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Multilateral Environmental Agreements: Principles, Structures, the 'Soft' Enforcement and the Innovations

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1. General Objective of the Report

This report will refer to international environmental law to assess the value of a legally binding standard and instrument within the field, as opposed to soft law instruments. To do this, the overview will synthesise the added value in global environmental conventions such as the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context; the 1992 Convention on Biological Biodiversity (CBD); and the 2015 Paris Agreement. First, this note will provide a short description of these Conventions, and then provide a generalised assessment of their features, before proceeding to an assessment of the value of such an instrument in the area of business and human rights.

2. Core Principles of International Environmental Law

2.1 Environmental Impact Assessment

The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

The Environmental Impact Assessment is the most accepted and undisputed standard in international environmental law, which was introduced in the US in 1970s and has become widely accepted in domestic legislation. The Espoo Convention was drawn up under the auspices of the United Nations Economic Commission for Europe as a reginal Convention. On

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the basis of its first amendment (in force 2014), all United Nations Member States can become a party to it and thus it has become a global convention from the regional. The Espoo Convention has been cited by the International Court of Justice as representative of the good international practice in the 2010 **Pulp Mills case**. EIAs became a globally recognised principle of international environmental law in Principle 17 of the 1992 Rio Declaration and Principle 10 (public information, participation, access to justice). EIA requirements are included e.g., in the 1982 United Nations Convention on the Law of the Sea: Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. Reginal EIA legislation is included in the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution; the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region; the Convention for Western Indian Ocean; the Convention for the Atlantic Coast of the West, Central and Southern Africa Region. With regard to non-binding guidelines EIA are included in the Caribbean Community and Common Market; the Central American Commission for Environment and Development of the Central American Integration developed an EIA Regional Action Plan in 2002, with the main objective of promoting coordination and cooperation among all authorities implementing EIAs in the region. EU member states must carry out assessments of the environmental impact of certain public and private projects before they are allowed to progress.

More extensive is the Strategic Environmental Assessments (SEAs), which is initiated at plans stage is also gaining increasing momentum over the last decade which is already implemented in more than 40 States. The definition is: **Environmental Impact Assessment (EIA)** is a systematic and integrative process for considering possible impacts prior to a decision being taken on whether or not a proposal should be given approval to proceed (Wood 2003) **Strategic Environmental Assessment (SEA)** is a process of prior examination and appraisal of policies, plans, and programmes and other higher level or pre-project initiatives (Sadler 1996).

The Espoo Convention is a forward -looking multilateral agreement in international environmental law. Its objectives include preventing, reducing and controlling significant adverse transboundary environmental impact from proposed activities by institutionalizing a standardized process of transboundary environmental impact assessment. There is in place a concrete and detailed framework of procedural regulation, concerning environmentally harmful activities. This Convention includes a very extensive participation of civil society in decision-making and the implementation of projects.

It includes, within its body, a list of activities subject to the procedures (App. I); description of general criteria to assist in the determination of the environmental significance of activities (App. III); a requirement of the concerned parties to exchange information for holding discussions on whether there is likely to be a significant adverse transboundary impact at the request of the affected party (Art. 3(7)); enforcement and facilitation procedures such as provision of disputes settlement with possibility of arbitration (Art. 15 and App. VII) and non-compliance procedure. The steps in EIA/SIA procedures include: (1) Screening; (2) Scoping and Impact Analysis; (3) Review of the EIA/SEA report; (4) Decision-making; (5) Follow-up and Adaptive Management and (6) Public Participation.

Ideally 'the good EIA' would include the degree of independence from government, efficiency of the process, level of expertise involved, authority and resources available, accountability to the public, and or fragmentation of information and decision-making processes across government (Chris Joseph, Thomas Gunton & Murray Rutherford, 2015).

2.2 The Precautionary Principle (Approach)

It is also a pivotal principle of International Environmental Law. It is formulated in in the 1992 Rio Declaration on Environmental and Development. 'In order to protect

the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation' (Principle 15). It has been included in many Multilateral Environmental Agreements (such as the Biodiversity Convention, the Climate Change Convention, the Convention on the Protection of the Marine Environment of the Baltic Sea Area and in Article 191 of the Treaty on the Functioning of the European Union. In practice, the scope of this principle is far wider and also covers consumer policy, European Union (EU) legislation concerning food and human, animal and plant health.

2.3 The Polluter-Pays -Principle

Is a fundamental principle of International Environmental Law enshrined in Principle 16 of the Rio Declaration on Environmental and Development: 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'. This Principle most directly regulates business as it means that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment. States have a duty to enforce it. This principle comes from economy and is incorporated in the majority of multilateral environmental agreements (e.g., Article 3 (2) of the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter: 'Taking into account the approach that the polluter should, in principle, bear the cost of pollution, each Contracting Party shall endeavour to promote practices whereby those it has authorized to engage in dumping or incineration at sea bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest) and Article 191 of the Treaty on the Functioning of the European Union.

3. The Examples of Innovations Introduced in Multilateral Environmental Agreements (MEAs): Bringing All Shareholders Together, Ensuring Transparency and the 'Soft' Enforcement

3.1 Bringing All Shareholders Together and Ensuring Transparency

The 1992 Convention on Biological Diversity (CBD):
This Convention has three main objectives: (1) the conservation of biological diversity; (2) the sustainable use of the components of biological diversity; and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The Convention on Biological Diversity was inspired by the world community's growing commitment to sustainable development. It represents a dramatic step forward in the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources. It has the strong participation of indigenous peoples and important role is played biogenetic and pharmaceutical industry. The implementation of the Convention on Biological Diversity is supported by two Protocols, namely, the Cartagena Protocol and the Nagoya Protocol on Access and Benefit-sharing Under the Biodiversity Convention and the Nagoya Protocol, businesses (pharmaceutical companies) and indigenous peoples cooperate based on contracts. **The basic provisions regarding these issues were adopted in the CBD negotiations and later detailed and specified through COP decisions.**

Large pharmaceutical support agreements between them and indigenous communities reach mutually agreed terms and share benefits. The long-established benefit sharing packages include a wide range of monetary and non-monetary benefits over time have become standard practice. The need to engage businesses in achieving the objectives of the Convention was recognized by the Conference of the Parties at its eighth meeting, in Curitiba, Brazil, in 2006.

Decision VIII/17 of the COP foresaw the participation of businesses in various biodiversity meetings and their involvement in the development and implementation of national and international biodiversity strategies and action plans.

Subsequent decisions were taken to establish the conditions that facilitate private sector engagement. The decisions encouraged businesses to "adopt practices and strategies that contribute to achieving the goals and objectives of the Convention its Aichi Biodiversity Targets."

This includes decisions to:

- Strengthen biodiversity consideration in business operations and promote behavioural change through "mainstreaming"; Encourage enterprises to align investments, management, and procurement policies with the conservation and sustainable use of biodiversity and ecosystem services; encourage businesses & support the establishment of the Global Partnership for Business and Biodiversity and other public/private partnerships to provide a platform to facilitate tool sharing, dialogue, and capacity building (it was adopted); support the measurement and reporting of business impacts and dependencies to biodiversity by formalizing biodiversity impact reporting in their annual reports; encourage businesses to take into account individual supply chain activity, national priorities, and conditions when conducting biodiversity assessment; **promote** business involvement in the development, revision, and implementation of national and international biodiversity strategies and action plans and implementation of national and international biodiversity strategies and action plans.

The 2015 Paris Agreement

The Paris Agreement is a legally binding international treaty on climate change. It was negotiated under the aegis of the United Nations. It aims to hold the increase in the global average temperature to "well below" 2 °C above pre-industrial levels. The agreement underpins the Conference of the Parties26 climate talks in Glasgow. At its heart is a "ratchet mechanism" which requires that every five years parties to the agreement come forward with more ambitious national climate goals. Implementation of the Paris Agreement requires economic and social transformation, based on the best available science. The Paris Agreement works on a 5-year cycle of increasingly ambitious climate action carried out by countries. By 2020, countries submit their plans for climate action known as nationally determined contributions (the hard obligations of this instrument). the Paris Agreement invites countries to formulate and submit by 2020 long-term low greenhouse gas emission development strategies). Long-term low greenhouse gas emission development strategies provide the long-term horizon to the Nationally Determined Contributions. Unlike Nationally Determined Contributions, they are not mandatory. Nevertheless, they place the Nationally Determined Contributions into the context of countries' long-term plan. The Paris Agreement reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more vulnerable, while for the first time also encouraging voluntary contributions by other Parties. Climate finance is needed for mitigation because large-scale investments are required to significantly reduce emissions. Climate finance is equally important for adaptation, as significant financial resources are needed to adapt to the adverse effects and reduce the impacts of a changing climate. the Paris Agreement places great emphasis on climate-related capacity-building for developing countries and requests all developed countries to enhance support for capacity-building actions in developing countries.

In the area of international environmental law, there have been a few challenges that treaty systems, particularly those overviewed above, have been able to address:

- The development of general obligations in binding instruments to make them compatible with general developments in relations between states (such as Agenda 20/30), the development of science, and the state of the environment. **In effect, a legally binding standard or instrument has ensured a dynamic set of rules instead of a static set of obligations.** The unique mechanism by which this gap is filled is by Decisions

of Conferences of the Parties. At meetings held with regular intervals (either annual or biennial), based on consensus of all parties, States are able to set the agenda for further development of the treaty regime. To illustrate, the Convention on Biological Diversity, by the decision of its Conference of the Parties, based on consensus, set Agenda 2011-2020 Strategic Plan, including the commonly known Aichi Biodiversity Targets. These were a very detailed programme with a number of goals and targets further developing the treaty. Additionally, during the fifteenth meeting of the Conference of the Parties to the Convention on Biological Diversity will adopt a post-2020 global biodiversity framework as a stepping stone towards the 2050 Vision of "Living in harmony with nature".

- Bringing together all stakeholders in a binding instrument. Some environmental conventions have a number of stakeholders with very divergent objectives. The clearest example of this is the Convention on Biological Diversity which has the following stakeholders: states, indigenous peoples and local communities, and the private sector. Such an example is adopted by a decision of the Conference of the Parties 2014 Global **Partnership for Business and Biodiversity**. There are also numerous examples of sofa law instruments adopted by the Conference of the parties concerning other stake holders such as indigenous and local communities.

The Paris Agreement further brought business as stakeholders as a pivotal player. A great number of businesses are reducing emissions and building climate resilience. As of the Global Climate Action Summit in September 2018, 492 companies – nearly one-fifth (17 %) of Fortune Global 500 companies – had committed to Paris-aligned emission reduction targets, an increase of 40 % over the past year.

The Kyoto Protocol, Paris Agreement and the Montreal Protocol on Substances that Deplete the Ozone Layer design required only developed countries to reduce emissions, while the Paris Agreement recognized that climate change is a shared problem and called on all countries to set emissions targets.

3.2 Non-Compliance Procedures in Multilateral Environmental Agreements: 'Soft' Enforcement

Allowing for a non-confrontational compliance procedure. These procedures can be triggered of by the Secretariat of the convention, a party to a convention which may be in noncompliance and any other party which is concerned about the compliance of another state-party. This is a facilitative procedure. Under this procedure also implementation of conventions is monitored.

All multilateral environmental agreements contain **non-compliance procedures**. The character of the Non-Compliance Procedures is well defined by the Basel Convention. In its Objectives it is states as follows: 'The objective of the mechanisms is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of the compliance with the obligations under the Convention. The mechanism's nature is described in the following terms: The mechanism shall be non-confrontational, transparent, effective and preventive in nature, simple, flexible, non-binding oriented in the direction of helping parties to implement provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries with economies in transition and is intended to promote co-operation between the Parties'.

Non-Compliance Procedures have evolved into integral components of every multilateral environmental agreement, including most recently the Paris Agreement. Therein it is based on Article 15. The task of the Paris Agreement Implementation and Compliance Committee is facilitative: 'Article 15 states that the Committee is expected to enhance the effective functioning and implementation of the Paris Agreement both by encouraging parties to fulfil the obligations from the Paris Agreement and by holding them accountable for aspects of their performance. Its modalities and procedures were adopted by the COP in decision 20/CMA in 2019.

Non-Compliance under the Aarhus Convention and Businesses

The Non-Compliance under the Aarhus Convention due to it hybrid character (a human rights/environmental) treaty has an unusual mechanism of bringing claims i.e., civil society and individual (as well States) can bring a claim before the Non-Compliance Committee. These are mostly human rights/environmental NGOs. Therefore, in relation to business they might be influenced indirectly by a decision on non-compliance. For example: case (ACCC/C/2006/17) brought against European Community by Association Kazokiskes alleging non-compliance by the European Community with its obligations under articles 6 (2) and (4), and 9 (2) of the Convention. The communication concerned compliance with the requirement of article 6 of the Convention in connection with Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive) and the decision of the European Commission to co-finance a landfill in Kazokiskes (Lithuania). The communicant alleged failure to comply with provisions regarding decision-making concerning co-financing of establishment of the landfill, and a general failure to correctly implement provisions of the Convention into the Community law, in particular through the provisions of the IPPC Directive. Obviously, such a decision **indirectly** influences businesses involved in a project in question. They are other examples such as against France (ACCC/C/2007/22 France) On 21 December 2007, the three French associations L'Association de Défense et de Protection du Littoral du Golfe de Fosse-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône, and Fédération d'Action Régionale pour l'Environnement, submitted a communication to the Compliance Committee, alleging non-compliance by France with its obligations under articles 3 (1), 6 (1)–(5) and (8), and 9 (2) and (5) of the Convention. The communication alleged that the Party concerned failed to provide for public participation in the decision-making processes and access to justice in relation to the decision-making process that led to the construction by Communauté Urbaine Marseille Provence Métropole of a centre for the processing of waste by incineration at Fos-sur-Mer. https://unece.org/env/pp/cc/communications-from-the-public

To summarize: under the Aarhus Convention the Non-Compliance Procedure is against States breaching one of the pillars of the Aarhus Convention. This procedure may be triggered off by a State, individual or civil society. Although businesses are not involved directly, they may be affected indirectly by decisions on non-compliance, through a follow-up decision of a State in this respect.

4. General Summary

- Binding instruments in the area of international environmental law have a negotiated framework of general obligations of states.
- They give a generalised and systemised obligations of states.
- Uniform and coherent national laws have to be enacted to implement these binding instruments.
- They have a very strong Conferences (Meetings) of the Parties making a treaty regime dynamic not static to adjust them to all stakeholders and changing circumstances, based on decisions of Conferences of the Parties adopted by consensus. These Conference fill the gaps in binding instruments through their decisions.
- To be successful they have relied on to global partnership, stakeholder involvement and overall commitment of the countries to the success such as the Montreal Protocol.
- There are Non-Compliance Procedures within each agreement that enable a collaborative, non-confrontational process of achieving the objectives of the agreement to ensure raised ambition and compliance. They ensure transparency and ensure the participation of the developing countries.
- States have an obligation to file national reports on implementation of binding instruments, including activities of all stakeholders.

4.1 Businesses and Transparency Framework under the Paris Agreement

For businesses, a strong transparency framework under the Paris Agreement has many benefits. It makes individual Nationally Determined Contributions targets credible

and progress against them clear. It increases overall ambition by allowing governments to clearly observe each other's progress. It also produces information which can be used as inputs by businesses in the construction of climate strategies and goals.

- The Paris Agreement transparency framework will need to ensure complete and accurate Greenhouse Gas emissions inventories, transparency of progress against Nationally Determined Contributions, transparency of adaptation measures undertaken by Parties, clear accounting for climate finance and effective technical expert review and multilateral assessment of Parties' reports.
- In the area of human rights, the Paris Agreement will ensure that the planning Nationally Determined Contributions takes into account human rights considerations; inform the planning of climate commitments and that the public and indigenous peoples can participate in the process; working with relevant institutions, stakeholders and indigenous peoples to ensure that human rights are effectively integrated in the implementation of climate action. 'The protection of human rights in mitigation and adaptation action can also promote policy coherence, legitimacy, and sustainable outcomes. For example, "green" jobs provide opportunities for both sustainable development and the realization of human rights. Similarly, when rights are considered in the planning of adaptation policies, outcomes are likely to be more effective and sustainable. Integrating human rights considerations in the planning of the Paris Agreement would: strengthen effectiveness of climate.' 'The Paris Agreement and Sustainable Development Goals (SDGs) recognize women and girls are disproportionately affected by climate change due to gender inequalities that restrict access to education, resources, decision-making spaces, and other opportunities.'

5. Summary of Common Features of Multilateral Environmental Agreements

5.1 From human rights perspective:

- transparency, non-discrimination, fairness and equitable solutions through procedural right are ensured.
- Public participation of all stakeholders (civil society, indigenous communities) and civil society as an equal actor in decision-making.
- Gender inequalities and education are taken into account.
- In respect to businesses added value:
- Strong transparency framework.
- Information exchange.
- Uniformity in obligations

5.2 From Businesses perspective:

- helping businesses to stay within the law.
- keeping employees informed about their environmental roles and responsibilities.
- improving cost control.
- reducing incidents that result in liability.
- conserving raw materials and energy.
- the perspective of states from different regions

6. The principle of Common but Differentiated Responsibilities and Respective Capabilities

This Principle establishes the common responsibility of states for the protection of the global environment. But in addition, it also lays down different standards of conduct for developed and developing nations. Principle 7 of the 1992 Rio Declaration on Environment and Development states: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global

environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

This Principle is included in many Multilateral Environmental Agreements

- The 1992 UN Framework Convention on Climate Change; Article 3 paragraph 1 provides that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in - the 1992 Convention on Biological Diversity, which even though most biodiversity is located in developing countries recognizes their sovereign rights over biological resources and takes into account interests of indigenous peoples and local communities.
- the 1992 Convention to Combat Desertification which recognized desertification as a common threat, even though the threat is greatest in developing countries.
- the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which has a special fund for developing countries and differentiated schedule of the reduction and elimination of substances which deplete ozone layer for developed and developing countries.

Without Common but Differentiated Responsibilities-style approaches, these agreements would not be universal in application and action. In these agreements, developing countries can commit to but be unable to discharge their obligations within the same compliance period to protect biological diversity, combat desertification, and eliminate their ozone depleting emissions unless there is a differentiation of responsibilities and action.

This principle is directly linked with the principle of capacity building of developing countries (e.g., Article 11 of the Paris Agreement).

7. General Recommendations to help building broad acceptance and constructive engagement by all parties in discussions about a legally binding standard or instrument in the area of business and human rights?

Based on the above experiences, it can be surmised that there are a few key takeaways from the experience of **multilateral environmental agreements**, that will be useful for the G7 in building a standard or instrument for business and human rights. These are laid out below:

- Involvement of civil society and all stakeholders in the making of this standard or instrument not only to ensure that obligations are easily assimilated and understood, but also to ensure that there is participation in the development of the standard.
- Creation of strong non-compliance procedures that facilitate compliance in a manner that is cooperative, facilitative and user-friendly.
- Respect for ideas of and cooperation with businesses and private sector actors, as they are one of the key actors and their participation is vital for ensuring the success of the unform standards and setting up normalised standards for businesses by the Conference of the Parties (see Biodiversity Convention).
- Obligations for States can be based on the already well developed in practice the notion of common but differentiated responsibilities together with the capacity building to ensure greatest success, which would bring all actors together.
- In relation to very detailed soft law documents, which set out commonly accepted standards such as the UN Guiding Principles on Business and Human Rights, treaty which incorporates them has an extra advantage of an absolute binding force. Soft law guidelines only must be complied with if they a part of binding customary international law. However, it is very diffi-

cult to prove a norm of customary international law. Other very useful standards which are not a norm of customary international law are not mandatory and may not be implemented. However, treaties must be absolutely observed in relation to all standards.

- Provisions of Multilateral Environmental Agreements are fairly precise. However, circumstances and knowledge change. Therefore, Conferences of the Parties keep the treaty under review and ascertain that through their decisions they develop these agreements i.e., that their character is dynamic not static.
- Relevant treaties are based on principles which are applicable to public and private entities such as in particular environmental impact assessment, the precautionary principle (approach) and polluter-pays-principle.

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