Hoc
Open Ended-Working Group established by
General Assembly Resolution 72/277,
adopted in Nairobi on May 22, 2019**

(1) Welcoming the Nairobi 2019 Consensus Recommendations

This Note welcomes the Recommendations agreed by the ad hoc open-ended working group (OEWG) established by UNGA Resolution 72/277, “Towards a global pact for the environment,”ⁱⁱ at the conclusion of three substantive meetings in Nairobi, Kenya, on 22 May 2019.ⁱⁱⁱ The Recommendations constitute a significant milestone towards achieving an enhanced framework of cooperation among States — and of coordination within the UN System — to strengthen the implementation of environmental law and support the full implementation of the 2030 Agenda for Sustainable Development within a precise timeframe in the period 2019-2022. ICEL finds that the consensus is a positive step forward toward providing institutional and policy steps that are essential for the realization of the Sustainable Development Goals (SDGs). It was important to reach a constructive outcome that can grow in ambition and commitment as all Member States, the entire UN system, and civil society contribute to their implementation.

The underlying concern stated in Resolution 72/277 is the “need to continue to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development.” To be sure, the severity of the state of the environment caused by anthropogenic stress on the Earth’s ecosystem, evidences the critical need for immediate action by all. Among the recent scientific assessments, the Global Environmental Outlook 6 indicates: “*sustainable development targets and internationally agreed goals are not expected to be achieved, including on climate change, biodiversity loss, water scarcity, excess nutrient run-off, land degradation and ocean acidification (well established).*”^{iv} And the Global Assessment Report on Biodiversity and Ecosystem Services notes: “*Past and ongoing rapid declines in biodiversity, ecosystem functions and many of nature’s contributions to people mean that most international societal and environmental goals, such as those embodied in the Aichi Biodiversity Targets and the 2030 Agenda for Sustainable Development, will not be achieved based on current trajectories. These declines will also undermine other goals, such as those specified in the Paris Agreement adopted under the United Nations Framework Convention on Climate Change and the 2050 Vision for Biodiversity.*”^v

Therefore, the purpose of this Note is to analyze the significance of the Recommendations and how to advance them for prompt “*consideration and action*”^{vi} by all the Member States, Specialized Agencies, and the Governing Bodies of Multilateral Environment Agreements (MEAs), taking into account the first report ever issued by the U.N. Secretary-General concerning the field of international environmental law, A/73/419 (30 November 2018).^{vii} In addition, the Note offers suggestions on the way forward to prepare for the fifth session of the United Nations Environment Assembly (UNEA), in February 2021, and for a momentous UN high level meeting for the 50th commemoration of the creation of UN Environment Programme (UNEP) by the United Nations Conference on the Human Environment in 2022.

Significantly, the UN High-Level Political Forum on Sustainable Development (HLPF) — not mentioned in the Recommendations — launched by the General Assembly following the Rio+20 outcome document (“The Future We Want”), is the universal, intergovernmental forum in charge of reviewing the implementation of sustainable development commitments and providing guidance on the follow-up of the 2030 Agenda and the SDGs. The HLPF will meet twice in 2019. In July, under the auspices of ECOSOC, for the fourth time, at which point it would have completed a first-round review of all 17 SDGs and means of implementation. In September, for the first time, under the auspices of the General Assembly, at the level of Heads of State and Government, to discuss the overall status of implementation of the 2030 Agenda and to prepare a political declaration on the subject. Thus, the Recommendations are timely input for the HLPF, at both meetings in 2019.

ICEL commends the hard work of the Co-Chairs, and the support of the Secretariat, to arrive at meaningful substantive Recommendations to fulfill the mandate set forth in Resolution 72/277. The fruitful consultations have sufficiently identified challenges in relation to principles, governance and implementation, and possible actions by Member States, Governing Bodies of MEAs, and the entire UN System, to tackle these challenges in order to advance environmental law and SGD implementation. The Recommendations mostly deal with the “what” is needed, however, and do not sufficiently address the “how” or the “when” to review or follow-up on such actions and challenges.

ICEL respectfully offers two suggestions on the way forward to prepare for UNEA-5, in February 2021, and the UN high level meeting in the context of the 50th commemoration of the creation of the UNEP by the UN Conference on the Human Environment in 2022. First, it would be appropriate for the General Assembly and all the relevant organs and bodies of the UN System and governing bodies of MEAs, to develop follow-up processes on the Recommendations to have meaningful input for UNEA-5 and the HLPF. Since a multifaceted response is called for, ICEL would encourage developing concrete actions to address the Recommendations, as well as the means and actors with authority to act on the solutions.

Second, for an adequate preparatory process leading to the UN high level meeting, ICEL proposes that the General Assembly establish a preparatory committee for the 2022 anniversaries, with the mandate to draft decisions and a declaration that would contribute to implementation of the SDGs, taking into account the input from UNEA-5 on strengthening the implementation of international environmental law and international environmental governance. By 2022 we shall have seven years of experience in working to attain the SDGs by 2030, and the encouragement of a new Declaration would stimulate the additional cooperation needed to attain the SDGs.

The significance of the consensus-based Recommendations — although there was no agreement to kick-start an intergovernmental conference to adopt an international instrument to strengthen the implementation of international environmental law — is that they are the first step in a process that launched a commitment “to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development,” the stated purpose in Resolution 72/277. Indeed, *“[s]ince the relevant environmental problems at stake are often of a global nature, the solution lies in collective action. The challenge is to encourage the participation of all relevant actors while at the same time ensuring that the*

commitments are ambitious enough to provide for an effective response to the problem, and to ensure that parties comply with their obligations,” notes the Secretary-General’s Report, referencing the work of Elinor Ostrom and Professor Scott Barret.^{viii}

Remarkably, as mandated by Resolution 72/277, voluntary contributions, reaching approximately USD 2 million, funded the activities of the AOWG, and the special voluntary trust fund for the purpose of assisting developing countries — in particular, the least developed countries, landlocked developing countries and small island developing States — to attend the consultations. Despite this special voluntary trust fund, many Member States were unable to send delegations to Nairobi. Thus, it was important to reach a constructive outcome that can grow in ambition and gain the commitment of all Member States and the entire UN system. ICEL congratulates the donors that enabled the first intergovernmental review on the status of international environmental law and environmental governance needed to support the full implementation of international environmental law, environment-related instruments, the 2030 Agenda and the SDGs.

The Recommendations to the General Assembly include three sections. Section one, lays out the 5 objectives guiding the recommendations. Section two, with 13 substantive recommendations, can be divided in 6 subgroups: on the role of UNEP, on means of implementation, on principles of international environmental law, on strengthening the science-policy interface; on governance and effective MEAs, and on implementation challenges. Finally, section three, has 2 recommendations on the consideration of further work. The compromise text is based on the Co-Chairs’ non-paper on draft elements of recommendations, dated 25 April 2019, input for the third substantive meeting, and three versions of draft recommendations by the Co-Chairs during the meeting May 20-22.^{ix}

(2) Comments on the Objectives Guiding the Recommendations

General Commentary: This section is highly commendable because five principles serve as foundations for the Recommendations and will guide and maintain an enhanced level of ambition as the Recommendations are carried-out by Member States, all within the UN System, and the Governing Bodies of MEAs. These five objectives are also essential to help galvanize active and meaningful engagement of all relevant stakeholders at all levels for the implementation of international environment law, environment-related instruments, and the 2030 Agenda for Sustainable Development.

a) reinforce the protection of the environment for present and future generations

Commentary: It is commendable that the Recommendations embrace intergenerational environmental protection as the first objective. Enshrined in the UN Charter’s preamble, the welfare of both present and future generations, is also at the center of the UN’s soon-to-be five decades long intergovernmental process to address environmental protection and sustainable development.^x Principle 1 of the Stockholm Declaration of the UN Conference on the Human Environment in 1972, unequivocally expresses the common conviction that humankind “has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a

quality that permits a life of dignity and well-being, and ... *bears a solemn responsibility to protect and improve the environment for present and future generations.*"^{xi}

Intergenerational equity is also at the heart of the Brundtland Commission's formulation of sustainable development, arguably the most accepted definition: development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".^{xii} And Principle 3 of the Rio Declaration on Environment and Development states that "[t]he right to development must be fulfilled so as to *equitably meet developmental and environmental needs of present and future generations.*"^{xiii} As noted in the Draft International Covenant on Environment and Development by IUCN and ICEL, "[a]lthough it is difficult to predict with precision the aspirations of future generations, the basic human needs and values expressed in the two 1966 United Nations Covenants on Human Rights must be taken as the minimum requirements."^{xiv}

Professor Edith Brown Weiss, devoted scholar of intergenerational equity, explains, "is based on the concept that each generation holds the Earth in common with other generations, past and future, with obligations to protect it for future generations and rights to benefit from it. It is based on a fundamental norm of fairness between generations in the conservation and use of the environment and its natural resources. *It provides a foundation for sustainable development, but it extends beyond it.*"^{xv} Further, "[i]ntergenerational equity has deep roots in diverse cultural and religious traditions, including the Judeo-Christian, Islamic, and Asian non-theistic traditions. It has roots in Islamic law, civil law, common law, customary law in African and other communities, and Native American traditional law," points out Professor Brown Weiss.^{xvi}

The Secretary-General's Report highlighted intergenerational equity as the fundamental goal of the process under Resolution 72/277, in the final conclusion: *We must collectively seize the opportunity to use international environmental law in new and dynamic ways to provide a strong and effective governance regime with a view to better safeguarding the environment for future generations.*^{xvii} The Report does not specifically discuss the principle of intergenerational equity, however, although it is imbedded in the principle of sustainable development, addressed in the Report, which "is undeniably a cornerstone of international environmental law that has shaped the field since at least the 1980's."^{xviii}

The Report moreover states that sustainable development is not simply a "soft law" principle, but that "[m]any international environmental law treaties make explicit or implicit references to the essential tenets of sustainable development," and that "is also referred to in other international agreements, such as trade and investment treaties and WTO agreements."^{xix} Furthermore, "international courts and tribunals have embraced sustainable development as a source of law and policy when addressing treaty implementation and the interpretation of norms."^{xx} As Professor Christina Voigt describes it, "sustainable development is a principle with normative content, which is defined by *the integration of present and future economic, social and environmental interests within limits set by certain essential ecological functions.*"^{xxi}

Intergenerational equity is also central to rights-based environmental protection, incorporated in at least 155 State Constitutions. This was rightly recognized in the 1993 landmark ruling by the Supreme Court of the Philippines in the case *Oposa Minors et al v. Factoran*, noting

that “unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, *the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.*”^{xxii}

The Court also noted that intergenerational equity and the right to a balanced and healthful ecology are not “less important than any of the civil and political rights” and belong “to a different category of rights altogether for *it concerns nothing less than self-preservation and self-perpetuation ... the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.*”^{xxiii}

Finally, stressing intergeneration equity as the cornerstone objective guiding the Recommendations is meaningful because the principle of sustainable development “has been incorporated into the larger global agenda by the 2030 Agenda for Sustainable Development and the Sustainable Development Goals,”^{xxiv} and the fourth objective guiding the recommendations, discussed below, is to “support the full implementation of the 2030 Agenda for Sustainable Development.”

b) uphold respective obligations and commitments under international environmental law of States members of the United Nations and members of specialized agencies

and

c) contribute to the strengthening of implementation of international environmental law and environment-related instruments

Commentary: These two objectives are the essence of the mandate set forth in Resolution 72/277. Regarding b), it is worth noting the importance of including the commitments of member of UN specialized agencies, such as FAO, IMO, IAEA, ICAO and ILO, as the entire UN System must coherently address, and mutually support, the Recommendations.

Regarding c), it is worth noting the reference to “environment-related instruments”. This expression “is taken to include those international legal instruments that do not fall exclusively within the field of the environment or have as their primary objective the protection of the environment. In this regard, it may be noted that environmental concerns have gradually penetrated other international regulatory frameworks, such as those dealing with international trade, investment, intellectual property rights, human rights, peace and security, migration and disaster management.”^{xxv} Therefore, the Recommendations embrace a holistic approach to pursue an effective legal framework to deliver on the sustainable development commitments and goals, discussed below.

- d) support the full implementation of the 2030 Agenda for Sustainable Development, as well as the outcome of the UN Conference on Environment and Development (Rio+20), including its paragraphs 88 and 89*

Commentary: The global consensus on the SDGs and the 2030 Agenda is a landmark achievement.^{xxvi} The SDGs make clear the gravity of today’s environmental and social problems. Resolution 72/277 explicitly reaffirms the General Assembly’s “commitment to working tirelessly for the full implementation of the Agenda by 2030.” The UN Secretary-General’s Report underscores that sustainable development principles have been incorporated into the larger global agenda by the 2030 Agenda for Sustainable Development.^{xxvii} However, the fragmented character of international environmental law is halting implementation and is likely to retard the attainment of all of the SDGs.

A major hurdle is that MEAs are not yet fully linked to all SDGs. For example, the principles and objectives found in the Convention on Biodiversity or the Ramsar Convention on Wetlands, are not tied to the terrestrial goals expressed in SDG 15. The UN Secretary-General’s Report also stresses the importance of effective implementation of the legal framework established by the UN Convention on the Law of the Sea (UNCLOS) and its implementing agreements in order to achieve SDG 14 on oceans, seas and marine resources.^{xxviii} Whereas, governance, access to justice and information principles are central to all the SDGs, as set forth in SDG 16.^{xxix} Clarification and reinforcement of international environmental law will promote the links between international and national environmental law and sustainable development, facilitate SDG integration, and contribute to a transformative realization of sustainability goals.

Arguably, the greatest hindrance to implementing environmental laws, both national and MEAS, as well as the 2030 Agenda, is the lack of shared commitment by States to making the environmental protection and the 2030 Agenda an over-arching priority. This has impeded sustainable development in the past and will also work to undermine the successful achievement of the SDGs. The Recommendations aim to address this central, circular, concern. First, calling for strengthening the capacity and synergies across the UN system to support the integration of the environment in the implementation of the 2030 Agenda. Second, seeking to promote the convergence of different strategies and to mainstream environment system-wide strategies into policies and programs at all levels. In addition, the Recommendations reference to the full implementation of UN Conference on Environment and Development (Rio+20), including its paragraphs 88 and 89. This is an acknowledgement that the commitments to enhance environmental governance must be fulfilled. These topics are further discussed in the commentary to substantive Recommendations below.

- e) not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies*

Commentary: Resolution 72/277 states that the process, and resulting implementation, “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.” This mandate for non-regression was echoed repeatedly by the delegations, many of which also called for progression. As noted in the Secretary-General’s report, “[n]on -regression aims at ensuring that environmental protection is not weakened, while

progression aims at the improvement of environmental legislation, including by increasing the level of protection, on the basis of the most recent scientific knowledge.”^{xxx} The concern over regression seems to have been overcome, but the issue of progression — linked to the level of ambition and challenges ahead — needs further consideration as the process launched by Resolution 72/277 continues in the coming years.

(b) Analysis of the Substantive recommendations

— *On the role of UNEP:*

- a) reaffirms the role of the United Nations Environment Programme (UNEP) as the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment, and the role of the United Nations Environment Assembly (UNEA)*

Commentary: The Recommendations reaffirm UNEP’s and UNEA’s established roles within the UN System. As the Secretary-General’s Report notes: “[t]he role of UNEP as the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as the authoritative advocate for the global environment was reaffirmed in Agenda 21, the Nairobi Declaration on the Role and Mandate of UNEP and the outcome document of the Rio+20 Conference, entitled “The future we want”.^{xxxi}

Specifically, the Rio+20 outcome document, paragraph 88, invited the General Assembly, “to adopt a resolution *strengthening and upgrading* UNEP.” This was accomplished by Resolution 67/213 in the manner set out in paragraph 88 of the Rio+20 outcome document. Resolution 67/213 also created UNEA, by establishing universal membership in the Governing Council of the UNEP, with the mandate “to expeditiously initiate the implementation of the provisions contained in paragraph 88 of the outcome document in their entirety.”

The language on UNEP is no different from paragraph 88 of the Rio+20 outcome document, while adding language on UNEA “as the highest decision-making body on the environment” faced stiff opposition with the main argument that there are decision-making bodies, such as Conferences of the Parties to MEAs, that do not come under UNEA. Proposed language on consolidating UNEP’s headquarters in Nairobi also failed consensus. In sum, the Recommendations reiterate the roles of UNEP and UNEA, and call for the full implementation of paragraph 88, which remains far from satisfactory, particularly on following issues:

- **Funding:** Have secure, stable, adequate and increased financial resources from the regular budget of the United Nations and voluntary contributions to fulfil its mandate;
- **Empowerment:** Enhance the voice of UNEP and its ability to fulfil its coordination mandate within the United Nations system by strengthening UNEP engagement in key

United Nations coordination bodies and empowering UNEP to lead efforts to formulate United Nations system-wide strategies on the environment;

- **Science:** Promote a strong science-policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environment Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making;
- **Information:** Disseminate and share evidence-based environmental information and raise public awareness on critical as well as emerging environmental issues;
- **Capacity -building:** Provide capacity-building to countries, as well as support and facilitate access to technology;
- **Consolidation:** Progressively consolidate headquarters functions in Nairobi, as well as strengthen its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the United Nations system; and
- **Stakeholders:** Ensure the active participation of all relevant stakeholders drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society.

In particular, the proper funding is “critical for UNEP’s visibility, credibility and ownership of the activities that contribute to the execution of its mandate,”^{xxxii} but was not specifically addressed in the Recommendations. As seen in the charts below, UNEP’s very modest funding has increased slightly, mostly as a result in earmarked contributions, while the UN regular budget allocation have also increased but remain at 4 percent of the overall income.^{xxxiii}

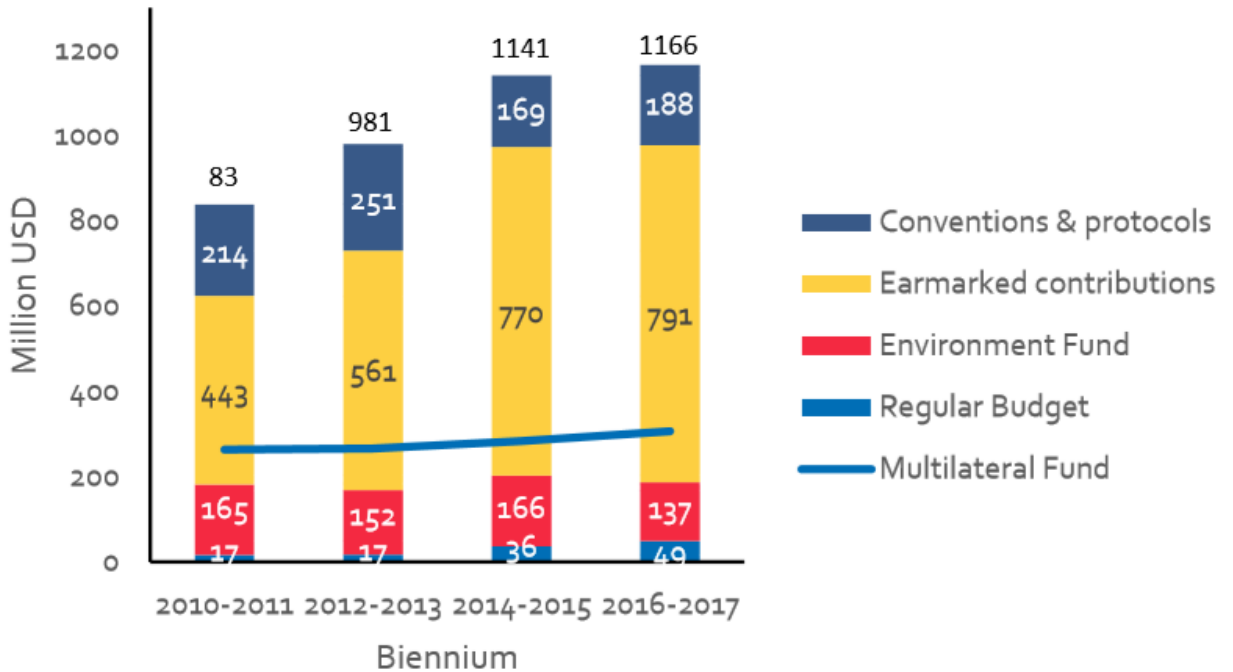


Figure 1: UNEP’s overall income between 2010-2011 and 2016-2017 - Source: Niko Urho, Maria Ivanova, Anna Dubrova, International Environmental Governance (Nordic Council of Ministers, 2019)

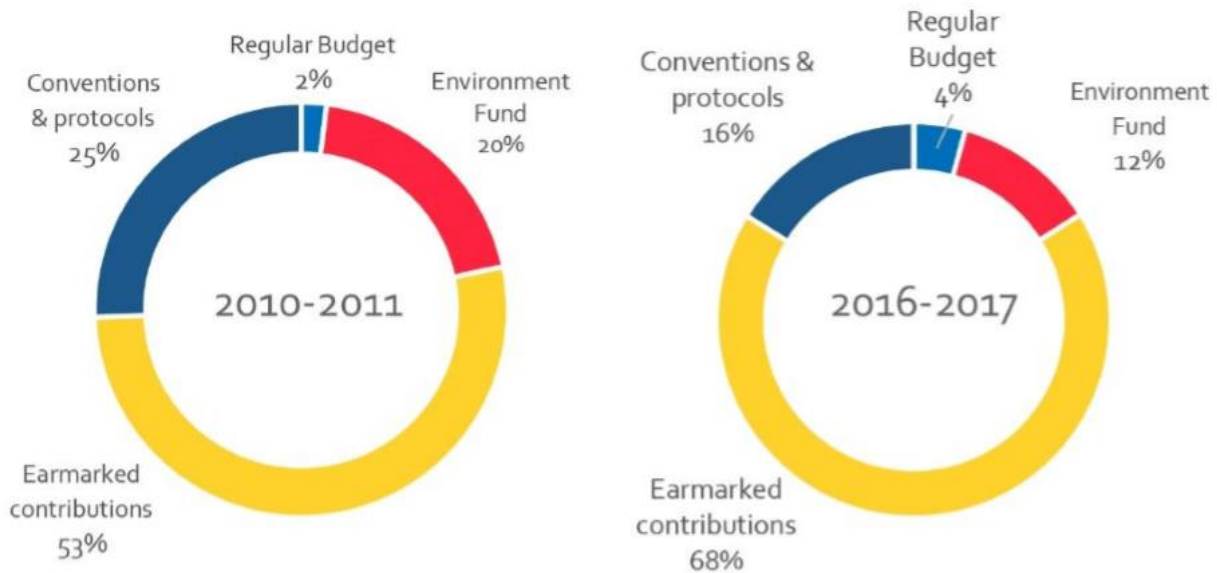


Figure 2: Share of UNEP’s funding elements in 2010-2011 and 2016-2017 - Source: Niko Urho, Maria Ivanova, Anna Dubrova, International Environmental Governance (Nordic Council of Ministers, 2019)

— *On Means of Implementation:*

- b) calls for renewed efforts at all levels to enhance the implementation of existing obligations and commitments under international environmental law, stressing the importance of enhanced ambition regarding means of implementation, including the provision and mobilization of all types and sources of means of implementation, consistent with the Addis Ababa Action Agenda and the 2030 Agenda for Sustainable Development*

Commentary: The level of ambition regarding means of implementation was a fundamental topic in the Nairobi consultations. ICEL applauds that the Recommendations strongly emphasize the provision of, and access to, means of implementation — such as financial resources, environmentally sound technologies and technical and institutional capacities — as the critical variable in the effective implementation of commitments and compliance with international environmental law.^{xxxiv}

On this topic, the barriers are well identified in the Secretary-General’s Report, as follows: “Generally, funding for implementation remains insufficient, unpredictable and incoherent, and varies considerably among the different regimes. On the other hand, the barriers facing the effective transfer of environmentally sound technologies include the limited information and decision-support tools required for transfer; inadequate arrangements for the protection of patents and other intellectual property rights; the lack of cooperation among governments, corporations and the financial community with regard to investing in and making available environmentally sound technologies; and the inadequacy of systems for collecting, synthesizing and reporting back information and knowledge on such technologies.”^{xxxv}

The Recommendations recognize that effective implementation of existing obligations and commitments under international environmental law requires efforts in education, technical assistance, and importantly, financial assistance.^{xxxvi} Significantly, nearly all international environmental law regimes are but minimally funded today. While adequate financial mechanisms and the provision of technical and technological assistance and capacity-building are key to enable compliance and implementation with MEAs.^{xxxvii} Indeed, effective implementation of MEAs requires strategic investment. Existing funding of MEAs needs to be re-evaluated and additional funding provided. As long as each separate MEA has its own scarce funding stream, there will be “duplications and contradictions” within the system.^{xxxviii}

States recognized the need for additional funding over three decades ago, in Agenda 21 (Chapter 33), particularly for the developing countries. The Recommendations reaffirm the Addis Ababa Action Agenda of the 3rd International Conference on Financing for Development, endorsed by the General Assembly on 27 July 2015, which is an integral part of the 2030 Agenda. The Addis Ababa Action Plan can be advanced by reference to strengthening implementation of international environmental law. Accelerated international cooperation is needed to attain both the Addis Ababa Action Agenda and the SDGs.

ICEL submits that enhanced ambition regarding means of implementation for sustainable development will require resources at a scale comparable to what States provide to their defense

agencies. Climate change impacts will bring disruptions to all States. However, given the need to invest to build resilience and prepare, there is an unequal situation in the case of developing nations, especially small island States.^{xxxix} Developing nations have also played a leading role in the design and implementation of new environmental law as they have seen factual evidence of environmental harm.^{xl} Thus, enhanced ambition regarding means of implementation is warranted to react, respond, strengthen resilience, and deliver the 2030 Agenda for Sustainable Development.^{xli}

— *On Principles of International Environmental Law:*

- c) recognizes the role of discussions on principles of international environmental law for enhancing the implementation of international environmental law, also noting the ongoing work in the International Law Commission on general principles of law*

Commentary: The discussion on principles of international environmental law, mainly whether or not to codify such principles in an instrument, if appropriate, and, “if deemed necessary, the scope, parameters and feasibility of an international instrument,” and whether to convene “an intergovernmental conference to adopt an international instrument,” under the mandate of Resolution 72/277, were among the most controversial topics during the consultations.

Without clear consensus on the way forward in this respect, the consultations settled on “*recognizes*” the role of discussions on principles of international environmental law for enhancing the implementation of international environmental law. Thus, the compromise language recognizes the importance of the topic, which implies further discussion, but without specificity or clear path forward. Nonetheless, the synthesis of the status of the principles set forth in the Secretary-General’s Report, and the ensuing consultations, provide guidance on convergence and divergence in views. The five convergence topics, borrowing from the Report, are:

- i. Principles of international environmental law are an important building block and their usage is widespread. Some are included in non-binding instruments, including political instruments, while others are enshrined in issue-specific multilateral environmental agreements that are legally binding. When enshrined in such agreements, the scope of the principles is confined to that particular multilateral environmental agreement.^{xliii}
- ii. More generally, environmental principles also serve to supplement or complement more specific rules. The general character of the principles permits their application to the continuously evolving interrelationships between human activity and the environment.^{xliii}
- iii. Several international courts and tribunals have confirmed the existence of rules of customary international law relating to environmental protection, in particular the obligation to prevent environmental harm beyond national jurisdiction, the performance of due diligence, the duty to conduct an environmental impact assessment and the obligation of reparation for environmental damage.^{xliv}
- iv. There are important deficiencies with respect to principles of international environmental law, in particular with respect to their content and legal status. There are instances where

there is no clarity as to the nature and content of a principle, or no judicial consensus as to its applicability, or no recognition in binding legal instruments, or all of the above. The degree of legal uncertainty surrounding many of these principles has a direct and indirect impact on the predictability and implementation of sectoral environmental regimes.^{xlv}

- v. There is a need to further clarify the principles of environmental law, without prejudice to the legal developments already achieved in the issue-specific contexts of various multilateral environmental agreements.^{xlvi}

On divergence, the two key issues are whether “[a] comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation” and whether “[a] comprehensive and unifying international instrument that gathers all the principles of environmental law could provide for better harmonization, predictability and certainty.”^{xlvii}

It is manifest from the consultations that follow-up work on principles is warranted in order to advance in the implementation of international law. Particularly, the deliberations on principles did not fully evaluate which ones are widely accepted and which ones are emerging. Of the former, it would be appropriate to consider where more than one expression of the principle is found and provide for better harmonization, predictability and certainty in international environmental law. Some emerging principles may be important enough to acknowledge in a declaration as the progressive development of the law is necessary as real-world conditions change.

As noted in the Co-Chairs’ summary of the second substantive session, many delegations understand “the added value of codifying or compiling principles to support implementation at all levels, improve consistency and facilitate interpretation, including by developing a common understanding,” of the challenges and solutions posed by environmental degradation and sustainable development. As discussions on principles continue, ICEL observes that it would be effective and productive to employ the two-tier approach to consider widely applicable and agreed-upon principles, such as those based on the 1972 Stockholm Declaration, the World Charter for Nature and the 1992 Rio Declaration, as well as those embodied in the 2030 Agenda outcome document, and clarifying emerging ones, such as the non-regression principle.

Acknowledging broad consensus on guaranteeing that the consultations do not undermine existing instruments, bodies and processes, there is no risk associated with compiling and refining existing principles. In this respect, ICEL has provided Member States with the tools that enable overview of existing environmental law commitments, in cooperation with the Vance Center of the New York City Bar and the international law firm of White & Case. ICEL has assembled this information in a set of Charts (“ICEL Charts”) available at <https://libraryguides.law.pace.edu/icel>.

The Charts identify general principles that have already been adopted within MEAs and regional agreements. They include: the African Union (AU), the Association of South East Asian States (ASEAN), the Caribbean Community (CARICOM), the Commonwealth of Independent States (CIS), the League of Arab States (Arab League), the Organization of American States (OAS), the South Asian Cooperative Agreement (SACEP) and the Pacific Islands Forum. ICEL has also assembled a Chart indicating the legal foundation provided by these agreed principles of

international environmental law for each of the SDGs. The ICEL Charts reveal the consensus on principles and objectives in international environmental law.

Finally, ICEL salutes the reference to the work of the UN International Law Commission. ICEL follows closely the work of the International Law Commission on the progressive development of international law and its codification. Indeed, on May 30, 2019, ICEL held an informal discussion on the Recommendation with members of the ILC. The work of the ILC is different from the processes by which States cooperate to define how to advance sustainable development in new ways, however. In any event, ultimately the ILC reports directly to the General Assembly, and some of ILC's work awaits consideration by the Assembly. Therefore, to continue the discussion on principles, "*also noting the ongoing work in the International Law Commission on general principles of law,*" provides an adequate and valuable guidance on the way forward.

— *On Strengthening the Science-Policy Interface*

- d) invites the scientific community to further their work on interconnected and crosscutting issues by sharing information among the leading scientific, technical and technological bodies that inform the work of Multilateral Environmental Agreements and environmental processes, as well encourages the scientific, technical and technological bodies to strengthen cooperation among themselves*

Commentary: This recommendation clearly ties in with Rio+20 outcome Paragraph 88 (d), which call on UNEP to "[p]romote a strong science-policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environment Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making." Science-policy assessment processes include most importantly, aside from the GEO, the Global Sustainable Development Report, the Intergovernmental Panel on Climate Change, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, the International Resources Panel, the Global Land Outlook produced by the UN Convention to Combat Desertification Secretariat, and the World Ocean Assessment.^{xlviii} Such processes have become key mechanisms to input knowledge and advice to Member States, the UN System, and bodies of MEAs on global environmental issues.

UNEA has adopted resolutions on the science-policy interface that emphasize the role of such assessments, however, "[t]he extent to which UNEP is delivering on its science-policy mandate has been questioned, due to the lack of core funding."^{xlix} The same would be true for specialized agencies and the entire UN System, particularly the HLPF on the follow-up of the 2030 Agenda with the Global Sustainable Development Report. Connecting science and policy through networks and platforms at all levels can be pursued by harnessing "big data" in open, transparent ways. As noted in a previous ICEL Notes, attention should be devoted to how such databases should link scientific and policy-related databases to improve interdisciplinary, integrated and cross-cutting approaches, and to harness big data initiatives, as well as supporting expert commissions in the relevant disciplines needed to strengthen the implementation of international environmental law. These could include academies of science and other scientific bodies and other networks, IUCN's expert commissions, and regional bodies.

— *On Governance and Effectiveness of MEAs:*

- e) *invites the governing bodies of the Multilateral Environmental Agreements, while preserving their independence and respective mandates, to increase their efforts to promote policy coherence across environmental instruments at all relevant levels and to consider identifying and addressing implementation challenges in their regimes, with a view to strengthening implementation at the national and international level*
- f) *invites the governing bodies and secretariats of Multilateral Environmental Agreements to enhance cooperation and collaboration among themselves within the scope of their respective mandates, as well as between them and UNEP and UNEA, building on work already done*
- g) *encourages the governing bodies of Multilateral Environmental Agreements and scientific, technical and technological bodies to exchange information and experiences, including with a view to considering the streamlining of reporting and/or monitoring processes*
- h) *encourages all that have not done so to consider ratifying Multilateral Environmental Agreements and to effectively implement them*

Commentary: On the issue of governance and effective implementation of MEAs, the consultations quickly gained constructive consensus. To be sure, the severity of the state of the environment, evidences the critical need for coherence within the MEAs.¹ As noted in the Secretary-General’s Report, “[t]he proliferation of multilateral environmental agreements and the resultant distinct and separate mandates ignore the unity, interconnectedness and interdependence of the Earth’s ecosystem.”^{li} Further, the multiplicity of agreements has made it difficult for States to provide sufficient national civil servants and diplomats to participate in all the international regimes. It has also led to concerns about legal inconsistencies and institutional fragmentation^{lii} and a lack of legal certainty.

International environmental law has evolved rather quickly over the last four decades. There are more than 500 international environmental agreements^{liii} that directly or indirectly relate to the environment. This variety of normative instruments cover a diverse spectrum of issues, such as loss of biological diversity, atmospheric pollution, the deterioration of the oceans or the soil, or the problem of deforestation, among many others.^{liv} To this profusion of norms, a plethora of policymaking organs has to be added to complete the dominant heterogeneity. Indeed, the MEAs have created their own specific set of institutions (such as the Conference of the Parties, Secretariats, etc.) to ensure the proper functioning of the agreements.^{lv} Thus, there is “potential for overlap and conflict, institutional and policy incoherence and increased financial and administrative burdens on States parties.”^{lvi}

The difficulty lies in making significant progress in the responses to these problems. While some efforts have been made to ensure mutual supportiveness among MEAs, “[m]ore efforts could be made to establish or strengthen mechanisms to harness interlinkages and promote synergies for more effective implementation,”^{lvii} ICEL notes that the Recommendations, formulated as a weak

“invitation” for the governing bodies of MEAs to “increase their efforts” do embrace suggestions to enhance synergies processes and clustering efforts of related MEAs — for example those dealing with atmosphere, or biodiversity, or chemicals and wastes— to improve policy coherence and ensure mutually supportive implementation.^{lviii}

As noted the Secretary-General’s Report, “[i]nstitutional fragmentation and weak coordination between treaties can be addressed through various means, such as: (a) creating clusters and synergies between conventions; (b) mapping existing global and regional action plans and agreements to create an overview of coverage and identify interlinkages; (c) avoiding duplication of reporting and/or monitoring processes by using the same reporting channels and not creating additional burdens (“integrated reporting”); (d) sharing lessons learned and best practices; (e) developing implementation guidelines for multilateral environmental agreements; and (f) sharing information among the different scientific bodies that support the work of related multilateral environmental agreements.^{lix} Further, enhanced coordination is necessary not only within the field of international environmental law, but also between MEAs and environment-related instruments.”^{lx}

On the strengthening of governance of international environmental law, particularly to overcome lack of coherence and cooperation between the different MEAs, there is also a clear reference on the need for concrete recommendations by the General Assembly for the full implementation of paragraph 89 of the Rio+20 outcome document. ICEL submits that such recommendations must underscore due care not to undermine specific regulatory regimes, avoid duplication, and respect the interdependence of each instrument and body. The OEWG has reaffirmed this notion and reiterated that any deficiencies identified under specific regimes are addressed in the context of each specific agreement, an explicit recognition that existing sector-specific agreements present specific law to be applied, *lex specialis*, and therefore have priority and should not be undermined.

— *On Implementation challenges:*

- i) encourages States members of the United Nations and all members of the specialized agencies to strengthen, where needed, environmental laws, policies and regulatory frameworks at the national level, as well as the capacities across all sectors for the effective implementation of international environmental law, including the administrative and justice sectors in accordance with national legal systems, while acknowledging the importance of international cooperation in supporting and complementing national actions*
- j) encourages States members of the United Nations and all members of the specialized agencies to mainstream environment into sectoral policies and programs at all levels, including into national development and sustainable development plans, to enhance the implementation of international environmental law and applicable environment-related instruments*

- k) encourages active and meaningful engagement of all relevant stakeholders at all levels in the different fora related to the implementation of international environment law and environment-related instruments*
- l) explores further ways for States members of the United Nations and all members of the specialized agencies to support and make full use of the Fifth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V) adopted by the fourth session of the United Nations Environment Assembly, in order to foster the environmental rule of law and advance the implementation of environmental law at all levels*
- m) encourages the United Nations Environment Program, as Chair of the Environment Management Group (EMG) and in collaboration with the members of the Group, to continue to strengthen system-wide inter-agency coordination on environment and to call for active involvement and support of all EMG members for the implementation of system-wide strategies on the environment*

Commentary: Strengthening the implementation of both international and domestic environmental law was identified as the fundamental element to guarantee the effective protection of the environment. National implementation is constrained in many countries mostly by lack of appropriate national legislation, financial resources, environmentally sound technologies and institutional capacities.^{lxi} Implementation issues include “knowledge gaps; a lack of adequate means of implementation, such as finance, capacity-building or technology; the need for facilitation for compliance; a lack of coordination between relevant government departments as well as with other sectors; insufficient monitoring and law enforcement; a lack of political will; and the inadequate engagement of different stakeholders, such as civil society and women’s organizations.”^{lxii}

Most of these issues, and possible responses, have been discussed above in relation to other Recommendations. As noted above, coherence, synergy and coordination of MEAs could improve implementation at the national and international levels. Despite the fact that some agreements are self-executing, States must also enact implementing regulations and have the capacity to ensure adequate compliance, monitoring, and reporting. Another significant challenge is that different ministries and agencies may be responsible for the implementation of different MEAs.

The recognition of the daunting implementation challenge is important but nothing new. In 1992, Agenda 21 (chapter 8, Integrating environment and development in decision-making) addressed the lack of implementation and poor compliance with regulations and MEAs^{lxiii} by strengthening domestic laws and institutions and building up national capacity.^{lxiv} Solutions require promoting coordination, cooperation, legal support, education and training in environmental law matters, respecting the national priorities and specific conditions of each nation.

The recommendation to mainstream environment into sectoral policies and programs at all levels, including into national development and sustainable development plans is notable but, to be effective, this effort would also require involvement and commitment of non-State actors. As noted in the Secretary-General’s Report, “[n]ational implementation could be improved through

the mainstreaming of environmental considerations into other sectors and the enhanced participation of non-State actors in decision-making and implementation.”^{lxv}

The recommendation on encouraging “active and meaningful engagement of all relevant stakeholders at all levels” is as clear recognition of the growing role of non-State’s actors in the implementation of both environmental law and environment-related instruments. To be sure, non-State actors are increasingly participating in international environmental negotiations,^{lxvi} albeit often in an informal fashion, without clear rules regarding the scope of their involvement. Systems of international environmental law need to explore further how to observe Rio Declaration Principle 10, on “public participation in environment decision-making.”^{lxvii} In a world of social media and information technologies and artificial intelligence, it is possible also to engage such actors to participate in debates and crafting solution about environmental challenges.

This recommendation does not make any specific indication on how to advance the role of non-State actors in environmental matters, however. In this respect, the Report of the Secretary-General provides helpful analysis:

“Principle 10 of the Rio Declaration, Agenda 21 and the outcome document of the Rio+20 Conference, entitled “The future we want”, have underlined the important role of non-State actors such as major groups, women, children and youth, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community and farmers, as well as other stakeholders in the development and implementation of sustainable development policies. However, the scope and space for the participation of non-State actors in the international environmental legal process varies with the different treaty regimes. The preponderant mode of engagement of non-State actors is participation as observers in the negotiations that take place during the conferences of the parties to the multilateral environmental agreements, but *no clear and effective rules have been developed to facilitate their input regarding the negotiation process*. In specific instances, observers can participate in subsidiary bodies on an equal footing with parties, such as in partnerships structures. In regimes such as climate change and ozone, the scientific community has direct input into policy development through dedicated institutional mechanisms that provide independent and authoritative information upon which decisions can be based. *Very few regimes provide for public participation in the non-compliance procedures established to monitor, review and verify compliance with international obligations.*^{lxviii}

Thus, the rules and opportunities for meaningful and constructive engagement of non-State actors require urgent attention by all the relevant organs and bodies of the UN System, including the Specialized Agencies, UNEA, UNEP, and other pertinent programmes and funds, as well as the Governing Bodies of MEAs.

ICEL welcomes the recommendation that Member States and members of the specialized agencies support and make full use of the Montevideo Programme V adopted by UNEA-4^{lxix} in order to foster the environmental rule of law, and advance the implementation of environmental law at all levels, which would strengthen national implementation of the SDGs. To that end, ICEL recommends streamlining global coordination, and fully finance, Montevideo V. While the

Montevideo program is a global program for the development of environmental law in general under the auspices of UNEP, its mandate does not yet facilitate coordination of the national implementation efforts of the MEAs.

ICEL further recommends that, as part of streamlined global coordination of Montevideo V, serious consideration be given to strengthen efforts, and provide adequate funding, for consolidating and centralizing, as appropriate, the databases being created under the MEAs about national implementation of the SDGs and MEA undertakings. ICEL has cooperated in doing so for environmental laws around the world, through ECOLEX, an information service on environmental law operated jointly by FAO, IUCN and UNEP (see <http://ecolex.org>), InforMEA, the information portal facilitated by UNEP to access MEAs (<http://www.informe.org>), which includes a portal on the process launched by Resolution 72/277 (<https://globalpact.informe.org>). Similar cooperative databases could be established across many international organizations that address aspects of implementing the SDGs.

The final substantive recommendation calling for UNEP, as Chair of the Environment Management Group (EMG) and in collaboration with the members of the Group, to continue to strengthen system-wide inter-agency coordination on environment, responds to concerns voiced by many that the EMG is “limited in effectiveness or scope.”^{lxx} Indeed, membership of the EMG consists of 51 specialized agencies, programmes and organs of the UN system, including the secretariats of MEAs, a colossal coordination task. There have been concerted efforts through the EMG, however, particularly “to build coherence among the biodiversity and chemicals regimes.”^{lxxi} Thus, ICEL celebrates that the recommendation calls for active involvement and support of all EMG members for the implementation of system-wide strategies on the environment.

As noted above, on the role of UNEP, Paragraph 88 of the Rio+20 outcome document calls for enhancing “the voice of UNEP and its ability to fulfill its coordination mandate within the UN system by strengthening UNEP engagement in key UN coordination bodies and empowering UNEP to lead efforts to formulate UN system-wide strategies on the environment.” Implementation of this paragraph has specifically focused on the EMG, “which is the primary coordination mechanism on environmental activities in the UN system established in 2001 pursuant to General Assembly Resolution 53/242 for the purpose of enhancing inter-agency coordination in the field of environment and human settlements.”^{lxxii}

Four main weaknesses of the EMG have been identified: lack of high-level political engagement, the negative perception of the EMG as an instrument of UNEP’s control, human and financial resource constraints, and lack of clarity of purpose and outcomes.^{lxxiii} In response, UNEP’s governing council and later UNEA-1 requested consideration of additional measures to strengthen UNEP’s voice and ability to fulfill its coordination mandate under the EMG. In this regard, both the Secretary-General and UNEP’s executive director have been “invited” to take necessary steps to enhance UNEP’s role in key UN coordination bodies and to identify possible measures to maximize the effectiveness and efficiency of the EMG. The EMG set up a task force consisting of members of UN agencies, which delivered a report for UNEA-2 in 2015 pointing out the need to update the terms of reference.

As a result of this effort, such terms have been revised to include the 2030 Agenda, and the EMG’s working modalities have been clarified in its rules of procedure. However, “[d]espite action taken by the EMG to increase the effectiveness and efficiency of its work, its functions remain ultimately the same.”^{lxxiv} Therefore, ICEL would suggest a thorough review of environmental coordination under the Secretary-General, including a review EMG’s mandate in relation to other UN environmental coordination bodies, such as UN-Water, to deliver a holistic approach to environmental issues and sustainable development.^{lxxv}

(d) Observations on the Consideration of Further Work

The working group recommends that the General Assembly:

- a) ***Circulates the above-mentioned recommendations and make them available to States members of the United Nations and members of Specialized Agencies and the Governing Bodies of Multilateral Environment Agreements for their consideration and action, as appropriate***
- b) ***Forwards these recommendations to the United Nations Environment Assembly for its consideration, and to prepare, at its fifth session in February 2021, a political declaration for a UN high level meeting subject to voluntary funding, in the context of the commemoration of the creation of UN Environment Programme by the United Nations Conference on the Human Environment held in Stockholm from 5-16 June 1972, with a view to strengthening the implementation of international environmental law, and international environmental governance in line with paragraph 88 of the “Future we Want”.***

Commentary: To begin, a brief note on the genesis of the consensus Recommendations regarding consideration of further work to strengthen the implementation of international environmental law and international environmental governance. The consensus text includes both a) proposal originated by the delegation of the United States of America to limit the outcome to solely circulating the recommendations to States and the secretariats of MEAs, and b) the Co-Chair’s initial suggestion on follow-up work (“zero draft”)^{lxxvi}, which was bracketed at the outset of the final round of consultations and referred to the informal group co-facilitated by the representatives of Colombia and Norway. Both proposals were considered during the final plenary.

Notably, subsection a) on circulating the Recommendations reads for “*consideration and action*” by all the Member States, and members of specialized agencies, and the governing bodies of MEAs. Regarding subsection b) on the follow-up process and outcome, “UN high level meeting” replaced “high level event”, short of “high level United Nations conference”, and retained “political declaration”, short of “adoption of an international instrument”. In addition, “taking into account” (the creation of UNEP and commemoration of the Stockholm Conference) changed to “in the context of”, while “subject to voluntary funding” was added. Regrettably, the reference to a preparatory committee, prior to holding said meeting, was deleted leaving uncertainty on the preparatory work during 2020-2021.

The consensus text, while a significant first step in the UN process to strengthen the implementation of international environmental law and international environmental governance, raises important questions as to how to advance on the Recommendations, and on the process towards the UN high level meeting. Even so, the first step towards keeping the momentum is to advance the Recommendations for prompt “*consideration and action*” by all the Member States and all the relevant organs and bodies of the UN System — including specialized agencies, secretariat and the pertinent programmes and funds — and the governing bodies of MEAs. ICEL also suggests forwarding the Recommendations to the HLPF for consideration in the upcoming meetings in 2019, in July, under the auspices of ECOSOC, and in September, for the first time, under the auspices of the General Assembly.

ICEL respectfully offers two suggestions on the way forward to prepare for UNEA-5, in February 2021, and the UN high level meeting in the context of the 50th commemoration of the creation of the UNEP by the United Nations Conference on the Human Environment in 2022. First, it would be appropriate for the General Assembly and all the relevant organs and bodies of the UN System and governing bodies of MEAs, to develop follow-up processes on the Recommendations to have meaningful input for UNEA-5 and the HLPF. Since a multifaceted response is called for, ICEL would encourage developing concrete actions to address the Recommendations, as well as the means and actors with authority to act on the solutions.

Second, for an adequate preparatory process leading to the UN high level meeting to commemorate 5 decades of UN commitment to environmental stewardship and sustainable development, ICEL proposes that the General Assembly establish a preparatory committee for the 2022 anniversaries, with the mandate to draft decisions and a declaration that would contribute to implementation of the SDGs, taking into account the input from UNEA-5 on strengthening the implementation of international environmental law and international environmental governance. By 2022 we shall have seven years of experience in working to attain the SDGs by 2030, and the encouragement of a new Declaration would stimulate the additional cooperation needed to attain the SDGs.

ICEL’s recommendation for the establishment of the preparatory committee for the 2022 anniversaries is based on the fruitful intergovernmental processes leading to the Stockholm, Rio and Johannesburg Declarations. To prepare the Stockholm Conference on the Human Environment in 1972, a preparatory committee was charged with the preparation of draft decisions for the conference.^{lxxvii} Similarly, UNGA Resolution 44/228, which decided to convene the Rio Conference on Environment and Development in 1992, established a preparatory committee to prepare draft decisions that held four sessions between 1990-1992.^{lxxviii} And the UN Commission on Sustainable Development acted as the preparatory committee for the 2002 Johannesburg World Summit on Sustainable Development and held three sessions between 2001-2002.^{lxxix}

These two suggestions on follow-up work could provide the basis for a momentous UN High Level meeting and global declaration in 2022 for the 50th anniversary of the Stockholm Declaration and the creation of the UNEP, the 30th anniversary of the Declaration of Rio de Janeiro on Environment and Development, and the 20th anniversary of the Declaration of Johannesburg on Sustainable Development. Such a timeframe for a new global declaration would also be timely for the mid-term review of the SDGs and the 2030 Sustainable Development Agenda. ICEL is

gratified to see how these declarations have advanced the framework for sustainable development in all nations.

While Member States took the transformative leap of adopting the SDGs and the 2030 Agenda, ICEL observes that the Stockholm, Rio, and Johannesburg Declarations, as well the World Charter for Nature (UNGA Res. 37/7), and other subsequent declarations and instruments in the context of sustainable development are not fully aligned with the new transformational and universal vision set forth in the 2030 Agenda. The General Assembly acknowledged that “[t]he challenges and commitments identified at these major conferences and summits are interrelated and call for integrated solutions,” and stated: “To address them effectively, a new approach is needed.” (A/RES/70/1, para. 13). A robust global declaration on the environment and sustainable development in 2022 would be a way to express that new approach.

ICEL was already 2 years old when the General Assembly convened the Stockholm Conference. Environmental Law was born in that year, laying the basis for the concept of sustainable development. Much has been achieved to fashion “the world we want,” but even more remains to be done in order to implement nationally and regionally the UN’s multilateral cooperation on sustainable development.

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This is ICEL’s fifth submission for consideration in the process launched by Resolution 72/277, to follow-up on the initial Note of 10 December 2018 on the Report of the Secretary-General entitled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment” (A/73/419); a second Note on the agreed principles that provide a foundation for restating a common aspiration and global vision for sustaining Earth’s shared biosphere, dated 10 January 2019; a third Note on options to address gaps under Resolution 72/277; and, a fourth Note on elements for consensus on draft recommendations, dated 12 April 2019. The ICEL Notes may be accessed on the website of the Law Library at the Elisabeth Haub School of Law, NY, at (<https://libraryguides.law.pace.edu/icel>), see also, <http://icel.international>.

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- ⁱ ICEL was founded in New Delhi in 1969 and is constituted under Article 60 of the Swiss Civil Code (Canton of Geneva). It has been accredited to the UN Economic and Social Council (ECOSOC) since 1973, and maintains representatives in Bonn, Geneva, Nairobi, and New York. It is a Member of IUCN. Contact via ICEL Executive Governor at nrobinson@law.pace.edu.
- ⁱⁱ A/RES/72/277, available at <https://undocs.org/A/RES/72/277>.
- ⁱⁱⁱ See Recommendations, at <https://www.unenvironment.org/events/conference/towards-global-pact-environment>.
- ^{iv} See <https://www.unenvironment.org/resources/global-environment-outlook-6>, Summary for Policy-Makers at 4.1. See also, *Global Land Outlook* produced by the UN Convention to Combat Desertification Secretariat in 2017: “Scientific knowledge on dryland production systems remains underdeveloped and is often side-lined in favor of management approaches that have been developed for humid lands. This is compounded by inadequate data on dryland environments and economies, which allow important decisions to be made in an information vacuum”; <https://knowledge.unccd.int/publication/full-report>, at 64; see also the first World Ocean Assessment: https://www.un.org/Depts/los/global_reporting/WOA_RegProcess.htm; “Knowledge Gaps” are identified at 42 to 47.
- ^v Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)(May 2019), available at <https://www.ipbes.net/global-assessment-report-biodiversity-ecosystem-services>.
- ^{vi} Recommendations, 3 (a) (emphasis supplied).
- ^{vii} See UN Secretary-General’s Report on “Gaps in International Environmental Law and Environment-Related instruments: Towards a Global Pact for the Environment” (A/73/419, 30 November 2018), at <https://globalpact.informea.org/report>.
- ^{viii} *Id.*, para. 23; see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990); see also Elinor Ostrom, “Polycentric systems for coping with collective action and global environmental change”, *Global Environmental Change*, vol. 20, No. 2 (October 2010); see Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford University Press, 2003).
- ^{ix} First version, Draft recommendations “zero draft” (dated May 20, 2019), presented during the beginning of the second day of consultations, with revisions to sections one and two of the non-paper, in response to suggestions from delegations during the first day. Section three of the “zero draft”, on consideration of further work, was placed in brackets pending informal group consultations, co-facilitated by Elizabeth Taylor (Colombia’s representative) and Solveig Crompton (Norway’s representative). Second version, revised Draft recommendations (dated May 21, 2019), again with revisions to sections one and two, input for the final day of the meeting. Third version, revised Draft recommendations (dated May 22, 2019), included further revisions to sections one and two, and a rethought section three, upon which final consensus was reached, after certain amendments were negotiated at the closing plenary. See <https://www.unenvironment.org/events/conference/towards-global-pact-environment>.
- ^x See Edith Brown Weiss, Intergeneration Equity, in *Global Pact for the Environment, Legal Foundations* (herein “GPE Legal Foundations”)(Cambridge University, C-EENRG report 2019-1, march 2019), available at <https://globalpactenvironment.org/uploads/Aguila-Vinuales-A-Global-Pact-for-the-Environment-Cambridge-Report-March-2019.pdf>
- ^{xi} Principle 1 of the Declaration of the United Nations Conference on the Human Environment in 1972, available at <http://www.un-documents.net/unchedec.htm>.
- ^{xii} Report of the WCED (Brundtland Commission), *Our Common Future* (1987), 51.
- ^{xiii} See <http://www.un-documents.net/rio-dec.htm>.
- ^{xiv} ICEL & IUCN, *Draft international Covenant on Environment and Development* (Fifth Edition 2015), available at: https://sustainabledevelopment.un.org/content/documents/2443Covenant_5th_edition.pdf.
- ^{xv} See Edith Brown Weiss, Intergeneration Equity, in *GPE Legal Foundations*, supra. at 51 (emphasis supplied).
- ^{xvi} *Id.*
- ^{xvii} UN Secretary-General’s Report (A/73/419), supra, para. 113.
- ^{xviii} Virginie Barral and Pierre-Marie Dupuy, Sustainable Development and Integration, in *GPE Legal Foundations*, supra, p. 44.
- ^{xix} UN Secretary-General’s Report (A/73/419), supra, para. 20.
- ^{xx} *Id.*
- ^{xxi} Cristina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law*, (Martinus Nijhoff, 2009), p. 186.
- ^{xxii} Supreme Court of the Philippines in *Oposa Minors et al v. Factoran, G.R. No. 101083 July 30, 1993* (emphasis supplied).
- ^{xxiii} *Id.* See also Opinion and Order of November 10, 2016 by US District Judge A. Aiken in *Juliana et al v US et al – Case No.6:15-cv-01517-TC*: “This action is of a different order than the typical environmental case,” ... “It alleges that the defendant’s action and inactions ... have so profoundly damaged the home planet that they threaten [the] plaintiffs’ fundamental constitutional rights to life and liberty.” “No doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society ... a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress”.
- ^{xxiv} UN Secretary-General’s Report (A/73/419), supra, para. 20.
- ^{xxv} *Id.*, para. 7.
- ^{xxvi} M. Kamau, P. Chasek, D. O’Connor, *Transforming Multilateral Diplomacy – The Inside Story of the Sustainable Development Goals* (Routledge, 2018).
- ^{xxvii} UN Secretary-General’s Report (A/73/419), supra, para. 20.
- ^{xxviii} *Id.*, para. 60.

- ^{xxix} See Marcos Orellana, Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration, *Review of European, Comparative and International Law*, vol. 25, No.1 (2016).
- ^{xxx} UN Secretary-General's Report (A/73/419), *supra*, para. 22.
- ^{xxxi} *Id.*, para. 78.
- ^{xxxii} Niko Urho, Maria Ivanova, Anna Dubrova and Natalia Escobar-Pemberthy, *International Environmental Governance* (Nordic Council of Ministers), p. 40, available at <https://www.norden.org/en/publication/international-environmental-governance>.
- ^{xxxiii} *International Environmental Governance*, *supra*, pp. 33-40.
- ^{xxxiv} UN Secretary-General's Report (A/73/419), *supra*, para. 87.
- ^{xxxv} *Id.*, para. 88 (emphasis supplied).
- ^{xxxvi} See UNEP, *Training Manual of International Environmental Law. 4. Compliance and Enforcement of Multilateral Environmental Agreements*, <https://autlawiel.files.wordpress.com/2014/10/unesp-tm-ch-4-compliance-and-enforcement-of-multilateral-environmental-agreements.pdf>.
- ^{xxxvii} An example of a very effective funding mechanism, is the Multilateral Fund for the Implementation of the Montreal Protocol, with a total budget of US \$540 million for the 2018-2020 triennium, plus additional voluntary contributions. See Multilateral Fund for the Implementation of the Montreal Protocol, <http://www.multilateralfund.org/default.aspx>.
- ^{xxxviii} Adil Najam, Mihaela Papa, Nadaa Taiyab, "Global Environmental Governance. A Reform Agenda", IISD, Ministry of Foreign Affairs of Denmark, 2006, p. 53.
- ^{xxxix} Lavanya Rajamani, The changing fortunes of differential treatment in the evolution of international environmental law, in *International Affairs*, 88.3 (2012), 605-623, p. 623.
- ^{xl} See, e.g., Parvez Hassan, "Role of the South in the Development of International Environmental Law," *Chinese Journal of Environmental Law* 1 (2017) 133-157; and Adil Najam, "Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement," in *International Environmental Agreements: Politics, Law and Economics* (September 2005), Volume 5, Issue 3, pp 303-321.
- ^{xli} Nicholas Robinson, Principle of Resilience, in *GPE Legal Foundations*, *supra*, p. 137.
- ^{xlii} UN Secretary-General's Report (A/73/419), *supra*, para. 9.
- ^{xliii} *Id.*, para. 10.
- ^{xliv} *Id.*, para. 101.
- ^{xlvi} *Id.*, para. 102.
- ^{xlv} *Id.*
- ^{xlvii} *Id.*
- ^{xlviii} See <https://www.unenvironment.org/resources/global-environment-outlook-6>, Summary for Policy-Makers; <https://sustainabledevelopment.un.org/globalsdreport>; <https://www.ipcc.ch/>; <https://www.ipbes.net/global-assessment-report-biodiversity-ecosystem-services>; <https://knowledge.unccd.int/publication/full-report>; https://www.un.org/Depts/los/global_reporting/WOA_RegProcess.htm; <https://resourcepanel.org/>.
- ^{xlix} See *International Environmental Governance*, *supra*, p. 47.
- ^l See Ivanova, Maria. "Global governance in the 21st century: rethinking the environmental pillar." Stakeholder Forum (2011).
- ^{li} UN Secretary-General's Report (A/73/419), *supra*, para. 80.
- ^{lii} Pauwelyn, Joost. "Bridging fragmentation and unity: International Law as a universe of inter-connected islands." *Mich. J. Int'l L.* 25 (2003): 903.
- ^{liii} Kanie, Norichika. "Governance with Multilateral Environmental Agreements: A Healthy or Ill-equipped Fragmentation?" *Green Planet Blues: Critical Perspectives on Global Environmental Politics* (2014): 137. UN Secretary-General's Report (A/73/419), *supra*, para. 79.
- ^{liv} Geoffrey Palmer, "New Ways to Make International Environmental Law", 86 AM. J. INT'L L. 259, 263 (1992).
- ^{lv} Indeed, international environmental institutions acquire their own character once they are established and start functioning. See Desai, Bharat. *Institutionalizing International Environmental Law* (Transnational Publishers, 2004).
- ^{lvi} UN Secretary-General's Report (A/73/419), *supra*, para. 80.
- ^{lvii} *Id.*
- ^{lviii} *Id.*
- ^{lix} *Id.*, para. 83 (noting that "Potential conflicts between treaty regimes can be managed by using legal means, including conflict clauses, mutual supportiveness or the application of the general rule of treaty interpretation contained in article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties.").
- ^{lx} *Id.*, para. 81.
- ^{lxi} UN Secretary-General's Report (A/73/419), *supra*, para. 111.
- ^{lxii} *Id.*, para. 86.
- ^{lxiii} Agenda 21 (chapter 8). See also The Montevideo Program, <https://www.unenvironment.org/explore-topics/environmental-governance/what-we-do/strengthening-institutions-0>.
- ^{lxiv} UNEP, *Possible Elements for a Programme in the area of Environmental Law for a Specific Period Beginning in 2020*, UNEP/ENV.LAW/MTV.4/FP.3, Geneva, 12-14 September 2018.
- ^{lxv} *Id.*
- ^{lxvi} Raustiala, Kal. "The participatory revolution in international environmental law." *Harv. Envtl. L. Rev.* 21 (1997): 537.
- ^{lxvii} See, for example, "World Wide Views on Climate and Energy," 10,000 citizens, 97 Debates in 76 countries (2015, Danish Board for Technology Foundation), organized through Missions Publiques, www.missionspubliques.com

^{lxviii} UN Secretary-General's Report (A/73/419), supra, para. 84 (citing two models: The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) of 1998 provides the broadest latitude for public participation through procedural rights granted to non-State actors by States parties as well as the opportunity to participate in the Convention's non-compliance mechanism. A similar approach was adopted in the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement) of 2018.).

^{lxix} See UNEP/EA.4/L.24.

^{lxx} UN Secretary-General's Report (A/73/419), supra, para. 81. See *International Environmental Governance*, supra, p. 41.

^{lxxi} UN Secretary-General's Report (A/73/419), supra, para. 81.

^{lxxii} See *International Environmental Governance*, supra, p. 41.

^{lxxiii} Id., p. 42.

^{lxxiv} Id., (noting that “[u]ntil recently, the work of the EMG was thematically driven and happened mainly through issue management groups and task forces (EMG, 2015). These bodies have helped to enhance the coherent delivery of many thematic issues, including biodiversity, drylands, sound management of chemicals, and green economy (EMG, 2015). However, they have not enabled the creation of a genuinely system-wide approach to the delivery of the environmental dimension of sustainable development.” Id., p. 43.

^{lxxv} Id., p.43.

^{lxxvi} See <https://www.unenvironment.org/events/conference/towards-global-pact-environment>.

^{lxxvii} Report on the Working Group on the Declaration of the Human Environment, Annex II, available at

https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1.

^{lxxviii} Rio Declaration on Environment and Development, UN Audiovisual Library of International Law, available at

http://legal.un.org/avl/pdf/ha/dunche/rio_ph_e.pdf.

^{lxxix} Report of the Commission on Sustainable Development acting as the preparatory committee for the 2002 World Summit on Sustainable Development, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/4&Lang=E.