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ARTICLE

The Rule of Law: A Core Premise for the Effectiveness of International Environmental Law

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Abstract

International environmental law rarely refers to the rule of law. However, in fostering inter-state cooperation, international environmental agreements oblige parties to prohibit, restrict or control various activities that are harmful to the environment. The application of these constraints at the national level requires the rule of law to be taken into account.

Keywords: Accountability to the law; avoidance of arbitrariness; effective judicial protection; environmental law; fundamental rights; independence and impartiality of courts; legal certainty; legality; participation in decision-making; rule of law; separation of powers

I. Introduction

The rule of law is the buzzword of the day. Although no one knows exactly what the concept encompasses, everyone seems to be in favour of it. In a nutshell, it entails that no person is above the law. That being said, the rule of law is anything but an unequivocal concept. It will thus come as no surprise that there are different conceptions of what constitutes the rule of law, several of which overlap.[1] Although the rule of law is not expressly enshrined in international environmental law (IEL), the structural principles identified in the introduction to this special issue nevertheless play an important role in this field. The aim of this article is to assess how different multilateral environmental agreements (MEAs) and the regulations of the state parties implementing these international obligations comply with various structural principles (legality, certainty, avoidance of arbitrariness, etc.) stemming from the rule of law.[2] Contrary to World Trade Organization (WTO) law, where disputes can be resolved according to a specific dispute settlement mechanism, international environmental treaties do not provide for judicial mechanisms.

II. The salience of the rule of law in international environmental law

States have concluded around 1,000 bilateral agreements and MEAs that oblige their parties either to protect vulnerable ecosystems, habitats or species or to regulate sources of pollution and hazardous activities, ranging from persistent organic pollutants (POPs) to

[1] B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press 2004).
[2] See the introduction to this special issue and the paper by H Culot.

industrial plants.[3] Several observations need to be made at the outset regarding the role of the rule of law in the context of environmental law.

Firstly, the rule of law is still in its infancy in the field of IEL. There is no explicit reference to the rule of law in the 1972 Stockholm Declaration on the Human Environment, the 1992 Rio Declaration on Environment and Development or any MEAs.

Secondly, nature or its various elements are, as a matter of principle, not legal subjects.[4] Accordingly, IEL focuses on protecting the environment not for its own sake, but because of its value to humans. The environment thus does not have any vested interest groups that could initiate cases before international courts in order to obtain protection for it. Like democracy and human rights, the rule of law is also anthropocentric in nature.

Thirdly, the principle of the separation of powers attendant to the rule of law is apparently not relevant in IEL. In effect, international treaties, including MEAs, do not sanction encroachments by one branch of government on the exercise of the functions of the other branches. Their aim is to foster international cooperation rather than structuring the manner in which the different state powers interact with one another. This interpretation is perhaps overly simplistic if one analyses recent MEAs. It will be noted below that a new generation of MEAs promotes access to justice before domestic courts.[5] Since environmental litigation is objective in nature (*contentieux objectif*), claimants generally challenge the legality of administrative licenses (environmental permits) before their domestic courts. As a result, the administrative courts verify whether executive and regulatory agencies have departed from the requirements set forth by lawmakers, thereby enhancing the separation of powers.[6] In addition, the separation of powers is buttressed by the principle of legality,[7] which subordinates the executive and legislature alike to respect higher-ranking rules.

Fourthly, given that environmental treaties – which are the main source of law in this area – are not self-executing and do not have direct effect,[8] they necessarily operate through the medium of domestic law. Indeed, they impose obligations on states to regulate the behaviour of non-state entities. Once states have consented to be bound by international obligations, they are called upon to adopt the relevant domestic legislation to fulfil them. Ultimately, individual legal subjects will be bound under national legislation transposing the obligations enshrined in a MEA. In other words, IEL's purpose is "to regulate the behaviour of private actors, not of states".[9] Accordingly, the domestic laws that flesh out the MEAs' obligations are likely to restrict operators' economic freedoms (freedom of enterprise, property, free movement of goods and services). In challenging before their domestic courts any measures that place restrictions on their fundamental freedoms, these operators are thus likely to invoke the rule of law, arguing that such measures violate the domestic law implementing international obligations. As a result, in

[3] PH Sand, "The Evolution of International Environmental Law" in D Bodansky and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2007) p 39.

[4] Regarding the absence of standing of trees affected by climate change in a liability case, see Tribunal 1st instance Brussels, *Klimaatzaak*, 17 June 2021. However, there are exceptions in domestic law. See Art 2 of the Spanish law on *Mar menor* that confers this lagoon and its basin rights to protection, conservation, maintenance and, where appropriate, restoration (Law 3/2020, 27 July 2020, on the restauration and the protection of the *Mar Menor* (BOE n° 221, 17 August 2020, 70878)).

[5] See Aarhus Convention on Access to Information, Public Participation in the Decision-Making Process, and Access to Justice in Environmental Matters, Art 9.

[6] Considered as a sub-component of the rule of law in the 2004 UN Secretary-General report on the rule of law. According to the Court of Justice of the European Union (CJEU), the principle of the separation of powers characterises the rule of law. See, to that effect, Case C-452/16 PPU, *Poltorak* [2016] EU:C:2016:858, para 35.

[7] Considered as a sub-component of the rule of law in the 2004 UN Secretary-General report on the rule of law. See also European Commission for Democracy through Law, *Rule of Law Checklist* (Venice, 11–12 March 2016).

[8] Case C-115/09, *Trianel* [2011] EU:C:2010:773, para 55.

[9] M Pallemaerts, *Toxic and Transnational Law* (Oxford, Hart 2003) p 29.

assessing the role of the rule of law in IEL, one must take account of the reception of international obligations in domestic law, which is a tall order given the diverse nature of legal systems. This assessment thus requires a parallel analysis of international and national law.

For each of the principles structuring the environmental rule of law, we shall assess whether they are relevant in the field of IEL (Section III). In addition, it is possible to highlight other principles that could prove very useful in ensuring better application of the environmental rules (Section IV).

III. Structural rule of law principles applied to international environmental law

As highlighted in the introduction to this special issue, several core components or sub-principles, which are not subordinate to one another, structure the rule of law. The aim of this section is to explore the salience of these various manifestations of the rule of law in the environmental context.

1. Legality

In accordance with the principle of legality,[10] state measures must be adopted in accordance with and be authorised by the law. In addition, the law must be accessible,[11] intelligible and stable.

Despite the consensus over the need to safeguard the environment, there has been no shortage of disputes over the nature and scope of the instruments that aim to protect the environment.

Environmental treaties have been negotiated in a variety of international fora, independently of one another, in different political contexts and amongst different states and non-state actors. It thus comes as no surprise that the scope and the degree of the stringency of their procedural and substantive obligations vary significantly from one treaty to another.

Firstly, the majority of MEAs provide procedural rules for reporting, consultation,[12] exchange of information,[13] transparency,[14] notification of impact assessments,[15] scientific and technological cooperation[16] and technical assistance,[17] but they seldom provide substantive standards. Secondly, a limited number of MEAs draw inspiration from techniques commonly applied by national authorities in requiring licenses,[18] process

[10] 2004 UN Secretary-General report on the rule of law; European Commission for Democracy through Law, *Rule of Law Checklist* (Venice, 11–12 March 2016).

[11] Regarding the accessibility criterion, see *Sunday Times v United Kingdom* [1979] E.H.R.R. 245, 27, para 49.

[12] 2003 Protocol on Strategic Environmental Assessment to the Convention on EIA in a Transboundary Context, Art 9.

[13] 1979 Convention on long-range transboundary air pollution, Art 4; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD), Art 20.

[14] Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, Art 15.

[15] UNECE Convention on Environmental Impact Assessment in a Transboundary Context; CBD, Art 14; Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, Art 4(3)(e); 1991 Protocol on Environmental Protection to the Antarctic Treaty, Art 8.

[16] UNCLOS, Art 202; CDB, Art 16; Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, Art 13.

[17] International Treaty on Plant Genetic Resources for Food and Agriculture, Art 8.

[18] Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, Art 5; Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities, Art 6; Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, Art 4; CITES, Arts III–VI; Cartagena Protocol on Biosafety to the CBD.

standards, best available technologies,[19] emissions ceilings,[20] discharge thresholds and prohibitions to discard waste,[21] amongst others. However, few of these MEAs provide for a full prohibition of exploiting a natural resource[22] or full protection of wildlife species.[23] Lastly, a few MEAs have developed uncanny mechanisms such as emissions allowances trading schemes established within the ambit of the Kyoto Protocol and payment schemes for CO_2 emissions reductions to reduce deforestation within the ambit of the Paris Agreement.[24]

One would expect the environmental obligations incumbent on authorities and economic operators to be laid down in unambiguous terms in these MEAs as well as in domestic legislation. The question is whether these different regulatory schemes give rise to clear, binding effects and comply with the criteria of stability, intelligibility and unambiguity that are inherent to the rule of law.

a. The binding effect of environmental treaties

The binding nature of an international rule is not merely a function of its legal form (whether the treaty entered into force) but also depends on its substantive content. By way of illustration, the obligation to promote and encourage "understanding of the importance of ... the conservation of biological diversity, as well as its propagation through media"[25] is more aspirational than prescriptive, whereas the obligation to prohibit trade in Annex I Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) species is clearly prescriptive.

Whether in international or national law, a rule has particular characteristics: namely, those of being general and abstract. It is endowed with these attributes thanks to its general formulation and its use of abstract linguistic formulae, a rigorous conceptual structure and a verbal economy. An international rule is therefore an expression of a stable, permanent, lasting and binding frame of reference to which the behaviour of the parties to international agreements must conform. Consequently, in addition to being formally binding, the international environmental obligations encapsulated in MEAs will be fully effective insofar as they impose unambiguous and precise obligations on their primary addressees.[26] In effect, the language of law is not descriptive or narrative; it is prescriptive.

Many MEAs water down their environmental obligations with terms such as "strive",[27] "inspire", "guide"[28] and "endeavour", amongst others. These terms imply that they are merely intended to prepare states to implement their international obligations. By the same token, terms such "as far as possible and as appropriate"[29] and "whenever possible and appropriate"[30] water down the binding effect of treaty obligations. In sharp contrast,

[19] 1998 Protocol to the CLRTAP on Persistent Organic Pollutants, Art 5(b)(i); Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, Art (4)(b).

[20] 1994 Protocol to the CLRTAP on further reduction of sulphur emissions, Art 2(5)(a).

[21] Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, Art 4; Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Art 6(b).

[22] 1991 Protocol on Environmental Protection to the Antarctic Treaty, Art 7.

[23] 1979 Convention on the Conservation of European Wildlife and Natural Habitats, Art 6.

[24] Art 5(2) REDD+.

[25] CDB, Art 14.

[26] Pallemaerts, supra, note 9, 27.

[27] 1991 Bamako Convention on the ban of the import to Africa and the control of transboundary movement and management of hazardous waste within Africa, Art 4(3)(f).

[28] 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Art 2(5); 1998 Convention on the protection of the Rhine, Art 4; UN Convention to combat desertification, Art 3.

[29] CBD, Arts 5 and 6(b).

[30] Convention on Environmental Impact Assessment in a Transboundary Context, Art 9(2).

MEAs that control the risks associated with trade in a particular category of toxic products, such as chemical pesticides, POPs[31] or substances that deplete the ozone layer, have been drafted in a much more precise way than framework MEAs.[32] For instance, although the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides does not ban or restrict any chemicals, it establishes in a very detailed manner a PIC procedure to ensure that restricted hazardous chemicals are not exported to states that do not authorise their import.

One has to take into account the multi-layered approach in IEL. The binding effects of MEAs is likely to vary significantly between umbrella conventions and their protocols. On the one hand, open-ended framework conventions such as the 1992 United Nations (UN) Framework Convention on Climate Change (UNFCCC), the 1985 Convention for the Protection of the Ozone Layer or the 1979 Convention on Long-Range Transboundary Air Pollution (CLRATP) or the Bonn Convention on Conservation of Migratory Species of Wild Animals set forth only vague objectives, proclaim general principles and establish institutional frameworks obliging states to take measures or "all practicable measures" in the form of additional protocols or agreements.[33] In contrast, their protocols lay down obligations that are much more precise and binding.

Whereas economic obligations (eg custom duties) in free trade agreements (FTAs) are binding, trade and sustainable development commitments are rather loose.[34] Accordingly, many of these sustainability requirements may be viewed as aspirational standards, intended to encourage the parties to attain a certain threshold of protection, with regulatory diversity being tolerated. As a result, nothing obliges the parties to a FTA to achieve the highest level of protection, or indeed even a high level of such.

b. The prevalence of soft law

In addition, IEL abounds with instruments that have ambiguous legal status, such as recommendations, resolutions, guidelines and declarations by heads of states or ministers at international conferences.[35] Soft law instruments are not the end point of the international normative process but rather only a stepping stone for its continuation.[36] They are precursors of hard law insofar as they are gradually transformed into treaty law. Likewise, the European Union (EU) institutions act through a melange of resolutions, declarations of intent, green and white papers, action plans and programmes and codes of conduct – all somewhat vague instruments which replace action with the mere shadow of action. This prompts several observations. Firstly, soft law instruments are only indicative and therefore cannot be binding per se.[37] For example, the fact that Principle 21 of the Rio Declaration on Environment and Development encourages mobilisation of the "creativity, ideals and courage of the youth of the world ... to forge a global partnership in order to achieve sustainable development and ensure a better future for all" is obviously of no legal consequence for either the youth of the world or the international community. Secondly, owing to their imprecise formulation, soft law instruments cannot be likened to normative

[31] 2001 Stockholm Convention on Persistent Organic Pollutants.

[32] 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.

[33] See the Bonn Convention on Conservation of Migratory Species of Wild animals.

[34] G Marin Duran, "Sustainable development chapters in EU free trade agreements: emerging compliance issues" (2020) 57(4) Common Market Law Review 1031–68.

[35] See the various studies on non-binding norms in environmental law published in D Shelton (ed.), *Commitment and Compliance* (Oxford, Oxford University Press 2000) pp 121–242.

[36] Pallemaerts, supra, note 9, 26.

[37] The clearest illustration of the absence of binding effects of soft law instruments is the 1992 UN Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests.

rules. The principle of legal certainty entails that the rule must be applied in a predictable manner. The binding effect of a treaty – which is the dominant source of IEL – is superior to the indicative value of a soft law instrument. Indeed, the latter is not very predictable, even though it allows greater adaptability to specific cases. It follows that the recourse to soft law instruments in IEL does not fulfil the requirement of legality attached to the rule of law. In brief, soft law instruments are meaningful insofar as they lead to the adoption of hard law instruments.

c. *Stability*

IEL operates as a "two-tier system" known as the so-called "framework–protocol approach". The numerous protocols that establish specific additional obligations according to rules agreed upon in the framework of MEAs create a genuinely coherent legal system (*système juridique*). These MEAs are relatively stable, in that they can only be amended unanimously by the respective parties. At the domestic level, the appearance of successive waves of new regulatory instruments has resulted in a veritable transformation of environmental law. Many environmental regulations are not only drafted in unclear terms but are also constantly being amended. Thus, the criterion of stability is not always respected at the national level.

d. *Intelligibility of environmental rules*

In order to seek consensus, negotiators of MEAs tend to adopt formulae that are open to more than one interpretation, and in relation to which each state may vindicate its own point of view. Needless to say, the ambiguities flowing from late-night compromises undermine the criterion of intelligibility. As a matter of course, provisions reflecting last-minute political compromises are not unique to IEL. However, such compromises have been required in order to conclude a number of environmental agreements (such as the Paris Agreement), and this does not have the effect of making the rules particularly intelligible. This may be the case, for instance, for the obligation imposed by the Paris Agreement on developed country Parties to take the lead in the fight against climate change "by undertaking economy-wide absolute emission reduction targets", whereas "developing country Parties should continue enhancing their mitigation efforts".[38] The level of engagement by both developed and developing countries is undermined.

e. *Strict derogations*

Furthermore, according to the principle of legality, the law must provide for those cases in which exceptional measures may be adopted as an exception to the normal protection regime, which is of particular importance in environmental law. Since most human activities have an environmental impact, regulatory schemes seek more to regulate them than to eliminate them completely. For example, different impact assessment procedures or arrangements for the granting of permits do not aim to eliminate projects that are harmful for the environment but rather to balance economic growth against the expectations of the public for a clean environment. As a result, sectoral prohibitions on harming the environment are replete with derogations.[39] In accordance with the rule of law, derogations must be narrowly defined, and any exercise of administrative discretion must be reasonably justified (statement of reasons). As far as EU environmental law is concerned, the Court of Justice of the European Union (CJEU) endorses a teleological interpretation and thereby construes narrowly any derogations from the principle of

[38] Paris Agreement, Art 4(4).

[39] See, for instance, Montreal Protocol on Substances that Deplete the Ozone Layer, Art 3(1).

preventing environmental damage.[40] By the same token, the review by the International Court of Justice (ICJ) of the granting of permits to kill, take and treat fin, humpback and Antarctic minke whales "for purposes of scientific research", under Article VIII of the 1946 International Convention for the Regulation of Whaling (ICRW), is a case in point. The ICJ considered that the design and implementation of the Japanese Whale Research Program, which could broadly be characterised as "scientific research", were not reasonably related to the achievement of its stated objectives.[41] In taking into account the elements of the Japanese programme's design and implementation (the use of lethal methods, the methodology used to select sample sizes, the programme's scientific output, etc.), the ICJ endorsed a rather narrow interpretation of Article VIII.[42]

2. Legal certainty

The principle of legality overlaps with the principle of legal certainty, which requires the law to be clear, precise and foreseeable.[43] Although MEAs are concluded by states, they may have adverse consequences for undertakings when their obligations are fleshed out in domestic law.[44] Consequently, in accordance with the principle of legal certainty, treaty obligations have to be drafted in a clear and precise way. That said, the sources of IEL are somewhat confusing. In effect, general preventative rules may be crystallised into customary rules, enunciated in soft law instruments, codified in framework MEAs and incorporated into the category of general principles in accordance with Article 38(1) of the Statute of the International Court of Justice.[45] As the *Iron Rhine* arbitral tribunal recognised, "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".[46] As far as domestic law is concerned, the decline in the quality of the legislation is correlated with legislative inflation. Furthermore, the excessive proliferation of technical standards that are constantly being amended undermines legal certainty.

3. Avoidance of arbitrariness

One of the key aspects of the rule of law is to require non-arbitrariness in the exercise of power. The essence of MEAs is to limit the sovereignty of state parties when exploiting their natural resources. As a result, the rule of law should subject governmental agencies to a genuine requirement to comply with environmental obligations that are often neglected, if not ignored outright. In effect, in many countries, the natural environment (biomes, ecosystems, habitats and their species) as well as vulnerable communities are

[40] In accordance with this theory, the CJEU applies strictly the derogatory conditions of environmental obligations, be it with respect to birds and habitats protection (Case C-900/19, *One Voice et LO* [2021]), to the quality of surface waters (Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015] EU:C:2014:2324; Case C-525/20, *Association France Nature Environnement* [2022] EU:C:2022:16) or the placing on the market of genetically modified organisms (Case C-528/16, *Confédération paysanne* [2018] EU:C:2018:20) and active substances in pesticides (Case C-162/21, *Pesticide Action Network Europe* [2023] EU:C:2023:30, para 34).

[41] Whaling in the Antarctic (Australia v. Japan) ICJ 2014, 31 March 2014.

[42] Paras 51–97.

[43] European Commission for Democracy through Law, *Rule of Law Checklist* (Venice, 11–12 March 2016).

[44] Case C-504/19, *Banco de Portugal and Others* [2021] EU:C:2021:335, para 51 and the case law cited.

[45] In imposing a duty of care on the Dutch authorities under Arts 2 (right to life) and 8 (right to privacy and family life) ECHR for the inadequacy of measures to reduce greenhouse gas emissions in the Netherlands, the Dutch High Court relied not only on ECtHR case law but also on the UNFCCC, the customary principle of no harm, as well as non-binding international and EU climate policy instruments. See HR, *Urgenda*, 19/00135 [2019] ECLI: NL: HR: 2019: 2006.

[46] *Iron Rhine Railway* (*Belgium v Netherlands*), PCA [2005] 27 RIAA, para 58.

liable to environmental destruction given inadequate and poorly implemented regulatory schemes, weak governance, negligence, corruption, inertia and arbitrariness. The rule of law should thus enhance the protection afforded to citizens against abuses of power and arbitrary decision-making.[47] This is also a prerequisite for the proper management of natural resources.[48] Resources must be exploited in accordance with strict environmental standards, which must be effectively enforced.[49]

It follows that governmental agencies cannot disregard environmental law or refashion it to suit other objectives (eg economic development) than environmental protection.

Preventing abuses of power requires safeguards against arbitrariness. It goes without saying that states must provide that the discretionary power of regulatory agencies is not unlimited, and that it is regulated by law.[50] All institutions are accountable to laws that are equally enforced and independently adjudicated.[51] This begs the question as to whether MEAs comply with this criterion.

The majority of MEAs confer wide discretion on national authorities to choose appropriate measures of implementation and to ensure compliance with the broad obligations laid down by them.[52] What is more, the conceptual ambiguities littered throughout the treaties tend to increase the extremely broad margin of discretion conferred upon national authorities. By prescribing broad objectives but leaving the authorities with the choice over their implementation, framework MEAs are well suited to taking into account the diversity in terms of the administrative and legal cultures of their parties. In tolerating – not to speak of encouraging – diverse regulatory approaches, they are in some sense keeping uniformity at bay.[53]

Furthermore, the broader and more loosely textured discretion becomes, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law.[54] However, discretion cannot by any means be unfettered at the domestic level. This calls for a few words of explanation. The fact that a law that is fleshing out treaty obligations confers discretion on the authorities responsible for implementing it is not in itself inconsistent with the principle of legal certainty and the criterion of foreseeability attendant to it. Nonetheless, lawmakers must clearly delineate the scope of discretion and the manner in which it is exercised, having regard to the legitimate aim in question: "to give adequate protection against arbitrary interference".[55] In addition, the decision-making power granted to the executive by legislation must always be exercised in accordance with the objectives of the parent statute and must not frustrate them.[56] Accordingly, the executive cannot misconstrue the parent statute in order to depart from the policy pursued by the lawmaker. Statutory powers must be exercised in good faith.

[47] LJ Kotzé, "Sustainable development and the rule of law for nature. A constitutional reading" in C Voigt (ed.), *Rule of Law for Nature* (Cambridge, Cambridge University Press 2012) p 134.

[48] HC Bugge, "Twelve environmental challenges in environmental law" in C Voigt (ed.), *Rule of Law for Nature* (Cambridge, Cambridge University Press 2012) p 7. See, for instance, UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Arts 2 and 3.

[49] Principle 9 of the Rio Declaration on Environment and Development.

[50] European Commission for Democracy through Law, *Rule of Law Checklist* (Venice, 11–12 March 2016).

[51] Administration Office of the US Courts, *Overview – Rule of Law*.

[52] By way of illustration, discharges of pollutants from land-based sources into the Mediterranean Sea are subject to an authorisation. However, the Athens Protocol does not specify the emission values. See the 1980 Athens Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, Art 6(3).

[53] By way of illustration, the implementation of the 2015 Paris Agreement must "reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances" (Arts 2(2) and 4(1) and (3)).

[54] T Bingham, "The Rule of Law" (2007) 66(1) Cambridge Law Journal 72.

[55] See, to that effect, Case C-413/08 P, *Lafarge* v *Commission* [2010] EU:C:2010:346, para 94, and Case C-501/11 P, Schindler *Holding and Others* v *Commission* [2013] EU:C:2013:522, para 57.

[56] T Bingham, *The Rule of Law* (London, Allen Lane 2010) p 63.

In accordance with the rule of law, the discretionary power over environmental licensing vested in authorities must be limited by formal requirements, in particular as regards the statement of reasons[57] and administrative procedures that are carried out in compliance with the guarantees conferred by the principle of sound (also referred to as "good") administration.[58] This principle[59] fosters public confidence in the decision-making process. This should give the public a perception of a decision-maker's impartiality. As regulators are not elected, they should not display any sign of bias. They not only must be well informed but must also base their decisions on scientific evidence and be fair-minded.[60] Procedural rules largely fall outside the scope of discretionary power.[61]

Furthermore, the exercise of discretionary power must obviously be subject to judicial review, within the limits of the principle of the separation of powers – one of the constituent elements of the rule of law.[62] As regards the review of the merits of a decision (plan, programme, license, etc.), public authorities are called upon to weigh up environmental protection against countervailing interests. Judicial review of discretion is limited to sanctioning a contested decision in which discretion was exercised unreasonably. In the civil law family, the courts (including the CJEU) restrict themselves to sanctioning manifest errors of appraisal (*l'erreur manifeste d'appréciation*),[63] whereas in common law countries they sanction the irrationality of the decision (*Wendnesbury unreasonableness*). Both doctrines represent a refinement of the classic function of the administrative courts of controlling abuses of powers by the administration. Administrative authorities cannot be allowed to distort technical and scientific evidence so as to reach an irrational decision, for any irrationality must be sanctioned by the courts. However, since the assessment of complex scientific facts lies at the heart of environmental litigation, courts tend to emphasise the fact that it is not their role to substitute their own assessment for that of the regulatory agency that adopted the contested decision.[64]

Finally, the exercise of discretion is subject to the general principle of proportionality, which is not mentioned as a constituent element of the rule of law.[65]

4. *Effective judicial protection* (ubi jus idi remedium) *and access to justice in environmental matters*

The rule of law entails the right to challenge in court the legality of any coercive measure by accessing "an impartial tribunal".[66] Access to justice thus requires an independent and impartial judiciary and the right to a fair trial. This implies a distinction from "rule by law". As far as environmental law is concerned, access to justice is the logical culmination of the right to information and participation, which will be addressed below. In effect, the right to consultation would remain a dead letter if its beneficiaries were deprived of the

[57] In the context of environmental impact assessment (EIA) procedures, the effective judicial review of a decision requiring or dispensing an EIA and the right to effective legal protection presuppose that the court to which the matter is referred and those seeking redress will have access to the statement of reasons for the contested decision. See AG Kokott Opinion in Case C-721/21 *Eco Advocacy* [2023] EU:C:2023:39, para 84.

[58] See Case T-77/20, *Ascenza Agro* [2023] EU:T:2023:602, para 321.

[59] Art 41 of the Charter of Fundamental Rights of the European Union.

[60] R Moules, *Environmental Judicial Review* (Oxford, Hart 2011) pp 261–71.

[61] M Pâques, *La sécurité juridique en droit administratif* (Brussels, Larcier 2023).

[62] 2004 UN Secretary-General report on the rule of law; European Commission for Democracy through Law, *Rule of Law Checklist* (Venice, 11–12 March 2016).

[63] D Lagasse, *L'erreur manifeste d'appréciation endroit administratif : essai sur les limites du pouvoir discrétionnaire de l'administration* (Brussels, Bruylant 1986).

[64] See Case T-584/13, *BASF Agro and Others* v *Commission* [2018] EU:T:2018:279, para 94.

[65] N de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, Oxford University Press 2014) pp 308–22.

[66] See Charter of Fundamental Rights of the European Union (CFREU), Art 47.

right to challenge a final decision taken by an administrative authority. Members of the public must be able to challenge in court any decisions that impair their fundamental rights (property, privacy, etc.) or "interests" using all of the means provided by the legal system. The CJEU has thus ruled in a case concerning the transposition of the directive on air quality that "whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights".[67] However, this does not require the recognition of a right of unimpeded access to courts.[68] Although restrictions may be applied to standing to avoid *actio popularis*, they may not render standing devoid of substance. Yet standing remains the most serious stumbling block for applicants seeking to achieve environmental protection through court action.

Given that environmental law is a hotbed of litigation, the CJEU has been called upon on numerous occasions to define the contours of the right to an effective remedy for citizens pursuing court action in order to obtain the correct application of secondary legislation that has been violated. Article 9(3) of the Aarhus Convention – a mixed treaty binding the EU and the Member States – provides that environmental non-governmental organisations (NGOs) shall have access to an effective and fair review procedure, but it does not specify how this is to be achieved. In accordance with the principle of effective judicial protection,[69] national courts are required to interpret national laws in accordance with both objectives laid down in Article 9(3) and (4) of the Aarhus Convention in relation to access to justice. The discretionary power of the national authorities to determine, in relation to the right to initiate proceedings (Article 9(3)), the criteria for establishing an "interest" of "members of the public", and a fortiori environmental protection NGOs, in bringing proceedings is not, however, absolute. By denying standing for any action seeking to challenge a decision falling within the scope of EU law, German procedural law has been held by the CJEU to violate the requirements arising under Article 9(3) of the Aarhus Convention read in conjunction with Article 47 of the EU Charter of Fundamental Rights, a provision at the heart of the rule of law.[70]

Furthermore, excessively high litigation costs may preclude access to justice, which is a key component of the rule of law. The requirement that the costs of judicial redress procedures must not be prohibitive, which applies under the Aarhus Convention as well as secondary EU environmental law,[71] guarantees effective judicial protection and, consequently, the rule of law.[72] In interpreting secondary law in accordance with the Aarhus Convention, the CJEU has sought to ensure that the prohibition on prohibitive costs applies to all financial costs incurred by claimants initiating judicial proceedings in relation to national environmental law.[73] Even if this requirement is not directly applicable, the fact remains that national courts are required to interpret their laws in accordance with this obligation.[74]

Judges are the last bastion of the rule of law. Preserving their independence and impartiality is therefore inherent to their task. These guarantees, which are central to the

[67] Case C-361/88, *Commission v. Germany* [1991] ECR 1-2567, para 16.

[68] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (Strasbourg, August 2022) § 108, p 39.

[69] Art 19(1), 2nd al. TEU.

[70] Case C-873/19, *Deutsche Umwelthilfe* [2022] EU:C:2022:857, para 71. See N de Sadeleer, "Overview of the rule of law and recent developments in the European case law" (2024) 56(1) Revue de droit de l'Union européenne 10-45.

[71] Aarhus Convention, Art 9(3) and (4). See Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Art 11(4).

[72] Case C-427/07, *Commission/Irland* [2009] EU:C:2009:457; Case C-260/11, *Edwards et Pallikaropoulos* [2013] EU:C:2013:221, paras 25–28; Case C-530/11, *Commission/United Kingdom* [2014] EU:C:2014:67. See also *Movement Ekoglasnost/Bulgaria*, 15 December 2020, 31678/17.

[73] Case C-530/11, *Commission v. United Kingdom* [2014] EU:C:2014:67.

[74] Case C-167/17, *Klohn* [2018] EU:C:2018:833.

public perception of justice, reflect the classic formula: "justice must not only be done, it must also be seen to be done".[75] If they cannot be independent and impartial, judges must disregard any national provisions or case law that would call these requirements into question.[76] The requirement of independence dictates that judges must be independent from the government as well as from vested interests of any kind. Where tenure in office,[77] promotion,[78] salaries[79] or disciplinary and criminal procedures depend on the political acceptability of their judgments or their obedience to a political party,[80] the rule of law will be jeopardised. The requirement of impartiality is closely related to independence. It stipulates that, whilst being independent from external pressures, judges must also be unbiased by any personal interest or extraneous influence or pressure, and if they are conscious of bias, or of any matters that might give rise to an appearance of bias, they must decline to adjudicate the case.[81]

As a result, the recognition of the rule of law in IEL should enhance the independence of the courts when reviewing the legality of environmental plans and authorisations.

As regards any review of the merits of an administrative decision (license, refusal to access information, etc.), public authorities are endowed with much discretion.[82] Too wide a discretion precludes a review of the contested decisions by the courts and, as a result, undermines the rule of law. When weighing up the interests leading to a decision that is likely to impair the environment, the core of environmental interests should be duly taken into consideration when the project at issue is likely to cause severe or irreversible damage. In such cases, the different pillars of sustainable development cannot be placed on an equal footing. Whenever the environmental interest at stake is fundamental for the resilience of ecosystems or for the health of the communities, it deserves greater weight.[83] The framing of the weighing of interests has not hitherto been addressed in the general debate on the rule of law, either at the international or the domestic level.

5. *Fundamental rights*

According to different authorities, the rule of law encompasses fundamental rights.[84] With the exception of a few procedural rights, MEAs do not confer substantive rights on particular categories of persons.[85] However, in IEL, first-generation rights and a new third-generation right to a clean environment are likely to strengthen the rule of law. We shall

[75] European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights* (Strasbourg, August 2022) 66.

[76] Case C-204/21, *Commission v Poland* [2023] EU:C:2021:834, para 234.

[77] Case C-824/18, *A.B. e.a.* [2021] EU:C:2021:153, para 121.

[78] Case C-216/21, *Asociația « Forumul Judecătorilor din România »* [2023] EU:C:2023:628, para 65.

[79] Case C-64/16, 7 February 2018, *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117, para 45.

[80] Case C-791/19, *Commission v Poland* [2021] EU:C:2021:596.

[81] Bingham, supra, note 56, 93. See Case C-216/18, *L.M.* [2018] EU:C:2018:586, para 64.

[82] The weighing of interests can be unfavourable to conservation. For instance, in nature conservation "imperative reasons of overriding public interest", including economic development, can override the protection of a Natura 2000 site. See Habitats Directive, Art 6(4).

[83] N de Sadeleer, *Environmental Principles* (2nd edition, Oxford, Oxford University Press 2020) pp 413–14; C Voigt, "The principle of sustainable development" in C Voigt (ed.), *Rule of Law for Nature* (Cambridge, Cambridge University Press 2012) p 150.

[84] The majority of the definitions of the rule of law refer only to the principles of equality and non-discrimination. However, according to the Venice Commission, the rule of law and human rights are interlinked. Even in common law, distinguished lawyers support the view that the rule of law entails the protection of fundamental rights. See Bingham, supra, note 54, 67.

[85] For instance, although farmers' rights, as they relate to plant genetic resources for food and agriculture, are recognised in the International Treaty on Plant Genetic Resources for Food and Agriculture, the Contracting Parties agree that the responsibility for realising these rights rests with national governments (Art 9(2)).

begin our analysis with first-generation rights (right to life, right to privacy, freedom of expression).[86] At this stage, a number of lessons can be learned from the case law of the European Court of Human Rights (ECtHR).

From a procedural perspective, Article 6(1) of the European Convention on Human Rights (ECHR), which protects the right to a fair trial, is a cardinal requirement of the rule of law in Europe.[87] Given that most legal disputes concerning environmental protection are adjudicated on by administrative courts, applicants are unable to rely on Article 6 in environmental cases on the grounds that their case must concern a "civil right".[88] However, the ECtHR has held in several cases that Article 6(1) ECHR was liable to be breached. Since Article 6(1) grants the citizen the right to have court orders enforced within a reasonable time, the failure to enforce a court order requiring the cessation of the hazardous activities with a view to circumventing a judicial decision resulted in a violation of Article 6(1).[89] Given that, in this case, the NGO's application against an authorisation permitting the expansion of a nuclear plant was brought in order to "defend the general interest against that which it perceives as an activity that is hazardous for the general public", there was a sufficient connection with a civil right within the meaning of Article 6(1).[90] Moreover, the ECtHR stressed that a more restrictive interpretation would not be consistent with the expectations of modern society, "where environmental NGOs play a key role".[91] Finally, the restrictions impaired the right of access of the NGO that, even though it is in the general interest, also defends the individual interest of its members against the risks created by a landfill.[92]

Although there is no explicit right to a clean environment in the ECHR,[93] a substantive right to environmental protection can be inferred from several first-generation ECHR rights: namely, the right to life, the right to a fair trial and the right to respect for privacy and family life. Accordingly, the ECtHR has guaranteed a minimum level of environmental protection indirectly ("*par ricochet*"). Thanks to a constructive and dynamic interpretation of Articles 2 (right to life) and 8 (right to respect for private and family life) of the ECHR, the ECtHR has been able to infer from these provisions a number of positive obligations of a preventative nature that afford potential victims a minimum level of environmental protection.[94] The authorities are thus called upon to take appropriate steps to safeguard the lives and privacy of those falling within their jurisdiction.[95] These measures must be timely and effective in limiting the occurrence of environmental harm. Moreover, the preventative nature of positive obligations does not require there to be any acute or immediate danger.[96]

[86] See P Birnie et al, *International Law & the Environment Development* (3rd edition, Oxford, Oxford University Press 2015) pp 271–85.

[87] See the paper by H Culot in this special issue.

[88] Case *Association des amis de Saint-Raphaël et Frejus v. France*, 29 February 2000; Case *Smits, Kleyn and Hal v. Netherlands*, 3 May 2003; Case *Balmer – Schafroth v. Switzerland*, 26 August 1997; Case *Athanassoglou and others v. Switzerland*, 6 April 2000.

[89] Case *Taskin and others v. Turkey*, 10 November 2004; Case *Öneryiltiz v. Turkey*, 30 November 2004; Case *Lemke v. Turkey*, 5 June 2007, para 53.

[90] Decision *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox and Mox v. France*, 28 March 2006, para 4 (text only available in French).

[91] ibid.

[92] Case *L'Erablière v. Belgium*, 24 February 2009.

[93] *Kyrtatos v Greece*, 41666/98, 22 May 2003, para 52.

[94] N de Sadeleer, "Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases" (2012) 81 Nordic Journal of International Law 39–74; see also de Sadeleer, supra, note 83, 114–22.

[95] States are called upon to provide a normative framework "designed to provide effective deterrence against threats to the right to life". See *Taskin v Turkey*, 10 November 2004, no 4611/99; *Boudaïeva v Russia*, 20 March 2008, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, para 158.

[96] In *Urgenda*, the High Court of the Netherlands ruled that even though there is scientific uncertainty concerning the exact nature of the risks that any sea-level rise might have on the human population in the

Amongst the many rights and freedoms that are established, the freedoms of expression and information, as counterweights, constitute some of the pillars of the rule of law. In this regard, the common law establishes a strong link between freedom of expression and the rule of law.[97] It is thus difficult to deny freedom of expression a leading role, particularly as it guarantees a form of checks and balances. As far as the ECHR is concerned, Article 10 has been systematically set aside by the Court in environmental cases in favour of Article 8.[98]

It is now time to address the right to live in a clean environment as a third-generation right. Although this right has been enshrined in a number of constitutions, it has generally been expressed in international law through non-binding declarations adopted by international conferences rather than in legally binding international human rights covenants. In effect, no major human rights instrument enshrines a genuine right to environmental protection. For instance, the ECHR, which was adopted in 1950, was drafted at a time when environmental law did not yet exist. As a result, a right to the conservation of nature or the environment cannot be inferred from the rights and freedoms guaranteed by the ECHR.[99] Accordingly, the destruction of marshland cannot be construed as a restriction on the private or family lives of local residents.[100]

Recently, the link between human rights and the environment, including climate change, has been addressed in different fora. Against this background, the right to a clean environment has recently been incorporated into two regional human rights conventions: the African Charter on Human and Peoples' Rights[101] and the Protocol of San Salvador of the American Convention on Human Rights.[102] In 2022, the UN General Assembly recognised that access to a clean, healthy and sustainable environment is a universal right.[103]

Although few MEAs explicitly recognise the link between human rights and the environment,[104] a new generation of treaties has enshrined three procedural rights – information, participation and access to justice – that enhance "the ability of citizens to hold public authorities into account".[105] In harnessing the discretion of public authorities, these three procedural rights buttress the rule of law. Furthermore, these three rights are highly intertwined: access to information is important for participation in the decision-making process, and without access to justice the authorities would not give consideration to the other two rights.

The authorities are not the best placed to strike the appropriate balance between environmental and other interests.[106] Consequently, environmental protection cannot be

Netherlands over an extended period of time, the Dutch authorities are not relieved of their positive obligations to prevent such a risk from being realised. In case the occurrence of such environmental damage could entail a violation of fundamental rights protected under international law, there is no need for them to prove that the adoption of preventative measures would necessarily have made it possible to avoid that event from occurring. See N de Sadeleer, "The Hoge Raad judgment of 20 December 2019 in the *Urgenda* case: an overcautious policy for reducing GHG emissions breaches Articles 2 and 8 of the European Convention on Human Rights" (2020) Elni Law Review 7–11.

[97] *R v. Home Secretary, ex. P. Simms* (2000) 2 A.C. 115.

[98] Case *Guerra and others v. Italy*, 19 February 1998, para 53. This provision "cannot be construed as imposing on a State ... positive obligations to ... disseminate information of its own motion". See Case *Roche v. United Kingdom*, 19 October 2005, para 172.

[99] Case *Fadeyeva v. Russia*, 9 June 2005, para 68; Case *Kyrtatos v. Greece*, 22 May 2003, para 52.

[100] Case *Kyrtatos v. Greece*, 22 May 2003, para 53.

[101] Art 24.

[102] Art 11.

[103] Resolution 76/300 of 28 July 2022, A/RES/76/300.

[104] The Preamble of the Paris Agreement calls upon states to respect, promote and consider their respective human rights obligations when taking climate action.

[105] AG Sharpston Opinion in Case C-204/09, *Flachglas Torgau* [2012] EU:C:2012:71, para 30.

[106] In effect, public authorities find themselves called upon to arbitrate amongst divergent interests.

left to governmental agencies alone. The effectiveness of environmental rules will be enhanced if various actors are accurately informed as to the choices being considered as well as the reasons underpinning them and are allowed to participate in the decision-making process.[107] Accordingly, the Aarhus Convention and the *Escazú* Agreement on Access to Information, Public Participation in the Decision-Making Process, and Access to Justice in Environmental Matters oblige parties to flesh out these three procedural rights in their respective domestic laws. Moreover, these rights should not be interpreted narrowly.[108]

Different MEAs require public participation,[109] which is considered as a component of the rule of law in the 2004 report of the UN Secretary-General. Several international courts have held that public participation is either a general principle of international law[110] or a customary principle with regional scope.[111] For instance, in *Onigoland*, the African Commission on Human and Peoples' Rights held that Article 24 of the 1981 Charter imposes an obligation on the state to take reasonable measures "to prevent pollution and ecological degradation" and to enable communities exposed to hazardous activities to "be heard and to participate" in the decision-making process.[112]

IV. Other principles complementing the rule of law

With respect to environmental law, the rule of law must be complemented by two other principles.

Firstly, environmental concerns are not isolated; they overlap with other policies that were originally regarded as ancillary to or liable to counter the goals of economic integration. However, given that environmental protection has more often given way to socio-economic considerations, nature has thus paid a heavy tribute for the absence of any incorporation of environmental requirements into other policies. The principle of integration, which is the backbone of sustainable development, requires the integration of environmental requirements across policies such as energy, agriculture and fisheries, forestry, industry, transport, regional development, land use and land planning. Unless this is achieved, environmental degradation will continue apace.[113]

Secondly, the principle of good administration could buttress a more robust implementation of international treaties.[114] Enshrined in Article 41 of the EU Charter of Fundamental Rights, this principle is made up of different rights. From the point of view of the rule of law, the most relevant rights are, on the one hand, the right to be heard and, on the other, the right to have access to relevant files. The right to be heard "guarantees every person the opportunity to make known his views effectively during an

[107] de Sadeleer, supra, note 83, 424.

[108] For instance, the CJEU has consistently held that that the EU Aarhus Regulation implementing the Arhus Convention aims "to ensure a general principle of access to environmental information held by or for public authorities and ... to achieve the widest possible systematic availability and dissemination to the public of environmental information". Case C-442/14, *Bayer CropScience and Stichting De Bijenstichting* [2016] EU:C:2016:890, para 55.

[109] CBD, Art 8; Convention on Environmental Impact Assessment in a Transboundary Context, Art 9; 2003 Kiev Protocol on Strategic Environmental Assessment to the Convention on EIA in a Transboundary Context, Art 8. See J Ebbesson, "Principle 10: Public Participation" in J Viñuales (ed.), *The Rio Declaration on Environment and Development* (Oxford, Oxford University Press 2015) pp 287–309.

[110] Inter-American Commission on Human Rights, *Yakye Indigenous Community v Paraguay* (Case 12.313).

[111] African Commission on Human and Peoples' Rights, *Centre for Minority Rights and Minority Rights Group v Kenya* (2010).

[112] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (2002), paras 54, 69.

[113] Principle 4 of the Declaration on Environment and Development provides that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". See also Art 11 TFEU and Art 37 CFREU.

[114] CFREU, Art 41.

administrative procedure and before the adoption of any decision liable to affect his interests adversely".[115] The purpose of the possibility for the addressee of an adverse decision to submit their observations before that decision is adopted is to enable the competent authority effectively to take into account all relevant information.[116] The right of access to the file is not absolute, as there are exceptions to it in relation, for example, to professional secrecy, business secrecy and so on. As far as environmental decisions are concerned, the principle of good administration implies an obligation for public authorities to base their decisions affecting the environment on scientific evidence that takes into account uncertainties in light of the precautionary principle.[117] From the point of view of the rule of law, it should be remembered that the principle of good administration applies to Individual decisions (licenses, authorisations) and not to acts of general application, such as legislation.

Furthermore, in addition to good governance and the robust enforcement of environmental rules, the rule of law implies governmental accountability, the combatting of corruption,[118] the alleviation of poverty[119] and standing with limited restrictions.[120]

V. Conclusion

The development of the rule of law in international public law is late in coming and remains incomplete. Rule of law is an evolving rather than a fixed concept. Perceptions of the concept are constantly evolving in time and space. In Europe, the case law of the ECHR and the CJEU has endowed the judicial dimension to the rule of law with greater substance (independence and impartiality of the courts, standing in environmental cases, etc.).

Until now, states have been the dominant actors in both the development and the implementation of IEL.[121] This legal branch has thus been dominated by a vision of international cooperation with a view to reducing environmental damage and, to a lesser extent, granting rights to members of the public. The key challenge is to assess whether international agreements comply with the different principles stemming from the rule of law, considering that these principles were conceived at the national level. The structural principles derived from the rule of law – legality, certainty and equality – are more appropriate for regulating state structures than inter-state relations.

Nonetheless, certain specific features of IEL make this discipline particularly fertile ground for the development of the rule of law. Although MEAs originally focused on inter-state cooperation, ignoring citizens' rights, a new generation of treaties – the Aarhus and the *Escazú* agreements – has emphasised procedural rights (information, participation and access to justice), which should enhance the rule of law in this field. Indeed, the implementation of environment law should not be the sole prerogative of public

[115] See, inter alia, Case C-287/02 *Spain* v *Commission* [2005] ECR I-5093, para 37.

[116] See, inter alia, C-349/07 *Sopropé* [2008] EU:C:2008:746, para 49.

[117] de Sadeleer, supra, note 83, 135–364.

[118] In accordance with Regulation 2020/2022 establishing a general regime of conditionality for the protection of the Union budget, cases of tax fraud, tax evasion, corruption and conflicts of interest must be effectively pursued by the investigation and prosecution services (Preamble 8). Whereas the causes of corruption in the environmental sector, in broad strokes, are like those of any other sector, lack of respect for the rule of law combined with weak governance, absence of transparency and poor enforcement make this sectoral policy particularly vulnerable to bribery, embezzlement and cronyism. This is the case for trafficking in threatened species and hazardous waste. Public servants in charge of environmental inspections and permitting systems are vulnerable to corruption.

[119] Principle 5 of the Rio Declaration on Environment and Development.

[120] See, for instance, Aarhus Convention, Art 9.

[121] T Marhaun, "The changing rule of the state" in D Bodanski et al (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2007) p 727.

authorities. Furthermore, in IEL, the rule of law not only has a procedural dimension but also substantive content. Indeed, the procedural principles of information, participation and standing buttress the substantive dimension to the rule of law as mirrored by various fundamental rights (life, privacy, fair trial) and freedoms (expression, association). Against this background, international human rights courts (ECtHR, Inter-American Court of Human Rights) have made state institutions accountable to environmental laws in accordance with the rule of law.

In many countries, the way in which the rule of law has been conceived of so far in the environmental context has been insufficient to establish a decision-making process that is immune from arbitrariness.

Finally, from a formal perspective, the rule of law does not call into question international agreements and principles of customary law that legalise environmental impairment. Irrespective of its effects on the environment, international law is valid upon the condition that it fulfils the criterion of legality and does not breach *jus cogens*.

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