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From Classical Liberalism to Neoliberalism: Explaining the Contradictions in the International Environmental Law Project

Hélène Mayrand

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Résumé de l'article

Le présent article propose une critique du développement du droit international de l'environnement, en montrant l'influence des idéologies du libéralisme classique, du providentialisme et du néolibéralisme sur des textes juridiques-clés. Partageant les postulats des approches critiques du droit et appliquant une méthodologie s'inspirant de la critique des idéologies, cet article vise à déconstruire la compréhension occidentale dominante de l'évolution positive du droit international de l'environnement vers une meilleure protection de l'environnement. Premièrement, il présente la conception libérale classique de la nature et ses concepts visant à résoudre les problèmes environnementaux avant la Seconde Guerre mondiale, à travers l'exemple des accords de pêche. Deuxièmement, il passe à l'influence du providentialisme sur le droit international après la Seconde Guerre mondiale, qui a donné lieu à plusieurs instruments environnementaux, notamment les accords sur la pollution marine et, plus tard, la Déclaration de Stockholm*. Troisièmement, il examine le changement conceptuel sous l'influence du néolibéralisme, qui s'est produit dans les années 1990 dans la* Déclaration de Rio *ainsi que dans les régimes gouvernant la diversité biologique et les changements climatiques. Comme le montre cet article, au lieu de modifier les conceptions problématiques de la nature dans le droit international, le droit international de l'environnement s'appuie sur ces conceptions libérales classiques et exacerbe l'instrumentalisation de la nature en mettant l'accent sur la rationalité économique et en favorisant l'analyse coûts-bénéfices, la déformalisation du droit, la déréglementation et l'autoréglementation par les acteurs privés, la gestion par les experts et les mécanismes de marché pour solutionner les problèmes environnementaux.*

From Classical Liberalism to Neoliberalism: Explaining the Contradictions in the International Environmental Law Project

Hélène Mayrand*

ABSTRACT

This paper provides a critique of the development of international environmental law, showing the influence of ideologies of classical liberalism, welfarist liberalism and neoliberalism on key legal texts. Sharing the assumptions of critical approaches to law and applying a methodology in line with ideology critique, this paper is aimed at deconstructing the prevailing Western understanding of the positive evolution of international environmental law towards better environmental protection. First, it describes the classical liberal understanding of nature and concepts to address environmental problems before World War II through the example of fisheries agreements. Second, it moves to the influence of welfarist liberalism on international law following World War II, which gave rise to several environmental instruments, especially marine pollution agreements, and later the Stockholm Declaration. *Third, it looks at the conceptual shift under the influence of neoliberalism that occurred in the 1990s in the* Rio Declaration *as well as in the biological diversity and climate change regimes. As the paper shows, instead of changing the problematic understandings of nature in international law, international environmental law relies on these liberal classical understandings and further exacerbates the instrumentalization of nature with the focus on economic rationality, and favouring cost-benefit analysis, deformalization of law, deregulation and self-regulation by private actors, management by experts, and market mechanisms to address environmental problems.*

KEY-WORDS:

International environmental law, critical approaches to law, ideology, classical liberalism, welfarist liberalism, neoliberalism.

* Associate Professor, Faculty of Law, Université de Sherbrooke; member of the Laboratoire pour la recherche critique en droit (LRCD).

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RÉSUMÉ

Le présent article propose une critique du développement du droit international de l'environnement, en montrant l'influence des idéologies du libéralisme classique, du providentialisme et du néolibéralisme sur des textes juridiques-clés. Partageant les postulats des approches critiques du droit et appliquant une méthodologie s'inspirant de la critique des idéologies, cet article vise à déconstruire la compréhension occidentale dominante de l'évolution positive du droit international de l'environnement vers une meilleure protection de l'environnement. Premièrement, il présente la conception libérale classique de la nature et ses concepts visant à résoudre les problèmes environnementaux avant la Seconde Guerre mondiale, à travers l'exemple des accords de pêche. Deuxièmement, il passe à l'influence du providentialisme sur le droit international après la Seconde Guerre mondiale, qui a donné lieu à plusieurs instruments environnementaux, notamment les accords sur la pollution marine et, plus tard, la Déclaration de Stockholm. *Troisièmement, il examine le changement conceptuel sous l'influence du néolibéralisme, qui s'est produit dans les années 1990 dans la* Déclaration de Rio *ainsi que dans les régimes gouvernant la diversité biologique et les changements climatiques. Comme le montre cet article, au lieu de modifier les conceptions problématiques de la nature dans le droit international, le droit international de l'environnement s'appuie sur ces conceptions libérales classiques et exacerbe l'instrumentalisation de la nature en mettant l'accent sur la rationalité économique et en favorisant l'analyse coûts-bénéfices, la déformalisation du droit, la déréglementation et l'autoréglementation par les acteurs privés, la gestion par les experts et les mécanismes de marché pour solutionner les problèmes environnementaux.*

MOTS-CLÉS :

Droit international de l'environnement, approches critiques du droit, idéologie, libéralisme classique, providentialisme, néolibéralisme.

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INTRODUCTION

International environmental law is often described as emerging following the 1972 *United Nations Conference on the Human Environment*[1] and the 1992 *United Nations Conference on Environment and Development*.[2] These two conferences resulted in the adoption of the Stockholm and Rio declarations, setting founding principles for this new branch of international law.[3] Ideas about protecting the environment were also present at the international level prior to the 1970s, including in international conventions. Notwithstanding the development of this new branch of law in the second half of the 20th century, very little contribution to environmental protection has been achieved, and the need to address environmental problems—climate change, biodiversity depletion, pollution, waste and water management, and so on—is more pressing than ever. For example, the sixth Global Environment Outlook (GEO-6) published by the United Nations Environment Programme (UNEP) in March 2019 includes alarming statistics. Essentially, "the report shows that the overall environmental situation is deteriorating globally and the window for action is closing."[4] The report highlights that the current state of environmental policy is simply insufficient in terms of counteracting other sectors' policies.[5] GEO-6 concludes that the rare instances in which the international community

1. *United Nations Conference on the Human Environment*, Stockholm, 5–16 June 1972.

2. *United Nations Conference on Environment and Development*, Rio de Janeiro, 3–14 June 1992.

3. *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc A/CONF/48\14\REV.1 [*Stockholm Declaration*]; *Declaration of the United Nations Conference on Environment and Development*, 14 June 1992, UN Doc A/CONF.151/26 (Vol. I), (1992) 31:4 ILM 876 [*Rio Declaration*].

4. United Nations Environment Assembly of the United Nations Environment Programme, "GEO-6 Key Messages (Developed by the Bureau members of the Summary for Policymakers meeting)," 12 February 2019, online: <wedocs.unep.org/bitstream/handle/20.500.11822/27692/GEO6_Key_Messages.pdf?sequence=1&isAllowed=y>, p 2 [UNEP, "GEO-6 Key Messages"].

5. *Ibid* at 3.

of states succeeds in adopting "internationally agreed environmental goals on pollution control, clean-up and efficiency improvements," as significant as these instances may be, cannot replace essential structural changes.[6]

This paper provides a critique of the development of international environmental law, showing the influence of ideologies that contribute to contradictions in the development of this body of law. Sharing the assumptions of critical approaches to law,[7] it is aimed at deconstructing the prevailing Western understanding of the positive evolution of international environmental law towards better environmental protection. It provides an explanation of why international environmental law is, in fact, part of the problem.[8]

To make my argument, I rely on two understandings of ideologies. First, ideologies refer to the common understanding in political science of systems of beliefs, values and concepts as part of a political tradition.[9] The development of international environmental law is analyzed through three main ideologies: classical liberalism; welfarist liberalism; and neoliberalism. The rise of the different ideologies corresponds roughly to certain periods of time: classical liberalism prior to World War II; welfarist liberalism from World War II to the 1990s; and neoliberalism from 1992 and onwards. These periods of time have to be understood as guides only.[10] As some examples provided in this paper show, the different conceptions of liberalism overlap and have been influential beyond these historical periods.[11]

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6. *Ibid*. The report uses the vocabulary of "transformative change."

7. Günter Frankenberg, "Critical Theory" in *Max Planck Encyclopedia of Public International Law*, online: Oxford Public International Law <www.mpepil.com>; see also Rémi Bachand, *Théories critiques et droit international* (Bruxelles: Bruylant, 2013).

8. David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2002) 15 Harv Hum Rts J 101; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

9. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: Oxford University Press, 2000) at 9–10; John B Thomson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge: Polity Press, 1990) at 5.

10. Others have identified similar periods (traditional era, modern era and postmodern era), although not focusing on ideologies; see e.g. Philip Sands, "The Evolution of International Environmental Law" in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *Oxford Handbook of International Environmental Law* (New York: Oxford University Press, 2007) 29 at 30.

11. As with international law generally, it is "historically and synchronically discontinuous," *ibid*, referring to Martti Koskenniemi, "Letter to the Editors of the Symposium on Methods in International Law" (1999) 93 AJIL 351 at 359.

Second, moving from this first understanding of ideology, I adopt a methodology in line with ideology critique as applied in the legal context.[12] Accordingly, the paper does not only describe the influence of different "ism" on the development of law, but also inquires into the ways certain meanings of legal texts perpetuate relations of domination. Unlike previous research focusing mainly on relations of domination concerning human beings, the paper looks at such relations of domination over nature. Rather than presenting a comprehensive history of international environmental law, it focuses on meanings in certain legal texts in international treaties and declarations, which are considered in many textbooks as key instruments for the development of this field of law.[13] While being aware of alternative understandings of nature in international law and practice, the goal of this paper is to show that concepts from classical liberalism, welfarist liberalism and neoliberalism as to how to conceive of nature and address environmental problems have been translated in technical terms in key legal texts, showing a trend in the development of international environmental law.[14] These concepts, incorporated in principles and rules, seem rational and normal, rather than a political choice.[15] However, they perpetuate relations of domination over nature that prevent the field from achieving substantive change.

Prior to World War II, international lawyers understood the ostensible function of international law at the time as ensuring the minimal coexistence of states. International environmental law as a distinct so-named specialization was nonexistent as of yet, but there were still some agreements addressing environmental concerns, especially fisheries agreements. From a classical liberal standpoint, environmental

12. Marks, *supra* note 9 at 12–15, relying on Thompson, *supra* note 9; for other approaches see e.g. Tor Krever, "International Criminal Law: An Ideology Critique" (2013) 26:3 Leinden J Int'l L 701.

13. See e.g. Philippe Sands & Jacqueline Peel, *Principles of International Environmental Law*, 4th ed (Cambridge: Cambridge University Press, 2018); Timo Koivurova, *Introduction to International Environmental Law* (London: Routledge, Taylor and Francis Group, 2014); Ved P Nanda & George R Pring, eds, *International Environmental Law and Policy for the 21st Century*, 2nd ed rev (Leiden: Brill, Nijhoff, 2013); Bodansky, Brunnée & Hey, *supra* note 10.

14. On the role of experts and how they shape international law to promote technical management, see David Kennedy, *How Power, Law and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016).

15. This refers to the processes of "legitimation" and "naturalization." Note, however, that ideology also has other modes of operation: dissimulation, unification, and reification. Marks, *supra* note 9 at 19; Thompson, *supra* note 9 at 60.

components were resources subject to appropriation and commodification.[16] Following World War II, international law was influenced by Keynesian ideas and turned to more substantive goals, including environmental protection. This liberal-welfarist turn led to the adoption of international agreements to address some environmental problems, and this was particularly the case for marine pollution and the rise of international environmental law as a distinct branch of international law following the 1972 *Stockholm Declaration*. While there was a shift in ideas that occurred and much hope was put in the development of international environmental law to correct the harm done to nature, the influence of the ideology of classical liberalism was still dominant. Following the 1992 *Rio Declaration*, the ideology of neoliberalism framed the building of international environmental law. As the paper shows, the new rules and concepts, such as sustainable development, the polluter-pays principle, the precautionary principle and the principle of common but differentiated responsibilities were developed in the *Rio Declaration*, as well as in the biological diversity and climate change regimes to promote an instrumental approach to nature centred on the market and management by experts for the regulation of environmental problems. The paper concludes by calling for rethinking the founding principles of international environmental law.

I. CLASSICAL LIBERALISM

International environmental law is recent in the history of international relations. Before the mid-twentieth century, international law, shaped primarily by Western states, ostensibly aimed at ensuring a minimal coexistence of sovereign states.[17] At the time, the dominant ideology influencing international law was classical liberalism.[18] According to this conception, states are sovereign, drawing upon the

16. On this point, see also Ileana Porras, "Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations" (2014) 27:3 Leiden J Int'l L 641, who looks at the concepts of commerce, property and commodification of nature in the early development of international law in the 16th to 18th centuries.

17. Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge: Cambridge University Press, 2012) at 29, 158.

18. *Ibid*; on liberalism, see e.g. John Locke, *The Second Treatise of Government* (Mineola: Dover Publications, 2002); Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Oxford: Oxford University Press, 2008); Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Mineola: Dover Publications, 2007); Étienne Bonnot de Condillac, *Le commerce et le gouvernement, considérés relativement l'un à l'autre* (Chapel Hill: FB&C, 2017).

idea of the right to liberty recognized for individuals.[19] As opposed to a realist conception of international relations, classical liberalism is based on the possibility of organizing international relations through international law. This turn towards international law as a neutral and objective order appeared in a context of a disillusion with politics in the wake of World War I, especially in light of the incapacity of the principle of balance of power to maintain peace.[20] In such a context, the goal of international law was to protect state sovereignty while ensuring peace and security.[21] Within this quest for international peace, trade was perceived as playing a vital role, by maintaining lasting relations between states while satisfying their individual interests.[22] As such, trade was established as a fundamental right of states.[23] Even if international law did not directly promote a specific economic system, it was taken for granted that exchanges as well as property rights were understood from a capitalist perspective, meaning the consecration of private property rights, capital accumulation and the development of international markets.[24] Environmental components were seen as subject to appropriation and commodification. To be sure, Western conservationist concerns were already on the rise since the 18th century, especially under the influence of professional natural scientists who raised awareness on the impacts of colonial practices on tropical lands.[25] These conservationist concerns, however, were understood by empires through a utilitarian mindset, to avoid the depletion of natural resources or to preserve environmental components for aesthetic appreciation.[26] As Grove underlines, "[i]f a single lesson can be drawn from the early history of conservation, it is that

19. Jouannet, *supra* note 17 at 32, 127; see also John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1998).

20. Jouannet, *supra* note 17 at 41.

21. *Ibid.*

22. It is namely referred to as the "sweet commerce." *Ibid* at 50, 56; William Robertson, *Histoire du règne de Charles Quint* (Paris: Amadan Media Corporation, 2004) at 67; Smith, *supra* note 18.

23. Jouannet, *supra* note 17 at 51; George-Frédéric De Martens, *Précis du droit des gens moderne de l'Europe*, t III, vol I (Paris: Guillaumin, 1858), vol IV at 310, 314–15.

24. Jouannet, *supra* note 17 at 52; Jean Baechler, *Les origines du capitalisme* (Paris: Gallimard, 1971).

25. Richard H Grove, "Origins of Western Environmentalism" (1992) 267:1 Scientific American 42 [Grove, "Origins"]; see also Richard H Grove, "Green Imperialism: Colonial Expansion," *Tropical Island Edens and the Origins of Environmentalism, 1600–1860* (Cambridge: Cambridge University Press, 1996).

26. Grove, "Origins", *supra* note 25 at 43; Ian Tyrrell, *Crisis of the Wasteful Nation: Empire and Conservation in Theodore Roosevelt's America* (Chicago: University of Chicago Press, 2015) at 24, 145–171.

states will act to prevent environmental degradation only when their economic interests are shown to be directly threatened."[27] Finally, classical liberalism relied on Western rationality and techniques, favouring Western understandings of science and technology to solve international problems.[28]

A. Fisheries Agreements

International fisheries agreements constitute a telling example of the manner in which the ideology of classical liberalism focuses on state sovereignty, freedom of trade, the appropriation of the environment as resources, and Western science and technology to face environmental problems. According to the law of the sea, fishing resources are part of resources over which states can claim sovereign property rights for the purpose of exploitation. In the case of shared resources between states, international agreements have been adopted to address overexploitation as early as the end of the 19th century. As such, fisheries agreements were among the first international instruments dedicated to an "environmental" protection objective. The environmental problem justifying the adoption of these agreements was overfishing (overexploitation of a natural resource), and the objective pursued was allowing the ongoing exploitation of this resource, often from a short-term perspective and ignoring the ecosystem of which the species were a part.

Adopted in 1946, the *International Convention for the Regulation of Whaling*[29] is illustrative of the classical liberal conception of the environment as resources. While strictly speaking outside of the historical period associated with classical liberalism, this convention relies on previous rules and principles adopted in the 1930s in the *Convention for the Regulation of Whaling, the International Agreement for the Regulation of Whaling* and the 1938 *Protocol to the Agreement*.[30] Even if

27. Grove, "Origins", *supra* note 25 at 47.

28. Alex McLeod & Dan O'Meara, eds, *Théories des relations internationales*, 2nd ed (Outremont (Québec): Athéna Éditions, 2010) at 134.

29. *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) [*Whaling Convention*].

30. *Convention for the Regulation of Whaling*, 24 September 1931, 155 LNTS 349 (entered into force 16 January 1935); *International Agreement for the Regulation of Whaling*, 8 June 1937, 190 LNTS 79 (entered into force 1 July 1937); *Protocol of 24 June 1938, for the Regulation of Whaling*, 26 November 1945, 11 UNTS 43; see also Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge: Cambridge University Press, 2015) at 6–28.

overexploitation and increased membership of states that were opposed to whaling led to a moratorium on whaling for numerous whale species, the *Whaling Convention* was adopted for the purpose of ensuring the long-term exploitation of a resource through regulation. Indeed, the Preamble, guiding the interpretation of the text of the convention, recognizes "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks."[31] Furthermore, this convention created the International Whaling Commission, whose mandate is to encourage studies and investigations, in order to collect, analyze and disseminate information on the state and size of whale populations, as well as on the best practices to maintain and increase these populations.[32] It regulates, through an annex to the convention, the whaling industry according to an objective of "provid[ing] for the conservation, development, and optimum utilization of the whale resources."[33] This regulation is based on scientific data, but also on "the interests of the consumers of whale products and the whaling industry."[34] The *Whaling Convention* thus illustrates the classical liberal ideas relying on science and technology to address an environmental problem of overexploitation with the view of favouring international trade of species seen as resources.

The International Court of Justice (ICJ) confirmed this historical conception of whales as resources in its 2014 decision on *Whaling in the Antarctic*.[35] Indeed, the ICJ recalled the historical origins of the *Whaling Convention* and the two agreements previously adopted in 1931 and 1937. It underlined that the adoption of the first 1931 convention "was prompted by concerns over the sustainability of the whaling industry"[36] and thus sought to "make possible the orderly development of the whaling industry."[37] With respect to the *Whaling Convention*, the ICJ concluded that it "pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation,"[38] the parties—Australia, New Zealand, and Japan—focusing on either object of the Convention according to their interests

31. *Whaling Convention*, *supra* note 29, at Preamble.
32. *Ibid* at art IV.
33. *Ibid* at art V(2)a).
34. *Ibid* art V(2)d).
35. *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, [2014] ICJ rep 226.
36. *Ibid* at para 43.
37. *Ibid* at para 56.
38. *Ibid*.

in the dispute.[39] Interestingly, there was a debate among the judges as to whether the *Whaling Convention* should be interpreted in an evolutionary manner and take into account the new developments in international environmental law, such as the principle of sustainable development, or if the object of the convention was based on the well-established liberal principles of international law concerning the management of fishing resources to achieve optimum/maximum yield.[40] Notwithstanding this attempt by some of the judges to move away from the classical conception of nature as resources and, as discussed below, some progress in international environmental law, the founding principles of international law aimed at exploiting nature for the purpose of optimal management of its components have not been displaced.

Even following World War II, the classical liberal mindset in fisheries agreements remained. The *Convention on Fishing and Conservation of the Living Resources of the High Seas* was adopted in 1958.[41] The conservation of these "resources" was motivated by their availability for humans from an economic exploitation perspective. Indeed, the convention clearly states that: "the expression 'conservation of the living resources of the high seas' means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products."[42] Even though it was adopted in 1982 after the 1972 *Stockholm Declaration* and at a time when international environmental law started to flourish through the adoption of international instruments, the *United Nations Convention on the Law of the Sea*[43] still puts forward a classical liberal conception of the exploitation of fishing resources. It establishes where states can assert sovereignty over fisheries, especially in their

39. *Ibid* at para 57.

40. See especially the dissent of Mr. Justice Abraham Owada, *ibid* at 301–20. He states from the outset that he opposes "the understanding of the Judgment on the basic character of the *International Convention for the Regulation of Whaling*" that the majority adopts (at para 1). He writes: "The concept of 'conservation of fisheries resources' contains the element of 'maximum/optimum sustainable yield' as its integral part as employed in the Convention. This is in line with the accepted approach to high-sea fisheries in general, which is well-established in the contemporary international law on fisheries" (at para 10). He adds: "The Convention is not malleable as such in the legal sense, according to the changes in the surrounding socio-economic environments" (at para 12).

41. *Convention on Fishing and Conservation of the Living Resources of the High Seas*, 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966).

42. *Ibid* at art 2.

43. *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1834 UNTS 3 (entered into force 16 November 1994) [UNCLOS]).

"exclusive economic zone" as well as how to "conserve" biological resources, which in fact means to favour their optimum exploitation for commercial purposes.[44] Even "conservation of biological resources" is defined with exploitation in mind and from an economic standpoint, as states should "maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors."[45] Not only must states ensure they determine the yield that corresponds to optimum exploitation, they *shall* grant other states access to the surplus should their own capacity be inferior to this "optimum" yield.[46]

Thus, the regulation of fishing, as an early manifestation of formalized international law related to the management of natural "resources," demonstrates the classical liberal orientation given to environmental law adopted later on. Living components of the sea were intrinsically considered as resources to be exploited, rather than conceptualized as part of an ecosystem. *UNCLOS* furthers this perspective by providing that states not only *can* exploit them to their "sustainable" limit, but indeed, *must*.

II. WELFARIST LIBERALISM

As Jouannet explains, international law followed a path similar to that of Western liberal welfare states after the end of the World War II, where the liberal conception of liberty, or state sovereignty, and the problems linked to industrial capitalism had to be addressed through legal corrective measures.[47] In the aftermath of World War II, there was a common understanding that the liberal ideals of state sovereignty, freedom of navigation and trade, and the capitalist organization of the economy that were at the heart of the international law project, did not succeed in bringing better living conditions to the world's population.[48] The aims of international law expanded to protect specific groups, such as women, children, workers, migrants, and so on. New concerns and contestations of existing liberal principles enshrined in

44. *Ibid* at art 62.

45. *Ibid* at arts 61(3), 119(1)a).

46. *Ibid* at art 62(2).

47. Emmanuelle Jouannet, "À quoi sert le droit international? Le droit international providence du XXI[e] siècle" (2007) 40:1 Rev BDI 5 at 17; see also Jouannet, *supra* note 17.

48. *Ibid*.

international law to favour colonial states resulted from the influence of decolonized states now playing an increasing role in the development of international law.[49]

It was in this context that international rules and principles arose to address environmental problems from a global perspective. Several factors contributed to the rise of these new rules and principles, including the accelerated exploitation and depletion of natural resources, major environmental disasters including oil spills from tankers, the 1960s and 1970s social movements, new environmental legislation adopted at the domestic level as well as the creation of institutional fora and organizations to negotiate international agreements.[50] As a result, this period has seen the proliferation of conventions and protocols aimed at addressing marine pollution. This is also when international environmental law as a distinct branch of international law arose at the international level following the 1972 Stockholm Conference and the adoption of UNEP, created later the same year.[51] Notwithstanding this shift towards environmental protection as illustrated in marine pollution agreements and the *Stockholm Declaration*, the concepts upon which these instruments rely are deeply rooted in classical liberalism.

A. Marine Pollution Agreements

States' interests in addressing pollution are rooted in the general principle of international law according to which the activities of a State must not cause damages to another State, which was established in the *Trail Smelter Case* between Canada and the United States, an arbitral award decided in 1941.[52] This principle is intrinsically linked to the idea of respect for state sovereignty. This paramount principle in international law, however, shows its paradoxical nature in this context, as two understandings of state sovereignty are in conflict: a State's right to use its own territory and exploit its natural resources in any manner it deems fit; and a State's right not to suffer from harm from another

49. Ram P Anand, "New States and International Law" (2007) in *Max Planck Encyclopedia of Public International Law*, *supra* note 7.

50. Sands, *supra* note 10 at 34; Nanda & Pring, *supra* note 13 at 78, 97–98.

51. Institutional and financial arrangements for international environmental cooperation, GA Res 2997 (XXVII), UNGA, 27th 77 Sess (1972).

52. *Trail Smelter Case (United States v Canada),* (1941) 3 RIAA 1905.

State.[53] Far from being helpful to address environmental problems, sovereignty as understood through the no-harm principle results in the balancing of states' interests in accordance with these two understandings of state sovereignty,[54] rather than implying a solution from an environmental perspective.

Even if international pollution became a preoccupation for states and led to the adoption of international agreements following World War II, the influence of the ideology of classical liberalism, putting emphasis on state sovereignty, freedom of trade as well as science and technology to address environmental problems, remained problematic to achieve substantial change for environmental protection. Marine pollution was one of the first environmental concerns that led to the adoption of international multilateral agreements. Oceans have historically been considered international spaces, especially in order to promote the freedom of the seas and navigation for commercial purposes.[55] Faced with pressing problems related to pollution of the seas, it became necessary to regulate pollution from ships. In 1954, the *International Convention for the Prevention of Pollution of the Sea by Oil*[56] was adopted in London. This convention's main objective was the prevention of pollution from ships, and it established specific discharge standards for hydrocarbons. In response to the 1967 oil spill in Torrey Canyon on the west coast of Cornwall in England,[57] the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*[58] and the *International Convention on Civil Liability for Oil Pollution Damage*[59] were adopted by the International Maritime Organization in 1969. However, these two conventions were not adopted to reduce pollution from ships, but rather to award powers to states to intervene in cases of spills in the high seas as well as to

53. Martti Koskenniemi, "The Politics of International Law" (1990) 1 EJIL 4 at 19.

54. *Ibid.*

55. This idea can be traced back to Hugo Grotius, *The Freedom of the Seas*, translated by Ralph Dan Deman Magoffin, 1916 (Kitchener: Batoche Books, 2000); Ruth Lapidoth, "Freedom of Navigation — Its Legal History and Its Normative Basis" (1975) 6:2 JL & Com 259.

56. *International Convention for the Prevention of Pollution of the Sea by Oil*, 12 May 1954, 327 UNTS 3 (entered into force 26 July 1958) [*OILPOL*].

57. *International Maritime Organization, Brief History of IMO*, online: International Maritime Organization <www.imo.org/About/HistoryOfIMO/Pages/Default.aspx>.

58. *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 29 November 1969, 970 UNTS 211 (entered into force 6 May 1975).

59. *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 UNTS 12 (entered into force 19 June 1975).

repair any eventual environmental damage. With the exception of *OILPOL*, it was not until the 1970s, when international environmental law emerged as a separate branch of international law, that international conventions specifically dedicated to pollution were adopted, namely the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*,[60] the *International Convention for the Prevention of Pollution From Ships*, as modified by the *Protocol of 1978 relating to the International Convention for the prevention of pollution from ships*,[61] and later *UNCLOS*.

While there was a shift following World War II in how states perceived the environment, as is in need of protection not only for commercial purposes, but also for the well-being of populations and oceans, the influence of the ideology of classical liberalism was still dominant. As was the case for fisheries agreements, the international agreements regulating marine pollution that followed, including *OILPOL*, the *London Convention*, *MARPOL 73/78* and even *UNCLOS* all placed emphasis on state sovereignty, freedom of trade and navigation, as well as science and technology to prevent, reduce and control marine pollution. Freedom of navigation was in fact never called into question and is still a trumping "natural" and inalienable right of states. The exploitation of oil as a resource, from which pollution originates, was not questioned either. As such, the logic was to reduce the harmful effects of international trade, as the basic assumption was that such exchanges must be promoted and flourish.

B. The *Stockholm Declaration*

The birth of international environmental law as a distinct branch of international law is often traced back to the *Stockholm Declaration*,[62]

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60. *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 UNTS 120 (entered into force 30 August 1975) [*London Convention*]. See also *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972, London, 7 November 1996, 36 ILM 1 (entered into force 24 March 2006).

61. *International Convention for the Prevention of Pollution From Ships*, 2 November 1973, 12 ILM 1319, as modified by the *Protocol of 1978 relating to the International Convention for the Prevention of Pollution From Ships*, 1973, 17 February 1978, 17 ILM 546 (entered into force 2 October 1983) [*MARPOL 73/78*].

62. Jean-Maurice Arbour et al, eds, *Droit international de l'environnement*, 3rd ed (Montréal: Yvon Blais, 2016) at 36; Anita M Halvorssen, "The Origin and Development of International Environmental Law" in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (London: Routledge, Taylor & Francis Group, 2012), 25.

adopted in 1972 following the Stockholm Conference. A conceptual shift occurred during the conference, namely the conceptualization of environmental problems in a global manner. Nevertheless, the emerging field of international environmental law did not question the founding principles of international law rooted in classical liberalism. In particular, the basic principle of international law remained the "sovereignty" of the fictive entity of the "State," the environment was still presented as resources, and commerce remained a paramount right to facilitate exchanges among states.

Adopting an anthropocentric conception according to which "[o]f all things in the world, people are the most precious,"[63] the *Stockholm Declaration* understands environmental components as resources. It reiterates the sovereign right of states to exploit environmental resources according to their own policies and priorities.[64] To avoid overexploitation, these resources have to be managed, but according to an economic development objective.[65] Moreover, economic development is recognized as the priority of states, and environmental policies could not impede such development.[66] The only limit to this development is that of reducing pollution, both by toxic substances that may cause serious or irreversible damages and by substances that cause damage to the territory of another State.[67] From a management perspective borrowed from economic theories, the *Stockholm Declaration* refers to the idea of rational planning as well as to science and technology for resolving environmental problems.[68] In the context of developing countries, despite the sovereign's prerogative to choose its own policies, the declaration conveys the idea that industrialization is inevitable and that specific economic measures could reduce harmful effects of such development on the environment.

III. NEOLIBERALISM

The years following the Stockholm Conference has seen important changes at the global level. A network of international environmental

63. *Stockholm Declaration*, *supra* note 3 at para 5 of the Preamble.
64. *Ibid* at Principle 21.
65. *Ibid* at Principles 2, 4, 5, 13, 17.
66. *Ibid* at Principles 8, 11, 12.
67. *Ibid* at Principles 6, 21.
68. *Ibid* at Principles 14, 17, 18, 20.

law experts, also analyzed through the lens of epistemic communities, were particularly active in different international fora to develop new environmental rules and principles.[69] Notwithstanding the development of numerous instruments under the influence of these experts and in light of environmental degradation, environmental disasters including Bhopal and Chernobyl, as well as new challenges, including climate change, there was a need for new concepts and principles which led to the adoption of the *Rio Declaration* in 1992.[70] This declaration was adopted in the particular political context following the end of the Cold War at a time of enthusiasm for the rule of law and multilateral agreements.[71] Third World states were also playing a significant role in the development of international law and had concerns and frustrations with the failure of globalization to distribute wealth and power equitably among states and address economic and social problems in the Third World.[72] These states were also particularly concerned with the costs associated with environmental measures and potential conflicts with their developmental objectives. The 1980s and 1990s were also characterized by the rise of the neoliberal ideology at the international level, embraced domestically and disseminated globally by the United States and Britain from the 1970s, which impacted the development of international environmental law.[73]

Neoliberalism is often pointed to as one of the main sources of the economic, political, and environmental problems of our times.[74] Bernstein has described this turn to neoliberalism to address environmental concerns as "the compromise of liberal environmentalism:"[75] the convergence of environmental and economic norms in order to

69. Sands, *supra* note 10 at 38; see also Peter Haas, "Epistemic Communities" in Bodansky, Brunnée & Hey, *supra* note 10, 791.

70. Sands, *supra* note 10 at 40; Nanda & Pring, *supra* note 13 at 102–103.

71. Martti Koskenniemi, "History of International Law, Since World War II" (2011) in *Max Planck Encyclopedia of Public International Law*, *supra* note 7 at para 42.

72. *Ibid* at para 48. Also see Shawkat Alam, ed, *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2016).

73. David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 22, 87–119.

74. George Monbiot, "Neoliberalism—The Ideology at the Root of All Our Problems", *The Guardian* (15 April 2016). See e.g. Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Brooklyn: Zone Books, 2015); Harvey, *supra* note 73.

75. Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

both protect the environment and maintain a liberal (capitalist) economic order. While having a contested meaning, neoliberalism can be broadly described as an ideology and political project relying on the prescriptions of neoclassical economics.[76] The influence of this ideology induced a turn in international law towards conceiving human beings as *homo economicus*, i.e. as actors understanding the world, including social relations with the natural environment, through economic rationality.[77] At its core, it envisages human-nature relations through the economic problem of infinite human wants, finite means of production and resources, and capital accumulation and technological progress to mitigate the depletion of scarce resources.[78] It postulates that every individual (and by extension, the state) is perceived as an economically rational actor who acts in his self-interest according to a cost-benefit analysis.[79]

Neoliberalism favours an approach centred on market incentives for the regulation of environmental problems.[80] On the one hand, it discourages state interventions, favouring privatization, deregulation and self-regulation by private actors. On the other hand, it requires states to regulate in order to put in place optimal conditions for market mechanisms.[81] Such moves towards greater self-regulation have led to deformalization of international law and the adoption of soft law instruments or weak and vague obligations in binding agreements.[82] Less state intervention and self-regulation also led to greater involvement of the industry and other non-governmental groups. The participation of such actors was, and is, accomplished with different

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76. Harvey, *supra* note 73 at 20–21; for a deeper and nuanced analysis of neoliberal thought, see Dieter Plehwe, Quinn Slobodian & Philip Mirowski, eds, *Nine Lives of Neoliberalism* (Brooklyn, London: Verso, 2020).

77. On the *homo economicus* in the environmental context, see Panos Kalimeris, "Ecce Homo-Economicus? The Dr. Jekyll & Mr. Hide Syndrome of the Economic Man in the Context of Natural Resources Scarcity and Environmental Externalities" (2018) 12:I J Phil Econ 89.

78. *Ibid* at 94.

79. Harvey, *supra* note 73 at 2, 64.

80. James McCarthy & Scott Prudham, "Neoliberal Nature and the Nature of Neoliberalism" (2004) 35 Geoforum 275 at 276; Peter Newell, "The Marketization of Global Environmental Governance: Manifestations and Implementations" in Jacob Park, Ken Conca & Matthias Finger, eds, *The Crisis of Global Environmental Governance: Towards a New Political Economy of Sustainability* (Milton Park: Routledge, 2008), 77.

81. Honor Brabazon, "Introduction, Understanding Neoliberal Legality" in Honor Brabazon, ed, *Neoliberal Legality, Understanding the Role of Law in the Neoliberal Project* (Abingdon: Oxon, 2017) 1 at 5.

82. McCarthy & Prudham, *supra* note 80 at 276.

degrees of resources and accountability in decision-making, and without regard to their equitable distribution.[83]

Similarly to liberalism, neoliberalism relies on Western science and technology to address environmental problems. It moves away, however, from state-centred decision-making to favour management by experts, often utilizing a management perspective borrowed from economic sciences. Neoliberalism applied to address environmental concerns has been described as "ecological modernization."[84] It has been attributed to the increased use of environmental economists' experts in the development of environmental law and policy.[85] Such management of environmental problems by experts has in fact only contributed marginally to the protection of the environment.[86] It has increasingly favoured consumerism instead of reconceptualizing the human-nature relationship beyond economic rationality.[87]

The following sections focus on the founding principles of international environmental law as set out in the *Rio Declaration*.[88] Moreover, it presents two key areas of international environmental law: biodiversity and climate change. The critical analysis of these texts show how key instruments of international environmental law build upon classical liberal ideology and embrace the precepts of neoliberalism.

A. The *Rio Declaration*

The *Rio Declaration* shows continuities with the classical liberal ideology, for example by reiterating the sovereign right of states to exploit environmental resources according to their own policies and priorities, including in terms of development.[89] However, the neoliberal ideology

83. *Ibid*.

84. Peter Christoff, "Ecological Modernization, Ecological Modernities" (1996) 5 Environmental Politics 476; Arthur Mol & Gert Spaargaren, "Ecological Modernization Theory in Debate: A Review" (2000) 9 Environmental Politics 17 at 23; Michael M'Gonigle & Louise Takeda, "The Liberal Limits of Environmental Law: A Green Legal Critique" (2013) 30:3 Pace Envtl L Rev 1005 at 1012; Arthur P J Mol, *Globalization and Environmental Reform: The Ecological Modernization of the Global Economy* (Cambridge (MA): MIT Press, 2001).

85. Mark Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment*, 2nd ed (Cambridge (MA): Cambridge University Press, 2008).

86. M'Gonigle & Takeda, *supra* note 84 at 1081.

87. On the move from *homo economicus to homo consumericus*, see Kalimeris, *supra* note 77.

88. *Rio Declaration*, *supra* note 3.

89. *Ibid* at Principle 2.

relying on the convergence of environmental and economic norms to address environmental problems is apparent throughout the document. For example, peace, development (understood in economic terms), and the protection of the environment were considered as "interdependent and indivisible."[90] Principle 12 clearly states that economic development can achieve peace and the well-being of populations. The *Rio Declaration* also sets the precedence of markets over environmental protection. To achieve economic growth, the market in an "open international economic system" must remain without barriers to the extent possible, which implies that environmental measures must not be considered arbitrary, unjustified or as constituting disguised restrictions on international trade. The adoption of local measures to protect the environment that might have an impact on international markets was thus discouraged. Such approach was consistent with the rules set out in the global trade regime, which was already well established under the *General Agreement on Tariffs and Trade*.[91]

The *Rio Declaration*'s embrace of the precepts of neoliberalism is even more striking in its principles. The *Rio Declaration* adopts a new approach to environmental protection, especially through the principle of sustainable development[92] as articulated in the Brundtland Report.[93] It relies on the idea that "the world can have economic growth, eliminate poverty, and that it can be done in an environmentally sound and sustainable fashion."[94] As Palmer underlines, the politics behind such approach is appealing to numerous parties: it seems to satisfy both interests to protect the environment and the concern for economic growth and development, while also addressing concerns of Third World and Western states.[95] However, the principle shifts the focus away from the economic and political structures that are in fact detrimental to nature and takes these structures as given and

90. *Ibid* at Principle 25.

91. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, 30 October 1947 (entered into force 1 January 1948) [GATT]. See also *United States-Restrictions on Imports of Tuna*, (1991) 30 ILM 1594; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, (1998) WTO Doc WT/DS58/AB/R, (1999) 38 ILM 121.

92. See *Rio Declaration, supra* note 3 at Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24, 27.

93. World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) [Brundtland Report]. Also see Nico J Schrijver, *The Evolution of Sustainable Development in International Law* (Leyde: Brill, 2009).

94. Geoffrey Palmer, "The Earth Summit: What Went Wrong at Rio?" (1992) 70:4 Wash ULQ 1005 at 1011.

95. *Ibid* at 1012.

natural. Indeed, the environment is still predominately understood as resources to be exploited for the purpose of fulfilling the needs of present and future generations.[96] As the Marxist scholar Liodakis argues, the capitalist economic system was not called into question in the development of these norms. Its contribution to environmental degradation was obscured, namely through the sustainable development principle that presupposes that economic development needs not to be radically rethought because it can allegedly be accomplished even while ensuring the social development of populations as well as protecting the environment.[97]

Moreover, the neoliberal principle of sustainable development and other new principles formulated in the declaration are put into practice through the theory of ecological modernization, based on the primacy of economic development, the use of Western science and technology,[98] and economic management[99] to solve environmental problems. For example, the polluter pays principle directly references an economic conception of environmental protection.[100] The precautionary principle, mobilized to make decisions in cases of scientific uncertainties, is limited in its operation and only applies in cases of "threats of serious or irreversible damage" and based on a cost-benefit analysis.[101]

In line with the neoliberal concept of favouring self-regulation, the *Rio Declaration* also refers to the principle of public participation, including by women, youth, and Indigenous peoples and communities.[102] While one cannot but welcome in theory the idea that those most affected have access to information about their environment, participate in the decision-making affecting their environment, and benefit from access to justice, the declaration does not address the questions of how participation should be enabled or the power inequalities existing between such groups and, for example, companies seeking to exploit resources and local populations. Furthermore,

96. *Rio Declaration*, *supra* note 3 at Principle 3.

97. George Liodakis, "Environmental Implications of International Trade and Uneven Development: Toward a Critique of Environmental Economic" (2000) 32:1 Rev Radic Political Econ 40 at 51, 60–61.

98. *Rio Declaration*, *supra* note 3 at Principle 9.

99. *Ibid*, see Introduction referring to a rational ecological management.

100. *Ibid* at Principle 16.

101. *Ibid* at Principle 15.

102. *Ibid* at Principles 10, 20, 21, 22.

stakeholder participation is not analogous to the possibility of questioning and changing the structural logic underlying environmental protection of this sort. Participation takes place in already set frameworks set in motion and decided at the time of consultation.

The *Rio Declaration* also introduces the "principle of common but differentiated responsibilities."[103] Resulting from the influence of Third World states on international law following decolonization, this principle can be understood as a way to achieve equity to some degree between developing and developed countries in their efforts to protect the environment.[104] The adoption of this principle was motivated by the fact that, as Natarajan states, "[w]hile the rich receive a disproportionate benefit from the exploitation of natural resources, the poor bear a disproportionate burden of scarcity, pollution, and environmental crises."[105] This principle refers to both a historical responsibility for the primary role of industrial countries in environmental degradation, as well as different capacities to address the current environmental crisis.[106] The way the principle is actually framed in Principle 7 of the *Rio Declaration*, however, encourages developed countries to transfer financial resources and technologies to developing countries, again promoting economic management of the environment.

Furthermore, as demonstrated by postcolonial and Third World Approaches to International Law (TWAIL) scholars, the principle of common but differentiated responsibilities does not remedy the fact that populations in postcolonial situations inherited colonial laws centred on the management of resources, and that this principle is characterized by restrictive negative norms rather than positive ones.[107] According to these scholars, European colonial understandings of law as well as of the environment have had a major influence on the

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103. *Ibid* at Principle 7.

104. Dinah Shelton, "Equity" in Bodansky, Brunnée & Hey, *supra* note 10, 639; Ellen Hey, "Common but Differentiated Responsibilities" (2011) in *Max Planck Encyclopedia of Public International Law*, *supra* note 7 at para 12.

105. Usha Natarajan, "TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring" (2012) 14 Or Rev Intl L 177 at 199.

106. Lavanya Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime" (2000) 9:2 RECIEL 120 at 121; Hey, *supra* note 104 at para 1.

107. Benjamin J Richardson, "Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum" (2000) 11:1 Colo J Int'l Envtl L & Pol'y 1 at 21; Kishan Khoday & Usha Natarajan, "Fairness and International Environmental Law From Below: Social Movements and Legal Transformation in India" (2012) 25:2 Leiden J Int'l L 415 at 424–25.

construction of law in Third World countries.[108] Although underlying the principle of common but differentiated responsibilities was the recognition that developed countries contributed significantly to the degradation of the environment through an industrial capitalist development model,[109] the principle of common but differentiated responsibilities does not question this development model itself. On the contrary, the *Rio Declaration* remained optimistic about economic growth pursuant to the current industrial capitalist development model in order "to better address the problems of environmental degradation."[110] This approach accepted that environmental exploitation and serious damages are unavoidable, even necessary, for development; obscuring that capitalism and industrialization are choices rather than natural inevitabilities.

Since the *Rio Declaration*, the principles of international environmental law have not substantially evolved. The *Johannesburg Declaration on Sustainable Development*,[111] adopted in 2002, essentially replicates the principles established in the *Rio Declaration*, in particular the principle of sustainable development. This is also the case in the UN General Assembly *Resolution 66/288 The Future We Want,*[112] adopted at the Rio+20 Conference in 2012, which also refers to the concept of "green economy" to achieve sustainable development and poverty eradication. While environmental problems are more pressing than ever, there has not been an ideational shift in the way nature is understood in international law. Since the 1990s, the dominant ideology remains that of neoliberalism illustrated in the attempts to address environmental problems through economic rationality.

As the next two sections illustrate, the binding instruments adopted after the *Rio Declaration* also follow the same ideational patterns, taking for granted the liberal conception of nature in international law and relying on neoliberalism to address environmental concerns.

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108. See especially for the Indian context Khoday & Natarajan, *ibid* at 425.

109. From a climate justice perspective, see e.g. Karin Mickelson, "Beyond a Politics of the Possible? South-North Relations and Climate Justice" (2009) 10 Melbourne J Int'l L 411.

110. *Rio Declaration*, *supra* note 3 at Principle 12.

111. *Johannesburg Declaration on Sustainable Development*, 4 September 2002, (2002) UN Doc A/Conf.199/20.

112. *Resolution 66/288. The Future We Want*, New York, 27 July 2012, UN Doc A/RES/66/288.

B. Biological Diversity

Adopted in 1992 at the Rio Conference, the objective of the *Convention on Biological Diversity* is "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."[113] Even if the convention recognizes in its Preamble the intrinsic value of biological diversity, the binding provisions of the convention are vague and ask very little of states. The *Convention on Biological Diversity* is infamous for its relative normativity,[114] amounting in many ways to a soft law instrument, with the frequent use of terms such as "as far as possible" and "as appropriate."[115] Significant latitude is left to states for self-regulation. In contrast, the right of states to exploit the environment as resources, including genetic resources, is unequivocally recognized, and this right can be exercised following states' own environmental policies.[116] The environment remains once again subordinated to the right to development conceptualized according to a capitalist economic model. Indeed, the *Convention on Biological Diversity* states that economic and social development "are the first and overriding priorities of the developing country Parties,"[117] implying that environmental protection can sometimes constitute an obstacle to this development and be in competition with the economic and social interests, which will take precedence. The obligations included in the *Convention on Biological Diversity* must also not affect the rights and obligations included in the law of the sea.[118] This explicit subordination of the *Convention on Biological Diversity* to *UNCLOS* considerably reduces the potential of the convention, considering that *UNCLOS* favours a classical liberal conception of the exploitation of marine resources and gives priority to freedom of navigation over environmental protection.

In line with neoliberalism, the emphasis in the *Convention on Biological Diversity* is on the management of biological resources and the

113. *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) at art 1.

114. Proper Weil, "Towards Relative Normativity in International Law" (1983) 77:3 AJIL 413.

115. *Convention on Biological Diversity*, *supra* note 113 at arts 5, 6b), 7–11, 14(1)c), e), 16(3)(4), 19(3).

116. *Ibid* at arts 3, 15; see also art 6.

117. *Ibid* at art 20(4); see also the Preamble.

118. *Ibid* at art 22.

risks that might affect it, in particular biotechnology.[119] This management includes "economically and socially sound measures"[120] and is based on science and technology.[121] Specific reference is made to traditional Indigenous knowledge and practices that are compatible with the sustainable conservation and use of biological resources.[122] However, notwithstanding this reference, regulation on biological diversity is made according to a mode of rational and economic management of resources.

Adopted in 2000, the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*[123] does not depart from this ideational structure, relying on key liberal principles of international law and moving to a neoliberal approach to manage biodiversity. Explicitly relying on the "precautionary approach,"[124] the *Cartagena Protocol* does not regulate the development of living modified organisms. Rather, it adopts a managerial approach, focusing on prior informed consent, risk assessment, and risk management for the transboundary movement of living modified organisms.

The 2010 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity*[125] explicitly adopts economic rationality, recognizing the market value of "genetic resources." The convergence of environmental and economic norms to both protect the environment and maintain the capitalist economic order is striking in the Preamble, which recognizes "that public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components." The *Nagoya Protocol*'s objective is to promote "the fair and equitable sharing of the benefits arising from

119. *Ibid* at arts 8, 13, 19.

120. *Ibid* at art 11.

121. *Ibid* at arts 12, 16, 18, 25.

122. *Ibid* at arts 8(j), 10, 17(2), 18(4).

123. *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003) [Cartagena Protocol].

124. *Ibid* at principle 1.

125. *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity*, 29 October 2010, Doc UNEP/CBD/COP/DEC/X/1 (entered into force 12 October 2014) [Nagoya Protocol].

the utilization of genetic resources."[126] To achieve this objective, the protocol relies on the ability to achieve "mutually agreed terms," including through the transfer of technologies and financial resources. Such reliance on self-regulation in a free market does not take into account the context in which the appropriation of genetic resources is undertaken, including power differentials and the historical deprivation of property rights resulting from colonization. While recognizing the importance of Indigenous peoples' rights over their traditional knowledge associated with genetic resources, such a right is subject to domestic legislation and states are only required to take measures to protect these rights "as appropriate."[127]

Thus, the international regulation for the protection of biological diversity has, since in inception, not only considered nature as resources subject to appropriation and commodification, but even considered such commodification as the best way to protect it.

C. Climate Change

The adoption of flexibility mechanisms to address climate change, including carbon trading and carbon offsets, are a prominent example of how international environmental law has embraced the neoliberal ideology. The *United Nations Framework Convention on Climate Change*,[128] adopted during the 1992 Earth Summit, as well as the 1997 *Protocol to the United Nations Framework on Climate Change*,[129] essentially restates in a specific context the principles elaborated in the *Rio Declaration*, including the sustainable development principle,[130] the precautionary principle based on a cost-benefit analysis[131] as well as the principle of common but differentiated responsibility.[132] Public participation is also encouraged without consideration of underlying

126. *Ibid* at Principle 1.

127. *Ibid* at Principle 7.

128. *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) [*UNFCCC*].

129. *Protocol to the United Nations Framework on Climate Change*, 10 December 1997, (1998) 37 ILM 22 (entered into force 16 February 2005) [*Kyoto Protocol*].

130. *UNFCCC*, *supra* note 128 at art 3(4); *Kyoto Protocol*, *supra* note 129 at art 2.

131. *UNFCCC*, *supra* note 128 at art 3(3).

132. *Ibid* at arts 3(2), 4(1); *Kyoto Protocol*, *supra* note 129 at art 10; the principle of common but differentiated responsibility is not framed in the same way in the *Rio Declaration* and the *UNFCCC*, leaving some ambiguity as to "whether developed countries were to take the lead because of their 'responsibilities,' 'capabilities,' or both." Susan Biniaz, "Comma but Differentiated Responsi-

power relations.[133] The convention and protocol recognize the importance of maintaining the integrity of an "open international economic system,"[134] and the primacy of economic development, especially as a concern of developing countries[135] and of those countries transitioning towards a market economy.[136]

Addressing climate change relies on a management model inspired by economic sciences and based on Western science and technology.[137] The *Kyoto Protocol*, particularly, establishes a number of market-based flexibility mechanisms to mitigate greenhouse gas emissions. Indeed, the protocol created specific mechanisms to counter "market imperfections,"[138] implying that a free market generally leads to the common good, and that we must only make a few adjustments of an economic nature in order to mitigate environmental problems. Accordingly, the *Kyoto Protocol* puts in place three market-based mechanisms. The Clean Development Mechanism enables investment and technology transfers for projects in developing countries and allows developed (Annex I) countries to receive credits towards their emission reduction commitments.[139] Through the Joint Implementation Mechanism, Annex I countries can earn emission reduction units when undertaking projects in other Annex I countries subject to emission reduction or limitation.[140] Finally, international emissions trading set up carbon markets for the acquisition and sale of greenhouse gas emission reduction units.[141]

The 2016 *Paris Agreement*[142] is in line with the *Kyoto Protocol* in terms of the principles it promotes, except for its introduction of "nationally determined contributions,"[143] as opposed to the internationally agreed targets set out in the *Kyoto Protocol*. As Dehm argues, one more step

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bilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime" (2016) 6:1 Mich J Entl & Admin L 37 at 40.

133. *UNFCCC*, *supra* note 128 at art 6.
134. *Ibid* at art 3(5).
135. *Ibid* at art 4(2).
136. *Kyoto Protocol*, *supra* note 129 at art 3(5).
137. *UNFCCC*, *supra* note 128 at arts 4, 9, 11; *Kyoto Protocol*, *supra* note 129 at arts 10–11.
138. *Kyoto Protocol*, *ibid* at art 2(1)v).
139. *Ibid* at art 12.
140. *Ibid* at art 6.
141. *Ibid* at art 17.
142. *Paris Agreement*, UNFCCC, 21st Sess, Annex, (2016) UN Doc FCCC/CP/2015/10/Add.1 23.
143. *Ibid* at art 4(2).

was taken towards the deformalization of law, through the adoption of soft law, voluntary, self-determined emission reduction targets.[144] There was thus a further shift in the climate change regime from a traditional state responsibility approach and non-compliance mechanisms found in the *Kyoto Protocol* to the voluntary implementation of obligations in the *Paris Agreement*.

As some critical researchers have demonstrated, the neoliberal management mode of governance for the climate change regime raises significant environmental justice problems, not only for states but also for populations within states, including for women.[145] Ideas such as carbon exchange markets are little more than a mirage in terms of innovative solutions, because they (re)perpetuate the existing unequal distribution of economic, social and environmental risks.[146] These economic solutions have the effect of rewarding polluters by awarding those rights to pollute.[147] These instruments do not call into question the industrial economic development model. As M'Gonigle and Ramsay argue:

> The main focus of climate change law is the level of emissions resulting from industrial activity, while every environmentalist knows that the systemic culprit is the level of fossil fuel energy consumption that underlies the growth economy.[148]

Thus, even with the evolution of international environmental law since the 1970s and its specialization and formalization to address

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144. Julia Dehm, "Reflections on Paris: Thoughts Towards a Critical Approach to Climate Law" (2018) 1 RQDI 61 at 76, quoting Martti Koskenniemi, "What Use for Sovereignty Today?" (2011) 1:1 Asian J Int'l L 61 at 65.

145. See especially Dehm, *supra* note 144; Mickelson, *supra* note 109; Maxine Burkett, "A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy" (2013) 35:2 U Haw L Rev 633; Michael Maclennan & Leisa Perch, "Environmental Justice in Latin America and the Caribbean: Legal Empowerment of the Poor in the Context of Climate Change" (2012) 3:3–4 Climate Law 283; Vandana Shiva, *Soil Not Oil: Environmental Justice in a Time of Climate Crisis* (Cambridge (MA): South End Press, 2008); Geraldine Terry, "No Climate Justice Without Gender Justice: An Overview of the Issues" (2009) 17:1 Gender & Development 5; Annie Rochette, "Climate Change Is a Social Justice Issue: The Need for a Gender-Based Analysis of Mitigation and Adaptation Policies in Canada and Quebec" (2016) 29 J Envtl L & Prac 383; M'Gonigle & Takeda, *supra* note 84 at 1086–91.

146. Steffen Böhm, Maria Ceci Misoczky & Sandra Moog, "Greening Capitalism? A Marxist Critique of Carbon Markets" (2012) 33:11 Organization Studies 1617 at 1620.

147. M'Gonigle & Takeda, *supra* note 84 at 1086; Larry Lohmann & Sarah Sexton, "Carbon Markets: The Policy Reality" (2010) 10 Global Social Policy 9 at 10.

148. Michael M'Gonigle & Paula Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation" (2004) 14 J Envtl L & Prac 333 at 337.

pressing environmental issues, this field has not challenged the way in which nature is understood by international law. In fact, it builds upon the very liberal principles that are problematic in the first place from an environmental perspective, due to their link with the appropriation and commodification of nature. It adopts neoliberalism in the hopes of reconciling, through economic rationality, the capitalist organization of the economy with environmental protection.

CONCLUSION: A RADICAL RETHINKING OF INTERNATIONAL ENVIRONMENTAL LAW

This paper offers a critical analysis of the development of international environmental law. It interrogates the ideologies at the heart of the international law project at large and international environmental law in particular. This paper argues that, before international environmental law became a separate branch of international law, international law aimed at addressing environmental problems, adopted a liberal conception of nature, as resources subject to appropriation and commodification in alignment with Western rationality and thought, including the reliance on science and technology to solve environmental problems. This is the case, for example, in fisheries agreements. Even if a shift towards a liberal-welfarist international law occurred following World War II, a liberal conception of nature with emphasis on state sovereignty, freedom of trade, as well as science and technology, remained in international agreements adopted to address marine pollution during this period. When international environmental law finally emerged in the 1970s following the Stockholm Conference, the founding text of the *Stockholm Declaration* builds upon key principles of international law rooted in classical liberalism. Due to its failure to (again) address environmental concerns, international environmental law evolved to embrace in the 1990s a neoliberal approach to both protect the environment and to maintain a capitalist economic order. International environmental law thus turned to economic rationality, favouring cost-benefit analysis, deformalization of law to promote deregulation and self-regulation by private actors, management by experts, and market mechanisms. As this paper illustrates, such a move is apparent in the *Rio Declaration* and in the instruments adopted to address biodiversity depletion and climate change.

Despite the birth of international environmental law, the adoption of numerous instruments to address environmental problems, and

the development of new rules and principles, there has been very little change to the manner in which nature is perceived in international law. Rather, the influence of neoliberal ideology on international environmental law exacerbates the economic instrumentalization of environmental components instead of providing new grounds for rethinking our relationship with nature. Accordingly, this branch of international law offers very little in terms of environmental solutions, and perpetuates existing problems.

While some authors have denounced the ideologies and contradictions within international environmental law, few have attempted to reconceptualize it on new bases.[149] A revolution is required to accomplish this because, rather than requiring a few changes to existing agreements, it requires the rethinking of the founding principles of international law, including the paradigms of capitalism and state sovereignty. The current state of our environment as well as the coronavirus disease COVID-19 pandemic provide an opportunity to undertake this large enterprise, not only of deconstruction but also of rebuilding, in order to broaden our horizons and truly rethink our relationship with nature.

149. For new ways to understand the human-nature relationship, see e.g. Andreas Philippopoulos-Mihalopoulos & Victoria Brooks, *Research Methods in Environmental Law: A Handbook* (Cheltenham, Northampton: Edward Elgar Publishing, 2017).