1. Introduction

1.1 INTRODUCTION

Environmental principles are commonly used in international politics amongst a variety of actors including states, non-governmental organisations and multi-national corporations.\(^1\) In an empirically based study of global business regulation, which extended to environmental issues, Braithwaite and Drahos suggested that a significant volume of negotiations internationally is carried out using principles.\(^2\) Others like Kiss and Shelton write that ‘[p]rinciples are widely used in international environmental law, perhaps more than in any other field of international law’.\(^3\) Sands has also suggested that the environmental principles in his list have received broad, ‘if not necessarily universal, support and are frequently endorsed in practice’.\(^4\)

Interestingly, and despite the obvious importance of environmental principles at the international level, there is as yet no instrument binding under international law which sets out the general principles of international environmental law and politics.\(^5\) Historically, the Declaration that was

\(^1\) See for instance Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2005), who at 258 comments that environmental law is strongly ‘marked by the presence of principles compared with other legal disciplines’.


signed at the Stockholm Conference on the Human Environment in 1972 was the first effort at the international level to use the language of environmental principles to refer to a series of norms listed into an international instrument; the *Stockholm Declaration* contained 26 principles. It has been argued that the *Stockholm Declaration* was a turning point in terms of tackling environmental concerns at the international level. In his 1972 speech to the General Assembly of the United Nations, Maurice Strong, who later became the first Executive Director of the United Nations Environment Programme, made the following observation highlighting the significance that the principles had, at that time, for those who had drafted it:

> It is the first acknowledgement by the community of nations of new principles of behaviour and responsibility which must govern their relationship in the environmental era. And it provides an indispensable basis for the establishment and elaboration of new codes of international law and conduct which will be required to give effect to the principles set out in the Declaration.\(^7\)

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\(^5\) See the *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972) (‘*Stockholm Declaration*’). Much has been written on the significance of the Stockholm Conference on the Human Environment; for a general introduction see, for instance, Lynton Caldwell, *International Environmental Policy* (3rd ed, 1996) especially chapters 2 and 3; Louis Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14 *Harvard International Law Journal* 423; Birnie and Boyle, above n 5, 37–45. The idea that the *Stockholm Declaration* codified and listed environmental principles for the first time is not to suggest that the ideas contained within them were used for the first time only in 1972; for instance, Principle 1 refers to intergenerational equity: Edith Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (1992) 385–412; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989); Birnie and Boyle, above n 5, ch 3, especially section 2(2). However the ideas behind this principle were, for instance, mentioned as far back as 1946 in the *International Convention for the Regulation of Whaling* in what would now be a preamble to an international agreement; the Convention recognised ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’: *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

\(^6\) See the *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972) (‘*Stockholm Declaration*’). Much has been written on the significance of the Stockholm Conference on the Human Environment; for a general introduction see, for instance, Lynton Caldwell, *International Environmental Policy* (3rd ed, 1996) especially chapters 2 and 3; Louis Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14 *Harvard International Law Journal* 423; Birnie and Boyle, above n 5, 37–45. The idea that the *Stockholm Declaration* codified and listed environmental principles for the first time is not to suggest that the ideas contained within them were used for the first time only in 1972; for instance, Principle 1 refers to intergenerational equity: Edith Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (1992) 385–412; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1989); Birnie and Boyle, above n 5, ch 3, especially section 2(2). However the ideas behind this principle were, for instance, mentioned as far back as 1946 in the *International Convention for the Regulation of Whaling* in what would now be a preamble to an international agreement; the Convention recognised ‘the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’: *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).


\(^8\) Quoted in Sohn, above n 6, 431.
In some cases environmental principles contained in the *Stockholm Declaration* expanded on previous responses to the rights states had to their natural resources. For instance, Principle 21 of the *Stockholm Declaration* connected what had already been established during the 1960s as the sovereign right states had to their natural resources with the provision that the ‘activities within their jurisdiction or control’ should not ‘cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’. The principles contained in the *Stockholm Declaration* arguably formed the foundations for a variety of subsequent normative developments at the international and domestic level. A number of the principles in the *Stockholm Declaration*, when combined, highlight the concern at that time with sustainability, which served as the basis for the later codification of the principle of sustainable development at the international level. Principle 2 of the *Stockholm Declaration* referred to the rights of ‘future generations’ which is seen as the early conceptualisation of the intergenerational equity principle frequently referred to in international environmental law and politics.

The initiative to list environmental principles of international significance has since been followed in other instruments such as the 1982 United Nations General Assembly Resolution entitled the *World Charter for Nature*, and of greater importance, the 1992 *United Nations Declaration*

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9 See Principle 21 of the *Stockholm Declaration* which provides for ‘the sovereign right’ of states ‘to exploit their own resources pursuant to their own environmental policies’. In 1962 the UNGA had passed resolution 1803(XVII) acknowledging the sovereign right of states to their natural resources. This absolute right was limited in 1972 by Principle 21 of the *Stockholm Declaration* requiring that states take into account environmental concerns.

10 Daniel Magraw and Lisa Hawke, ‘Sustainable Development’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (2007) 613, 615. Magraw and Hawke, at 615, refer to Principles 1, 8, 11, 21 and 23 as the foundations for the development of the concept of sustainable development in international law. See also the statement by the UNGA when convening the Stockholm Conference on the Human Environment, where it wrote about ‘an urgent need for intensified action, at national and international level to limit, and where possible, to eliminate the impairment of the human environment’: *Problems of the Human Environment*, GA Res 2398, UN GAOR, 23rd sess, 1733rd plen mtg, UN Doc A/Res/2398 (1968).


12 *World Charter for Nature*, UN GAOR, GA Res 37/7, 48th plen mtg, UN Doc A/RES/37/7 (1982). The *World Charter for Nature* lists 5 environmental principles but, unlike the *Stockholm Declaration*, the resolution contains other parts that spell out the scope of the principles in terms of their function and implementation.
Nations Conference on Environment and Development in June 1992, which resolved in favour of the *Rio Declaration*, many multilateral agreements, declarations and resolutions amongst states have included articles listing relevant environmental principles in them.16 A variety of international courts and tribunals have considered environmental issues and applied international environmental law to resolving disputes.17 Several have referred to or decided cases drawing upon environmental principles.18 The precautionary principle has been considered

1988) (‘*Convention for the Protection of the Ozone Layer*’) and the *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 29 (entered into force 1 January 1989) (‘*Montreal Protocol*’), neither of which refers to the precautionary principle in the substantive provisions of the agreement; instead in both agreements there is a reference in their preambles to the ‘precautionary measure’.

16 This is not to suggest that before then international agreements did not refer to environmental norms that were potentially open-textured or abstract. In fact, Koskenniemi lists and discusses a number of international environmental agreements before 1992 which contained normative provisions that fail to develop concrete measure for actors to implement: see Martti Koskenniemi, ‘Peaceful Settlement of Environmental Disputes’ (1991) 60 Nordic Journal of International Law 73. Some examples he gives include: art 2(1) of the *Convention on the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 324 (entered into force 22 September 1988); and arts 192 & 193 of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (‘*UNCLOS*’). Examples of treaty provisions concluded in and after 1992 with explicit references to environmental principles include, for instance, art 3 of both the *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 165 (entered into force 21 March 1994), and the *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 143 (entered into force 29 December 1993). Two agreements that include reference to, for instance, the precautionary principles are art 4 of the *Stockholm Convention on Persistent Organic Pollutants*, opened for signature 22 May 2001, 40 ILM 532 (entered into force 17 May 2004), and art 6(3) and (5) of the *International Convention on the Control of Harmful Anti-fouling Systems on Ships*, opened for signature 5 October 2001, 40 ILM 532 (2001) (entered into force 17 September 2008).


18 Scholarly works examining environmental principles in international dispute resolution are usually of two different kinds. They either assess how a specific principle has been applied by tribunals or they are part of a broader analysis of a


The following cases decided by the ITLOS have dealt with environmental issues: Southern Bluefin Tuna (Provisional Measures) (1999) 38 ILM 1624 (‘Southern Bluefin Tuna’); MOX Plant (Provisional Measures) (2001) ITLOS No.10; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore) (Provisional Measures, Order of 8 October 2003) ITLOS No. 12. The Southern Bluefin Tuna case at paras [77]–[79], is the only case that has given serious consideration to the precautionary approach or principle: see Alan Boyle, ‘The Environmental Jurisprudence of the International Tribunal for the Law of the Sea’ (2007) 22(3) The International Journal of Marine and Coastal Law 369, 373–376.

The ICJ referred to the principle of sustainable development in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7, [140]. See chapter 6 of this book for a discussion of this principle in the context of the Danube Dam Case. The WTO Appellate Body in Shrimp Turtle II also discussed sustainable development in the context of Art XX(g) of the 1947 General Agreement on Tariffs and Trade, opened for signature 30 October 1947.
to and formulated versions of the basic notions found in Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declaration* relating to the obligations states have to avoid causing harm to the environment of neighbouring states. References to environmental principles are potentially even more common in written and oral pleadings before international courts and tribunals.

At the international level, environmental principles have also been codified in contexts that have relevance for actors other than states. In particular, transnational corporations have expressed interest in environmental principles codified into institutions at the international level that have been set up by states. Prominent examples of this include


22 For example, the ICJ in the following three cases discusses this principle: *Case Concerning Pulp Mills in the River Uruguay (Argentina v Uruguay), Request for the Indication of Provisional Measures*, Order of 13 July 2006, 45 ILM 1025, [72]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [29]; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, [140].

23 See for example the numerous references to and use made of the precautionary principle in the ‘Minutes of Public Sittings’ of the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v Japan)*, Provisional Measures (18 to 20 August 1999), www.itlos.org/start2_en.html. In the *Danube Dam Case*, the State of Hungary in its *Memorial of the Republic of Hungary in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* Vol 1 (2 May 1994), esp. Part III, www.icj-cij.org/docket/index.php?p1=3&p2=3&k=8d&case=92&code=has&p3=1 also made wide ranging references to environmental principles, including the precautionary principles, sustainable development, and environmental impact assessment.

24 At the United Nations, ‘transnational’ is the preferred term over ‘multinational’; see Viljam Engström, *Realizing the Global Compact* (2002) 5, who argues that a transnational corporation distinguishes itself from other corporations by being able to ‘locate production across national borders, to trade across frontiers, exploit foreign markets, and organize managerial structures in a way that affects the international allocation of resources’. See also Peter Muchlinski, *Multinational Enterprises and the Law* (1995); Luzius Wildhaber, ‘Some Aspects of the Transnational Corporation in International Law’ (1980) 27 *Netherlands International Law Review* 79. This discussion is based on the assumption that transnational corporations themselves choose how to engage with the principles prescribed for them at the international level. This is different, for instance, from something like the *Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12 (2003) which applies to transnational corporations after they have been adopted by the government of the country that they are incorporated in. Also, other actors
the Global Compact initiative of the United Nations,\textsuperscript{25} and the \textit{OECD Guidelines for Multinational Enterprises}.\textsuperscript{26} The \textit{OECD Guidelines for Multinational Enterprises} adopt provisions listing the expectations that member states have of transnational corporations.\textsuperscript{27} In the commentary on the Guidelines, the OECD highlights the fact that the environmental provisions ‘reflect the principles and objectives of the Rio Declaration’.\textsuperscript{28} The Global Compact initiative of the United Nations is markedly different from the \textit{OECD Guidelines for Multinational Enterprises} because it simply adopts three environmental principles to frame the learning initiatives developed within the regime.\textsuperscript{29} In the case of both these initiatives, states have used environmental principles developed to guide states for the purposes of giving direction to the behaviour of transnational corporations.

This brief description of the significant use of environmental principles at the international level is not meant to suggest that they are all the same in terms of historical relevance, substantive content or normative persuasiveness.

are not bound internationally to environmental principles, whether it be through soft or hard law. For instance, a number of efforts have been made by the United Nations Environment Programme to build the capacity of domestic judges in terms of applying environmental principles at the grassroots. Such initiatives are aimed at the application of environmental principles at the domestic rather than the international level; see for instance, United Nations Environment Programme, \textit{Judges Programme}, www.unep.org/Law/Programme_work/Judges_programme/index.asp; Environment News Service, \textit{Judges Fortify Environmental Law Principles} (2002) www.ens-newswire.com/ens/aug2002/2002-08-27-01.asp.

\textsuperscript{25} See the official website of the Global Compact, www.unglobalcompact.org.


\textsuperscript{28} The \textit{OECD Guidelines for Multinational Enterprises}, above n 26, at 29, point out that the provisions also take into account:

‘the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflects standards contained in such instruments as the ISO Standard on Environmental Management Systems.’

\textsuperscript{29} See United Nations Global Compact, \textit{The Ten Principles} (2008) www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html. The three environmental principles are: Principle 7, Businesses should support a precautionary approach to environmental challenges; Principle 8, undertake initiatives to promote greater environmental responsibility; and Principle 9, encourage the development and diffusion of environmentally friendly technologies. In relation to the Global Compact see chapter 8 of this book.
The fact that the *Stockholm Declaration* and the *Rio Declaration* list 26 and 27 environmental principles respectively does not necessarily mean that they all function in similar ways. The same environmental principles can receive different treatment from actors depending on the context in which they are employed. The precautionary principle, for instance appears in international agreements or treaties that are in force as part of international law. However, the principle also gets frequent mention in instruments that do not, according to Article 38(1)(c) of the *Statute of the International Court of Justice*, reflect international law. Some see the precautionary principle as an action-oriented rule, a directing principle, an environmental principle, or an approach. Yet there is doubt whether the precautionary principle is part of the customary practices of states and a norm of international law. Whether it is a norm of international law or not does not

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30 Over 50 multilateral agreements have incorporated the precautionary principle in them: see Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002) 63 et seq. Although the precautionary principle is used here other environmental principles are also deployed in similar ways in international law and politics. For instance the principle of common but differentiated responsibilities is the subject of very different use by scholars, diplomats and formally in international agreement; see Christopher Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *American Journal of International Law* 276.

31 There are many such examples, but the most prominent of these is Principle 15 of the *Rio Declaration*. Art 38(1)(c) of the *Statute of the International Court of Justice* is relied upon as the authoritative statement regarding the sources of international law: see Ian Brownlie, *Principles of Public International Law* (5th ed, 2003) 3–4.


33 de Sadeleer, above n 1, 266–274.

34 Sands, above n 4, 231.


appears to have an impact on the frequency of its use at the international level in terms of international politics. \(^\text{37}\)

There are a range of environmental principles contained within treaties or various statements of international conferences and international organisations. Since the *Stockholm Declaration* and the *Rio Declaration* no other significant multilateral soft law instrument has sought to categorise the relevant principles of global environmental governance. Some environmental principles have received greater attention in international law and politics and have been the subject of increasing commentary and critique. Different scholars have developed their own lists of important environmental principles using different criteria. Sands has developed a list of environmental principles that he claims are significant because they are ‘potentially applicable to all members of the international community across the range of activities which they carry out or authorise and in respect of the protection of all aspects of the environment’. \(^\text{38}\) They include:

1. the obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely, that states have sovereignty over their natural resources and the responsibility not to cause transboundary environmental damage;
2. the principle of preventive action;
3. the principle of co-operation;
4. the principle of sustainable development;
5. the precautionary principle;
6. the polluter-pays principle; and
7. the principle of common but differentiated responsibility. \(^\text{39}\)


\(^\text{38}\) Sands, above n 4, 231.

\(^\text{39}\) Ibid. It is important to point out that these particular principles are listed for illustrative purposes. Chapter 3 below discusses in more detail what environmental principles are and the constructed nature of the concept in international law and politics. Also, each principle listed here by Sands can appear in many different formulations across different multilateral agreements. For instance,
On the other hand Beder in a 2006 study examined six principles which had relevance for environmental policy makers.\textsuperscript{40} In this list she included, aside from the sustainability, precautionary and polluter pays principles, the principles of participation and equity as well as human rights principles more generally.\textsuperscript{41} What qualifies a particular or a group of norms as environmental principles appears to be conditional on the community of actors engaging with each other and the reason why someone is looking at a particular set of conditions.

The 1992 \textit{Convention on Biological Diversity} states that:

\begin{quote}
States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.\textsuperscript{42}
\end{quote}

The \textit{Biodiversity Convention} adopts only these two norms as the relevant environmental principles for that regime. Although it would be useful to develop a list of important environmental principles, each convention or treaty selects its own norms which are then classified as important and

\textsuperscript{40} Sharon Beder, \textit{Environmental Principles and Polities: An Interdisciplinary Approach} (2006).
\textsuperscript{41} Ibid, 2-6.
\textsuperscript{42} Opened for signature 5 June 1992, 1760 UNTS 143 (entered into force 29 December 1993) (\textit{Biodiversity Convention}).
guiding principles for the regime. It is very possible for Sands’ list of environmental principles to be used in a significant number of global environmental governance initiatives. As this book will go on to highlight and explore, particularly in the last chapter, it is more important to understand the nature of the way that environmental principles, as abstract and open-textured norms, influence governance through changing international law and politics. This is because a list of environmental principles will prove useful only if it is possible to appreciate how each of them influences governance and change more generally.

1.2 ENVIRONMENTAL PRINCIPLES, LEARNING AND CHANGE IN INTERNATIONAL LAW AND POLITICS

A lot has been written on the subject of principles, whether approached from an ethical, moral, legal, or political science perspective. In scholarly works, the concept of a principle is often referred to as a norm that is ‘imprecise’ in terms of what it means, or as having a wide margin of appreciation. Braithwaite and Drahos have argued that principles as a type of norm prescribe ‘highly unspecific actions’. Miers and Twining have argued that definitions of principles are commonly united by some conception of the ‘levels of generality, precision and prescriptive status of the norm’.

Environmental principles generally share these characteristics with principles because often concepts within them are expressed in abstract

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45 de Sadeleer, above n 1, 308.

46 Braithwaite and Drahos, above n 2, 18.

47 See William Twining and David Miers, How To Do Things With Rules (4th ed, 1999) 126. For instance, at 126, they write:

From time to time, it may be useful to differentiate between general and specific rules, between vague and precise rules, between categorical precepts and mere guides or other standards which do not dictate results. Such distinctions have a bearing on problems of interpretation, but to insist on them at the start would introduce an artificial and premature rigidity into the discussion. Levels of generality, precision and prescriptive force are all matters of degree.
terms, or they are constructed as norms in an open-textured way. After studying the principle of common heritage of mankind, Pinto argued that it took a ‘quarter of century . . . to determine by near-consensus the legal content of the “common heritage”, only to have that legal content radically altered in the two years that followed’. This suggests that there is a need to reconcile the abstract and open-textured nature of environmental principles with the fact that they have been, and are, commonly used in international law and politics. The dissonance between their abstract and open-textured qualities and their common use at the international level needs to be examined in terms of their potential to contribute to change in international law and politics. This seems to have also been the message behind the following statement of the arbitral tribunal in the 2005 Case concerning the Iron Rhine (‘Ijzeren Rijn’) Railway (Belgium v Netherlands) where it was noted that:

[There is considerable debate as to what, within the field of environmental law, constitutes ‘rules’ or ‘principles’; what is ‘soft law’; and which environmental treaty law or principles have contributed to the development of customary international law . . . The mere invocation of such matters does not, of course, provide the answer. . .]

48 See chapter 3 of this book for a discussion of these terms.

49 Moragodage Pinto, “‘Common Heritage of Mankind’: From Metaphor to Myth, and the Consequences of Constructive Ambiguity” in Jerzy Makarczyk (ed), Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski (1996) 249, 265 (emphasis in original). Interestingly this comment assumes that the norm failed by assessing its effectiveness in terms of whether a uniform approach to what it means can or needs to be developed and agreed upon in international politics. See also Bodansky, ‘Customary (and Not So Customary) International Environmental Law’, above n 36, 115–116. Bodansky at 116 refers to environmental principles as representing ‘the collective ideals of the international community, which at present have the quality of fictions or half-truths’. On the concept of common heritage of mankind and its application as an environmental principle see, for instance, Nico Schrijver, ‘Permanent sovereignty over national resources versus the common heritage of mankind: complementary or contradictory principles of international economic law?’ in Paul De Waart, Paul Peters and Erik Denters (eds), International Law and Development (1988) 87, 95–99.

50 Beyerlin, above n 32, at 429 has also argued, after studying the views of certain scholars who have written on environmental principles, that ‘the determination of the status, role, and effects of such “twilight” norms still needs clarification’.

The abstract and open-textured nature of environmental principles has led some scholars to classify environmental principles as indeterminate in terms of legal consequence,\(^52\) as a ‘twilight’ norm at the ‘bottom of the normative hierarchy of modern international environmental law’,\(^53\) or as ‘general in the sense that they are potentially applicable to all members of the international community across the range of activities which they carry out or authorise and in respect of the protection of all aspects of the environment’.\(^54\) Dhondt, writing about environmental principles in the context of the European Union, makes the observations that ‘they have no direct legal consequences, require no specific action or they allow for derogation and are therefore not legally binding rules’.\(^55\) These general views are sometimes even more pronounced when particular environmental principles, such as sustainable development, are examined more closely.\(^56\)

As engaging as these critiques are they are mostly expressed in the context of whether environmental principles function in general terms as a legal rule or have legal consequences for actors.\(^57\) This is problematic because of the assumption built into such views that normativity or the

\(^{52}\) See, for instance, de Sadeleer, above n 1, especially ch 4; Kiss and Shelton, above n 44, 89.

\(^{53}\) Beyerlin, above n 32, 426.

\(^{54}\) Sands, above n 4, 231.


consequences of norms are one-dimensional. Durkheim, for instance, in his study of the law, is said to have placed too much emphasis on its function in limiting the activities of individuals.\textsuperscript{58} As a result he ignored the ‘facilitative aspects of law’, that is, ‘the law concerned with powers, constituting relationships’ and ‘defining practices’.\textsuperscript{59} The law can have an educational quality to it, and this is something that seems to be missing from Ehrlich’s sociologically informed jurisprudence.\textsuperscript{60} Endicott in his study of law as rules argued that they are inherently vague. However, because his study was contextualised in adjudicative approaches to the concept of law, its contribution to understanding norms is naturally limited.\textsuperscript{61}

Koskenniemi has argued that environmental principles are often drafted with incompatible concepts and ideas built into them and actors are left to themselves to determine their meaning and normative impact at some future time.\textsuperscript{62} This argument presumes that the critique about environmental principles is too abstract to draw conclusions about their normative potential. Assumedly the difficulty Koskenniemi is highlighting, presuming that he is correct that all environmental norms contain similar tensions within them, is in terms of the degree of uncertainty that comes with what environmental principles actually mean in practice given that they are open-textured. However, this does not say much about whether in contexts where certain conditions exist, such as environmental harm being very apparent, actors draw on environmental principles to learn how to develop their collective preferences. In other words, the open-textured nature of environmental principles might not contain the precise

\textsuperscript{58} Michael D A Freeman, \textit{Lloyd's Introduction to Jurisprudence} (6th ed, 1994) 521.
\textsuperscript{59} Ibid.
\textsuperscript{60} Eugen Ehrlich, \textit{Fundamental Principles of the Sociology of Law} (1936).
\textsuperscript{61} Timothy Endicott, \textit{Vagueness in Law} (2000).
\textsuperscript{62} Koskenniemi, above n 16, 76. He gives the example of Principle 21 in the \textit{Stockholm Declaration}, which gives states:

the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Koskenniemi points out that the principle states the values that underpin what states should do but also confirms their sovereignty. He has expressed similar views in his more recent scholarly works: see Martti Koskenniemi, ‘The Fate of Public international Law: Between Technique and Politics’ (2007) 70 \textit{Modern Law Review} 1; Martti Koskenniemi, ‘International Legislation Today: Limits and Possibilities’ (2005) 23 \textit{Wisconsin International Law Journal} 61.
normative implications for behaviour, but this does not stop groups from creating meaningful experiences from them in particular contexts.

The challenge of trying meaningfully to define a principle and the role it plays has meant that scholars have been developing typologies that distinguish them from other kinds of norms. This is in addition to separating different kinds of principles from each other. De Sadeleer, for instance, differentiates environmental principles based on how they function. He writes that some principles ‘indicate the essential characteristics of legal institutions (descriptive principles)’, they can ‘designate fundamental legal norms (basic principles)’, or be viewed as filling ‘gaps in positive law by assigning a constitutional or legal value to rules which are not yet formally set forth in written sources of law although they are considered essential (general principles of law)’. Ebbesson on the other hand tries to avoid the dichotomy between environmental principles and rules so common in the scholarly work on legal norms by differentiating norms on the basis that they are either ‘balancing norms’, ‘goal oriented norms’ or ‘fixed norms’.

However, typologies in themselves may not adequately explain the potential role or function of environmental principles in terms of contributing to change in international law and politics. This can be seen in Beyerlin’s analysis of environmental principles, where he seeks to distinguish them simply in terms of whether they are policies, legal principles, or legal rules. He argues for instance that the precautionary principle is essentially an ‘action-oriented rule’. Sands argues that the core of the precautionary principle is ‘still evolving’ but maintains that it is an environmental principle. Beyerlin and Sands actually adopt a similar definition of a principle in their work but come to different conclusions in relation to its application to the precautionary principle: for Sands the precautionary principle functions as an evaluative norm, whereas it is

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64 de Sadeleer, above n 1, 306; Kiss and Shelton, above n 44, 89.
66 Beyerlin, above n 32.
67 Ibid, 440.
68 Sands, above n 4, 268.
an ‘action-oriented rule’ for Beyerlin. This suggests that presumptions about typologies explaining the role and function of environmental principles in different contexts are difficult to sustain because they rely on their interplay with social processes, like persuasion for instance, to contribute to change in international law and politics.

Even in situations where the role and function of environmental principles are examined, scholarship often does not distinguish between the consequences they could have for individuals as compared to groups of actors interacting at international level. Much attention has been given to environmental principles directing actors, obligating them to pursue certain ends, or changing their preferences. The potential of environmental principles to change how groups of actors respond to environmental issues has not as a result been adequately explored. The fact that this is the case seems odd, given that environmental principles have been frequently used in framework conventions which presume that ratifying states will further interact with each other to create meaning from them. Others have highlighted how environmental principles provide a sound basis for the development of international law, but scholarship has not closely examined whether and how this is the case when it comes to groups of actors. In other words, descriptions of the potential role of environmental principles in framing and structuring what actors learn to be their preferred way of collectively responding to environmental issues need to be explored more rigorously.

The question examined in this book is whether and how, as an abstract

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69 They both adopt what Ronald Dworkin has written about a principle. That is, it is ‘one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another’: Dworkin, above n 65, 26. It is a norm used to evaluate the conduct of actors: Bodansky, above n 57, 277.


71 This is not to suggest that scholarship in relation to principles does not focus on how communities develop preferences, but that it is more focused on areas of the world that actors share in common with each other. Brunnée as an example discusses the concepts of ‘common areas’, ‘common Heritage’ and ‘common concern’ which have shaped how states collectively respond to environmental concerns: Jutta Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (2007) 550.

72 See the statement by Hans Alders at the United Nations Conference on the Environment and Development in 1992 during which he was the Minister of Environment of the Netherlands: ‘We see the Declaration as a sound basis for the much needed development of international law, and therefore endorse it as its stands’, quoted in Panjabi, above n 7, 273.
Global governance of the environment

and open-textured norm, environmental principles contribute to changing the rules and norms of international law and politics. The presumption that an environmental principle is a legal, value based or moral norm narrows the diverse ways that it can generate, facilitate, structure or frame change in the intersubjectivity amongst groups at the international level. It has been argued that international law is incapable of differentiating between the casual pathways that a norm requires to create change. This suggests that the approach to studying principles is as important as the questions whether they can contribute to change or not.

1.3 GENERAL OUTLINE AND STRUCTURE OF THE BOOK

The approach taken to the questions just posed can be broadly characterised as falling within the field of scholarship pertaining to the regulation of what transnational actors do, as opposed to public international law which focuses more narrowly on states and their cooperation problems.74 Scholarship relating to how transnational actors develop interests and preferences in relation to the environment and how they can best be influenced or determined is gaining momentum.75 The potential range of

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74 The term regulation can be misleading a little because this book focuses on both the regulatory and constitutive role of environmental principles; in relation to the distinction between regulatory and constitutive effects of norms see, for instance, Nina Tannenwald, ‘The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-use’ (1999) 53(3) International Organization 433. A difference in the approach to regulation can be seen by comparing the works of Hilary Charlesworth and Christine Chinkin, ‘Regulatory Frameworks in International Law’ in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), Regulating Law (2004) 246, and Braithwaite and Drahos, above n 2. Braithwaite and Drahos focus more broadly on norms, mechanisms for regulation and actors rather than states and international law rules.

conclusions that one can draw from case studies depends on the perspective taken in studying regulation. This means that structural differences between the international and domestic systems make it difficult and inappropriate to apply theories of regulation from the domestic level to transnational actors.\footnote{Richard Stewart, ‘Instrument Choice’ in Bodansky, Daniel, Brunnée, Jutla, and Hey, Ellen (eds), The Oxford Handbook of International Environmental Law (2007) 147 at 161–168.}

It is also difficult to use certain approaches to regulation developed by scholars of international law because of the particular theoretical focus, from an international relations perspective, that they adopt in framing their study. For instance, Barrett argues that it would be difficult for environmental agreements to achieve any significant impact on states without appropriate carrots and/or sticks to support the use of this kind of a regulatory instrument.\footnote{Barrett, above n 75.} This approach to regulation presumes that some kind of coercive compulsion or ‘material lever’ is necessary for a treaty to achieve significant results.\footnote{See Thomas Schelling, Arms and Influence (1966); referred to in Rodger Payne, ‘Persuasion, Frames and Norm Construction’ (2001) 7 European Journal of International Relations 37, 41.} Alternative theoretical approaches to international relations, such as social constructivism, assume that social processes, like ‘authentic persuasion’, can help actors as a group or a community to build intersubjectivity to better define what they each want.\footnote{Payne, ibid.} Actors learn about what they are interested in by participating in and engaging with others in social contexts established at the international level.

This book adopts and develops the moderate social constructivist approach to international relations and politics which theoretically shapes how certain issues are dealt with.\footnote{See, for instance, John Ruggie, Constructing the World Polity: Essays on international institutionalization (1998); Emanuel Adler, Communitarian International Relations: The Epistemic Foundations of International Relations (2005); Reus-Smit, above n 73; Jeffrey Checkel, ‘Why Comply? Social Learning and European Identity Change’ (2001) 55(3) International Organization 553; Alexander Wendt, Social Theory of International Politics (1999). The constructivist approach adopted for this book is described in chapter 2.} Much of the sociologically informed

\begin{itemize}
\item Barrett, above n 75.
\item See Thomas Schelling, Arms and Influence (1966); referred to in Rodger Payne, ‘Persuasion, Frames and Norm Construction’ (2001) 7 European Journal of International Relations 37, 41.
\item Payne, ibid.
\end{itemize}
scholarly work on norms at the international level has engaged with the
differences between social and legal norms, whether they matter, and
the social processes through which they can influence the behaviour of
actors. Although this book draws on these views to examine and critique
existing approaches to the role and function of environmental principles it
is also concerned with the qualitative dimensions of how they contribute
to change at the international level. In this sense, this work examines how
groups of actors learn in social contexts established at the international
level. The idea that groups of actors can learn what their preferences
are through their interactions at the international level emerges from
the social constructivist approaches developed from international rela-
tions and politics. Processes such as persuasion and social influence are
dimensions of the learning experiences of groups at the international level.
Other dimensions include how norms like environmental principles, by
being open-textured and abstract, interplay with social processes to help
create the learning experiences of actors. The focus on collective learning
and the social processes that help create them means that this book should
be able to offer views other than whether environmental principles matter
or not.

What this means is that this book is not concerned with a number of
other things. It does not say much about what particular environmental
principles mean because it will examine how they are expressed within the
context of learning experiences that actors have at the international level.
Although this book is about the role of environmental principles in global
governance it does not seek to determine their source or how they originate
because this work is more about the constructed nature of their function in
international law and politics. In other words it is not concerned with the
historical origins of environmental principles and whether the context of
how they developed defines them as a legal, political or a moral norm.

81 See Reus-Smit, above n 70, 3. On this see also Peter Katzenstein (ed), The
Culture of National Security: Norms and Identity in World Politics (1996); Martha
of International Law and Politics 699; Friedrich Kratochwil, Rules, Norms, and
Decisions: On the Conditions of Practical and Legal Reasoning in International
82 Martha Finnemore and Kathryn Sikkink, ‘International norm dynamics
83 Ibid.
84 See chapter 2 of this book for an explanation of these ideas and concepts
and how they link together for the purposes of this work.
85 In particular, see Payne, above n 78; Martha Finnemore, National Interests
in International Society (1996), especially ch 1.
Importantly, this book does not differentiate between change in international law and politics. It uses Reus-Smit’s ideas, which emerge out of his social constructivist approach to social reality, on the mutually ‘constitutive relationship between international politics and law’. He refers to politics as a ‘variegated, multi-dimensional form of human deliberation and action’. In this sense, he argues that politics integrates four types of reasoning: idiographic, purposive, ethical, and instrumental. When actors deal with questions like ‘how should we act?’, they are engaging in politics with a particular purpose in mind. As will be discussed in this work it is through the interplay of social processes like persuasion with the abstract and open-textured qualities of norms like environmental principles that meaning is created in context. This suggests that developing a strict dichotomy between international law and politics can serve no real purpose when one is studying the function and role of environmental principles at the international level. To separate law and politics would actually restrict or narrow the kind of change that could be observed at the international level. For instance, intersubjectivity that emerges from actors engaging with each other might take the form of instantiating a cultural norm describing what international law and politics are capable of achieving.

Lastly, this book uses the term ‘actor’ to avoid having to be specific about whether it refers to a state, transnational corporation or non-governmental organisation. This is because the focus of this work is on examining the role and function of environmental principles in bringing about change in terms of whether groups learn at the international level. The work does not take for granted that it is arguable whether transnational corporations are capable of political association at the international level. It is important, however, for this work to highlight the potential that environmental principles have for influencing transnational

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86 Reus-Smit, above n 73, 14. See also Christian Reus-Smit, ‘Politics and International Legal Obligation’ (2003) 9 European Journal of International Relations 591, and Alexander Wendt, who argues that we need to look at how politics is socially constructed or constituted rather than assume that it means only one thing in international relations: Alexander Wendt, Social Theory of International Politics (1999), especially ch 1.
87 Reus-Smit, above n 73, 24.
88 Ibid, 25.
89 Ibid.
90 For an example of this argument see section 7.3. and chapter 7 more generally.
91 For this see section 7.3. and chapter 7 more generally.
corporations which are significant actors at the international level and in shaping politics.  

1.3.1 The Structure of the Book

This book is divided into four parts. The first, which includes this introduction, discusses the theoretical framework which has given shape to this work. Chapter 2, after briefly discussing moderate social constructivism, examines how the idea of social learning is different from socialisation. In particular it highlights how the practices of actors give meaning to social learning. It also establishes the importance of steering social learning and briefly discusses how persuasion and social influence are important processes in this respect.

The second part assesses what the concept of an environmental principle is and how different scholarly works have approached ideas relating to its role and function. Chapter 3 defines environmental principles and explores what it means for them to be abstract and open-textured. It uses the concept of social learning amongst groups to assess what they are rather than whether environmental principles are legal, moral, ethical, or political norms. This distinguishes this study of environmental principles from other works on norms within international law and relations. Chapter 4 discusses a selection of scholarly approaches to social learning which have valued the abstract and open-textured nature of norms more generally. It seeks to highlight their differences and similarities to the approach adopted in this work to examining principles in the context of social learning. Chapter 5 reviews the scholarship on the function and role of environmental principles at the international level to highlight some significant realist and liberal approaches to the ways that environmental principles contribute to change in international law and politics. This establishes the significance of the definition of an environmental principle adopted in chapter 3 by highlighting the potential it has for understanding their role in changing international law and politics.

Part III studies the role and function of environmental principles within particular groups of actors, drawing on social processes that have a dominant role within their interactions. The selected case studies are different from each other in many ways because this part of the book aims to

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92 The lack of attention given to transnational corporations in the development of law and politics internationally is an important issue: see Fleur John, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’ (1994) 19 Melbourne University Law Review 893.
Introduction

examine whether environmental principles play a role in changing international law and politics rather than whether they do so in one particular context. Also, given the variable nature of how groups learn, the selected chapters each discuss a different social process that is either persuasive or influences how groups intersubjectively identify with each other. The purpose of this is not only to examine whether environmental principles interplay with or constitute a variety of processes, but also to identify the variable role they play in this respect in different contexts. Additionally, this part also adopts case studies that identify different types and kinds of actors interacting with each other at the international level. The aim here, once again, is to ensure that the arguments in this book are not developed in relation only to one type of actor, given that international law and politics engage more than just states.

Chapter 6 examines the diffuse nature of power as a persuasive process within the interactions of the International Court of Justice (ICJ). It selects a variety of ways in which environmental principles arguably interplay with or constitute power within and through the ICJ. Given that individuals are judges on the ICJ and only states can litigate before it, Chapter 7 focuses on the Global Compact (GC) initiative through the United Nations (UN) which has corporations as its participants. It examines how diffusion as a social process interplays with environmental principles to instantiate a culture shift through the GC. It also assesses the potential that environmental principles have to constitute the type of identity that membership of the GC might be generating. Chapter 8 studies the role and function of environmental principles in the negotiations of the contracting parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Materials,93 and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,94 relating to the injection of carbon dioxide (CO₂) into the sub-seabed repositories. It examines the interplay between the precautionary principles and the persuasive nature of arguments as opposed to bargaining as a style of negotiation.

93 Opened for signature 29 December 1972, 1046 UNTS 120 (entered into force 30 August 1975) (‘LC’). The agreement was renamed in 1993 the London Convention.
94 Opened for signature 7 November 1996, (1997) 36 ILM 1 (entered into force 24 March 2006) (‘LP’). The term ocean dumping regime will be used to refer to the collective impact of the LC, LP, and the resolutions of the consultative committee to both agreements. The LP as of 31 March 2008 has 34 contracting parties compared to the 82 that have signed and ratified the LC. See the official website of the International Maritime Organisation at www.imo.org/
The last part is chapter 9 which concludes this work. It discusses the importance of social learning as the dynamic for change in international law and politics. In particular it draws from the three case studies to show how the interplay between environmental principles and processes of persuasion or social influence can generate common knowledge or cultures amongst groups of actors as a result of their interactions with each other. Importantly the chapter discusses the significance of environmental principles through their role and function in social learning. It concludes by identifying the potential importance of environmental principles in protecting the environment at the international level.