

Introduction to International Environmental Law (2)

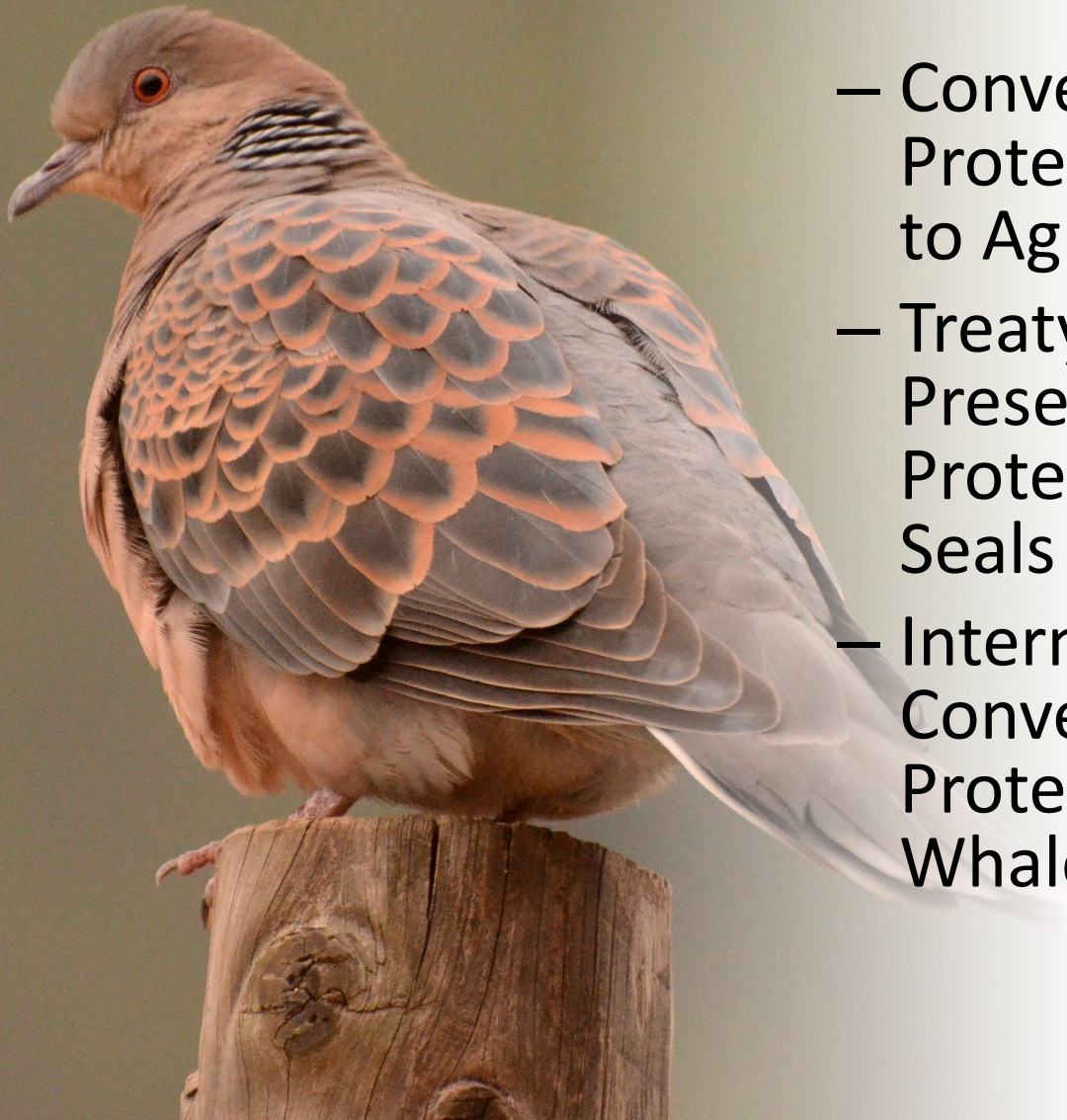
The sources

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Early Treaties

- Convention to Protect Birds Useful to Agriculture (1902)
- Treaty for the Preservation and Protection of Fur Seals (1911)
- International Convention for the Protection of Whales (1931)



IEL: 40 Years

- **1972:** UN Conference on the Human Environment, Stockholm
- **1980:** World Conservation Strategy (IUCN)
- **1982:** UNGA adopts the World Charter for Nature
- **1987:** «Our Common Future» – Report of the World Commission on Environment and Development
- **1992:** UN Conference on Environment and Development (UNCED), Rio de Janeiro
- **2002:** Rio+10: World Summit on Sustainable Development, Johannesburg
- **2012:** Rio+20: UN Conference on Sustainable Development, Rio de Janeiro

1. Principles of customary law

Customary international law has two elements:

- Sufficient state practice
- *Opinio juris*

States (including the EU) are bound by customary international law, regardless of whether they have codified these customary laws domestically or through treaties

What are Principles?



Norms of general application

- Do not necessitate an outcome/decision/action
- Interpretation
- In treaty law: guide the implementation of that treaty (Art. 3 UNFCCC, Art. 3 CBD) and the negotiation of further protocols/COP decisions

Principles

- Sovereignty over Natural Resources
- Prohibition of Transboundary Harm /Prevention
- Polluter Pays Principle (controversial)
- Precautionary Principle (controversial)
- Common Heritage of Mankind
- Common But Differentiated Responsibilities (controversial)



Environmental Law Principles

From Political Slogans to Legal Rules (Second Edition)

Nicolas de Sadeleer

OXFORD
UNIVERSITY PRESS

Guiding function of an environmental principle

Article 3(3) UNFCCC In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be **guided**, inter alia, by the following: ...

The Parties should take **precautionary measures** to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.

Permanent Sovereignty over Natural Resources

Each State has exclusive jurisdiction within its territory to

- adopt laws (legislative sovereignty)
- enforce them
- administer its territory
- adjudicate disputes that arise therein
- exclude other States from exercising their jurisdiction

Rights under the Principle of Sovereignty over Natural Resources

- to dispose freely of the natural resource
- to freely explore and exploit natural resources
- to exert effective control
- to use natural resources for national development
- to manage natural resources pursuant to national environmental policy
- to an equitable share in benefits of transboundary natural resources
- to regulate foreign investment
- to expropriate or nationalize foreign investment (right to determine the conditions of nationalization and the amount of compensation)

Duties under the Principle

- Exercise permanent sovereignty over natural resources for national development and the well-being of the people (UN Res. 1803/XVII, 1962)
- Respect the rights and interests of indigenous people
- Equitable sharing of transboundary natural resources
- Fair treatment of foreign investors
- Conservation and sustainable use of natural resources

Focus on natural resource management

UN Resolution 1803 (1962): “the right of peoples and nations to permanent sovereignty must be exercised in the interest of their **national development** and of the **well-being of the people of the State concerned**”

“The exploration, development and disposition of such resources as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable”;

“inherent and overriding right of a state to **control the exploitation and the use of its natural resources**”

Sovereign rights over forests

Principle 2(a) States have the sovereign and inalienable right to utilize, manage and develop their forests in accordance with their development needs and level of socio-economic development and on the basis of national policies consistent with sustainable development and legislation, including the conversion of such areas for other uses

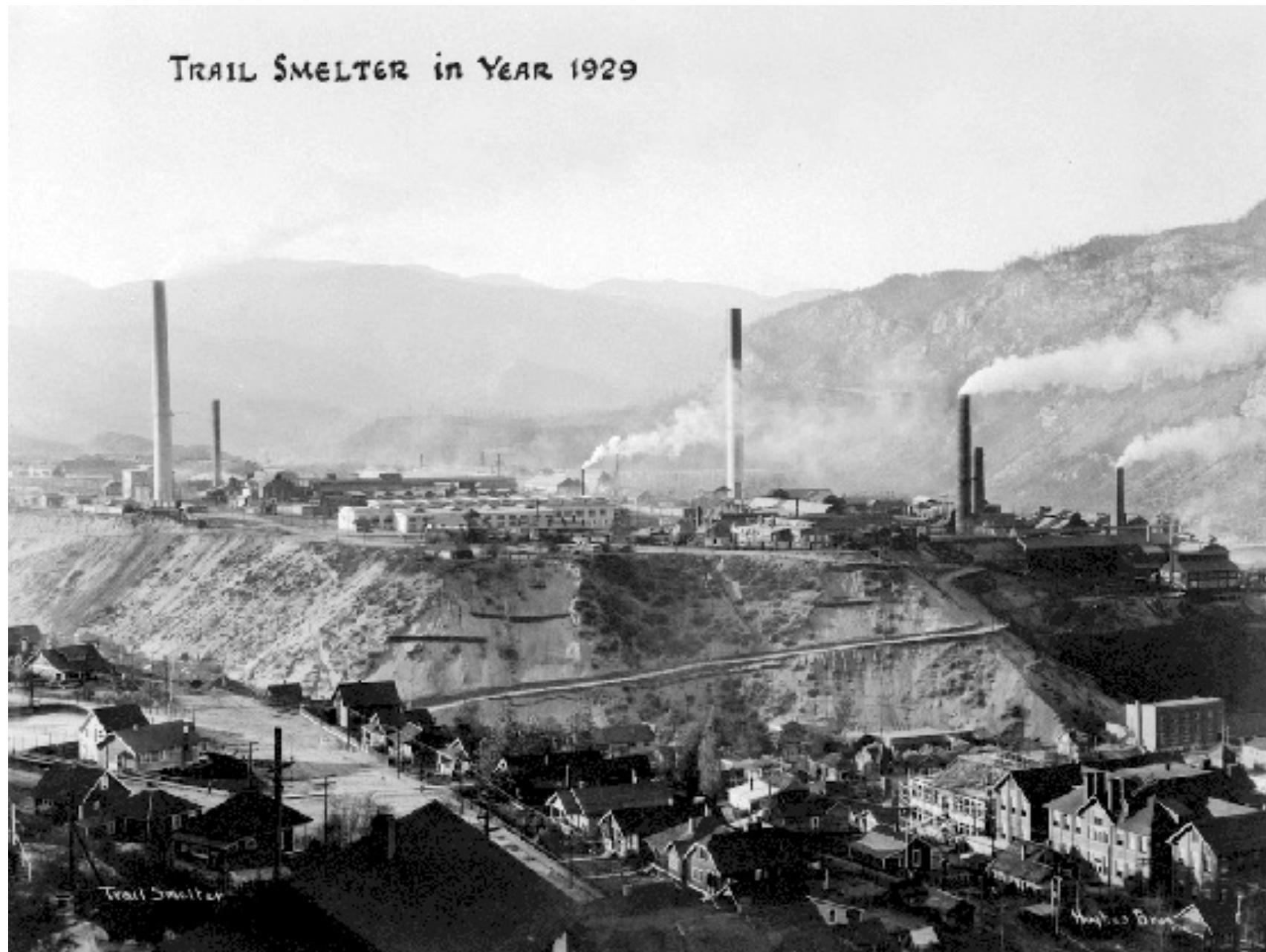
1992 Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests

Prohibition of Transboundary Harm

Trail Smelter dispute

- Smoke from the smelter in Trail, BC, Canada caused damage to forests and crops in the surrounding area and also across the border.
- The dispute between US farmers and the Canadian operator became an international issue.
- For the first time, a dispute over air pollution between two countries had been settled through arbitration.

TRAIL SMELTER in YEAR 1929



Trail Smelter

Trail Smelter

Prohibition of Transboundary Harm

“[u]nder the principles of international law as well as of the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state or the persons or properties therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”

Trail Smelter Arbitration (US v. Canada) (1939) 33 AJIL 182 and (1941) 684



Duties under the Principle

**Principle of
customary law**

Not to cause
environmental
damage to other
States or of areas
beyond the limits of
their jurisdictions of
national jurisdiction

A photograph of a grey, textured wall, possibly concrete or stone. A red wavy line is drawn across the middle of the wall, starting from the left edge and ending on the right. Above the line, there is a small red dot. The text "General principle of prevention" is written in white, bold, sans-serif font in the upper left quadrant. The text "Better safe than sorry" is written in white, sans-serif font in the lower right quadrant.

**General principle of
prevention**

Better safe than sorry

ICJ Case law on the duty to prevent environmental damage

“101. The Court points out that the **principle of prevention**, as a **customary rule**, has its origins in the **due diligence** that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (....). A State is thus obliged to use all the means at its disposal in order to **avoid** activities which take place in its territory, or in any area under its jurisdiction, causing **significant damage to the environment of another State**. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (....).» (*Pulp Mills, 2010*)

ICJ Case law

“29. ..The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

- ICJ: 8 July 1996, *LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS*, Advisory Opinion

2. Multilateral Environmental Agreements (MEAs)

- One of the key objectives of the EU policy on the environment is to promote measures at international level to deal with regional or worldwide environmental problems (Art. 191(1) TFEU).
- The EU therefore plays an active role in the elaboration, ratification, and implementation of multilateral environmental agreements.

The EU and the MSt are bound by the treaties they conclude

Article 216 TFEU

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
2. Agreements concluded by the Union are **binding** upon the institutions of the Union and on its Member States.

Marine environment

United Nations Convention on the Law of the Sea

1969 International Convention on Civil Liability for Oil Pollution Damage

1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

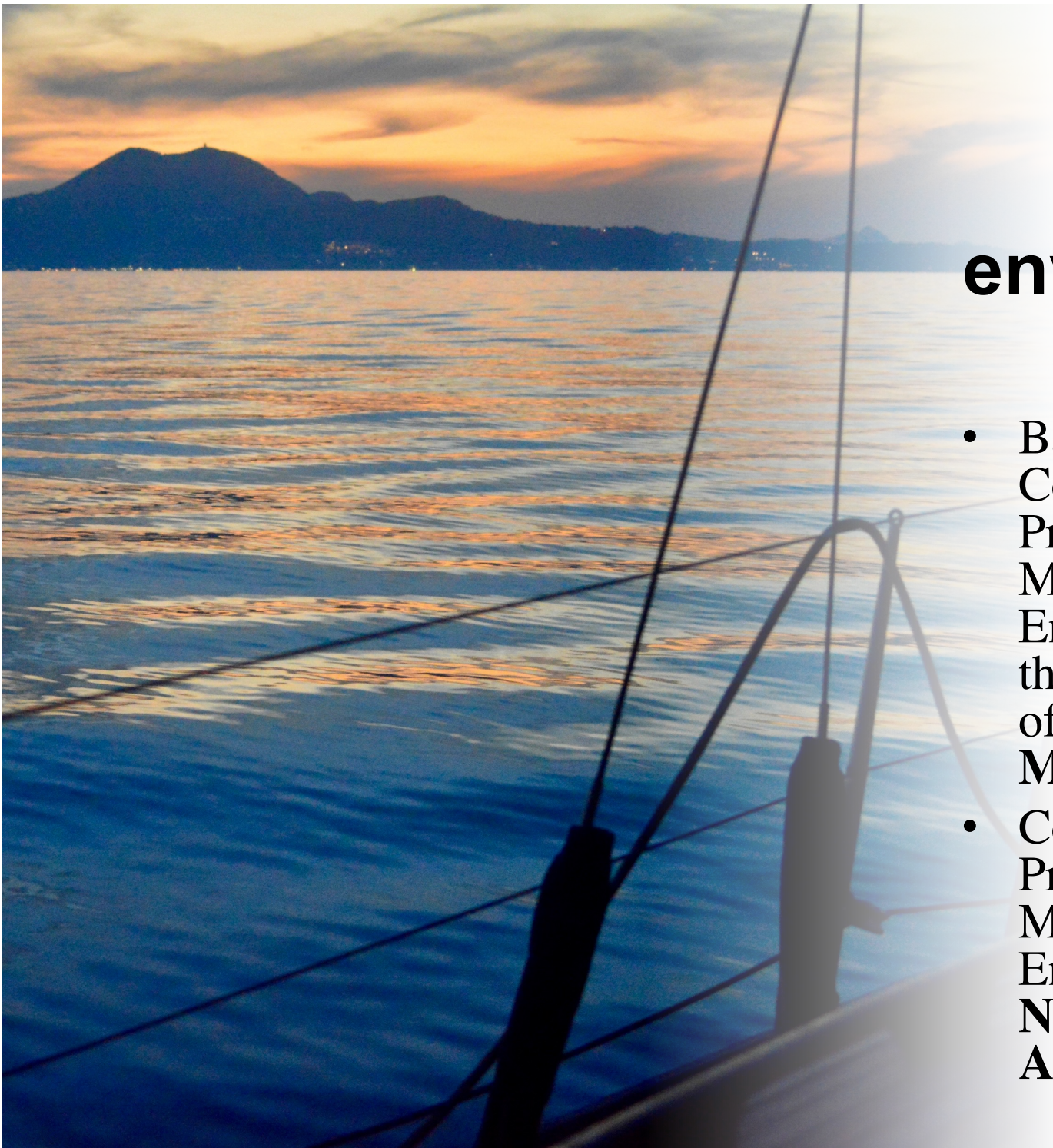
1990 International Convention on Oil Pollution Preparedness, Response and Co-operation





Marine environment

- Helsinki Convention on the protection of the **Baltic Sea**
- Convention on the Protection of the **Black Sea Against Pollution**



Marine environment

- Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the **Mediterranean**
- Convention for the Protection of the Marine Environment of the **North-East Atlantic**

Atmosphere

Geneva 1979 Convention on Long-Range Transboundary Air Pollution

- Protocol on the Reduction of Sulphur
- Protocol on the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes
- Protocol on the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes Protocol on Heavy Metals
- Aarhus Protocol on Persistent Organic Pollutants
- 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone



Atmosphere: Stratospheric ozone

- Vienna 1985 Convention for the Protection of the Ozone Layer,
- Montreal 1986 Protocol on Substances that Deplete the Ozone Layer

Success Story: ‘the human perturbation of the stratospheric ozone depletion has decreased and is now within the safe operating space. The boundary for ozone depletion is currently only transgressed over the Antarctic and southern high latitudes and only in the 3-month Austral spring’

Richardson *et al.*, ‘Earth beyond six of nine planetary boundaries’ *Sci. Adv.* **9**, eadh2458 (2023) 13 September 2023

Implementation by the EU of the Montreal Protocol

1986

Montreal 1986 Protocol on Substances that Deplete the Ozone Layer

Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer

16 Sep. 2009

Marine living resources

2001 Agreement on the
Conservation of
Albatrosses and Petrels

1980 Convention on the
Conservation of Antarctic
Marine Living Resources

Buller Albatross (*Thalassarche bulleri*)
Status: near-threatened
Photographed in Australian territorial
waters, East of Kimea, NSW



Marine living resources

Agreement on the
Conservation of
Cetaceans of the
Black Sea,
Mediterranean Sea
and Contiguous
Atlantic Area

Sperm Whale

(*Physeter macrocephalus*)

Photographed in the NE
Atlantic





**Freshwater
resources**

Helsinki 1992 Convention
on the Protection and Use of
Transboundary
Watercourses and
International Lakes



Nature conservation

- 1992 Convention on Biological Diversity
- 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals
- 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora
- 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat

EU implementation of the CITES

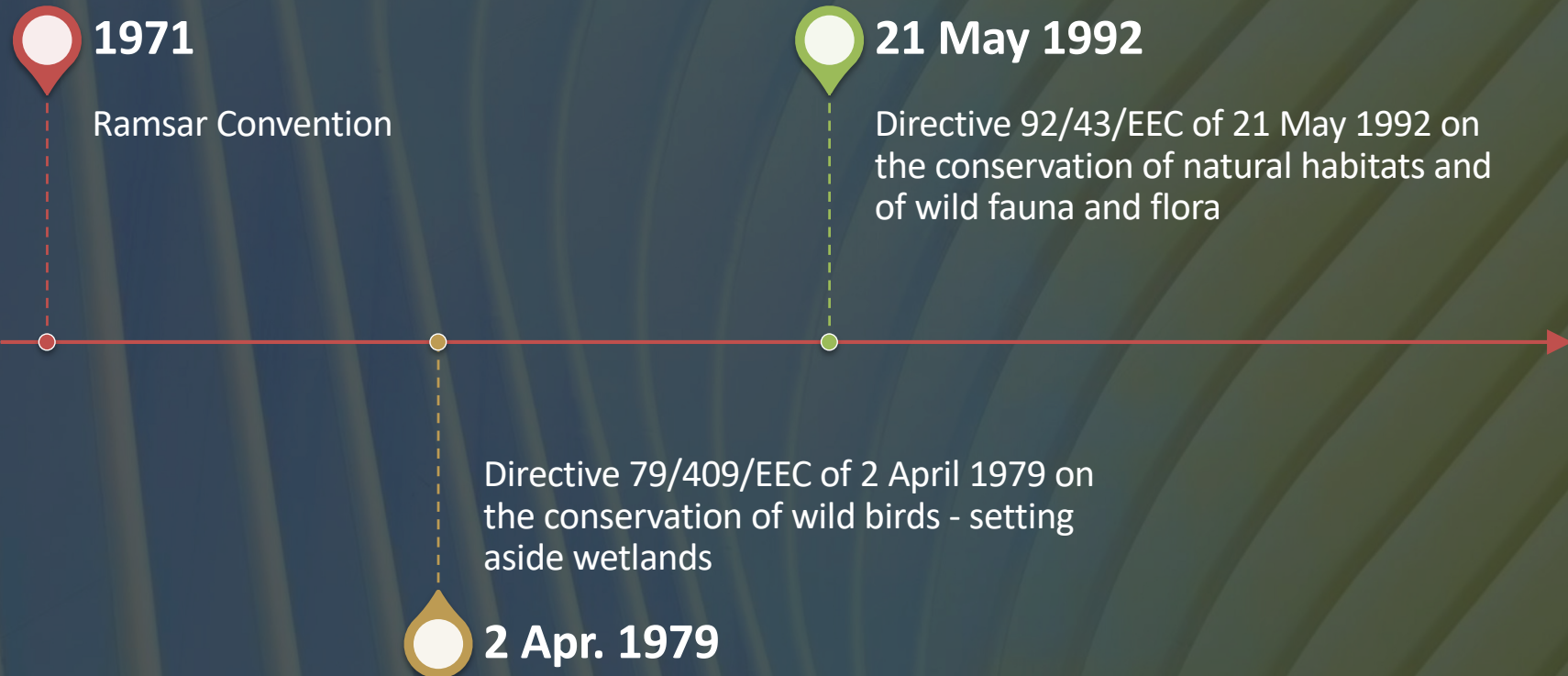
**1973 Washington
Convention on International
Trade in Endangered Species
of Wild Fauna and Flora**

1973

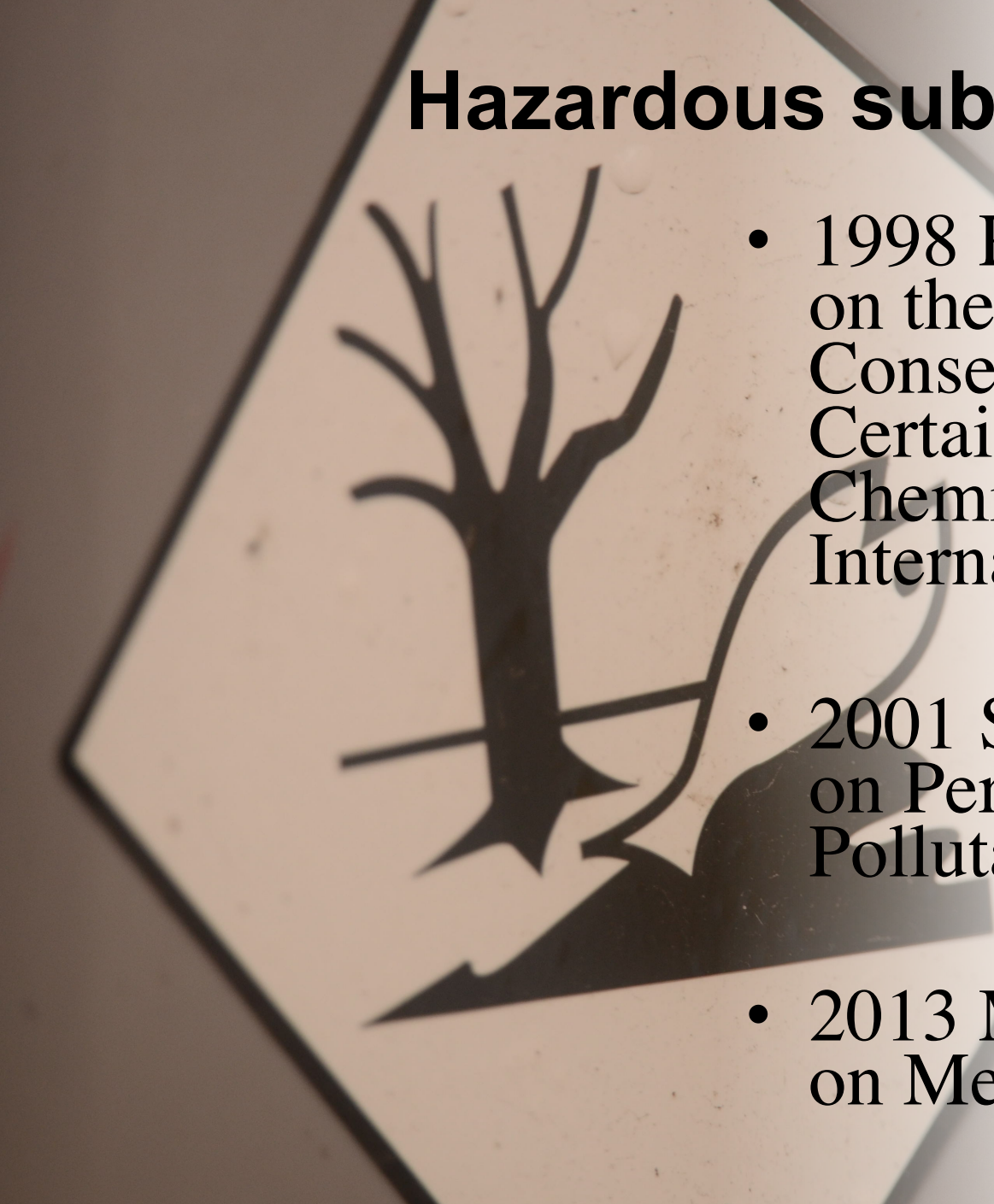
9 Dec. 1996

**Council Regulation (EC) No 338/97 of
9 December 1996 on the protection of
species of wild fauna and flora by
regulating trade therein**

Implementation by the EU of the Ramsar Convention



Hazardous substances



- 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- 2001 Stockholm Convention on Persistent Organic Pollutants
- 2013 Minamata Convention on Mercury

Control of Transboundary Movements of Wastes



**22 March
1989**

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




Regulation (EC) No
1013/2006 of 14
June 2006 on
shipments of waste



14 June 2006



Industrial Accidents



Helsinki 1992
Convention on the
Transboundary Effects
of Industrial Accidents

A photograph of two individuals wearing bright yellow protective suits and gloves, working on a sandy beach. They are using long-handled tools to clean up dark, possibly oil-soaked, debris. The background shows a hazy, overcast sky and a distant shoreline.

25 June 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Right to a
Clean
Environment

Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies



Climate change

1992 UN
Framework
Convention on
Climate Change

2015 Paris
Agreement

Ever more ambitious!

2015 Paris Agreement

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graph TD; A[2015 Paris Agreement] --> B['Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (Article 2(1)(a))]; B --> C[Regulation (EU) 2021/1119 'European Climate Law']; C --> D['Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter'. (Article 2(1))];
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'Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (Article 2(1)(a))

Regulation (EU) 2021/1119 'European Climate Law'

'Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter'. (Article 2(1))

Failure of treaty law

Currently, anthropogenic perturbations of the global environment are primarily addressed as if they were separate issues:

- climate change,
- Ozone depletion,
- Waste,
- biodiversity loss,
- or pollution.

Gaps

No international agreements on forest, ocean acidification, biogeochemical flows (P and N cycles), atmospheric aerosol loading, etc.

Intl Env L cannot address the interactions between

- The **geosphere** (energy flow and nonliving materials in Earth and atmosphere)
- The **biosphere** (all living organisms/ecosystems)
- The **anthroposphere** (anthropogenic perturbations of the global environment)

3. Case law of international courts



3. International Court of Justice

Environmental Cases

- *Nuclear test cases* (Australia and New Zealand/France) 1973/1974
- *Phosphate Lands in Nauru* (Nauru/Australia) 1992, ICJ Reports 240
- Advisory Opinion, *The Legality of the Threat or Use of Nuclear Weapons*, 1996
- *Gabcikovo-Nagymaros* (Hungary/Slovakia) 1997, ICJ Reports 7
- *Pulp Mills* (Argentina/Uruguay) 20. April 2010
- *Whaling in the Antarctic* (Australia/Japan) 2013

3. International Arbitral Awards related to environmental issues

- *Methanex v USA*, 15 January 2001, 44 ILM 1345 (2001)
- *S.D. Mayers vs Canada*, NAFTA chapter 11 Arbitral Tribunal, 13 November 2000, 40 ILM 1408 (2001)
- Belgium/Netherlands (*Iron Rhine arbitration*) PCA Award of 24 May 2005
- *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) 1 February 2011, International Tribunal for the Law of the Sea
- *Mox Plant* (Ireland/UK) 3 December 2001, International Tribunal for the Law of the Sea
- *Southern Bluefin Tuna* (New Zealand/Japan) 4 August 2002

3. GATT/WTO Environmental Cases

- US-Reformulated Gasoline, 35 ILM 603 (1996)
- US-Certain Shrimp and Shrimp Products, WT/DS58/AB/R 12. October 1998
- EC-Measures Affecting Asbestos, WT/DS135/AB/R 12 March 2001
- EC-Biotech, WT/DS291/R; WT/DS292/R; WT/DS293/R 29 September 2006
- Brazil-Retreaded Tyres, WT/DS332/AB/R 3 December 2007
- US-Tuna, WT/DS381/AB/R 16. May 2012



4. Soft Law

Principle 21 Stockholm Declaration:

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.

Principle 2 Rio Declaration:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, 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.”

3 Conditions

- The harm must result from human activity
- Must cross national boundaries
- Must be **significant or substantial**