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I. INTRODUCTION

Despite the large number of environmental agreements at the global, regional and bilateral levels, the role of customary international law remains of great importance in practice.¹ First, many treaties which are in force remain largely

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¹ See UN Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, 30 November 2018, A/73/419. On environmental protection in general international law see: P.-M. Dupuy, 'Overview of Existing Customary Legal Regime Regarding International Pollution,' in D. Magraw (ed.), *International Law and Pollution* (Philadelphia: University of Pennsylvania Press, 1991), pp. 61–89; P.-M. Dupuy, 'Où en est le droit international de l'environnement à la fin du siècle?' (1997) *RGDIP* 873; J.E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law' (2008) 32 *Fordham International Law Journal* 232; P.-M. Dupuy, 'Formation of Customary International Law and General Principles', in D. Bodansky et al. (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008), pp. 449–66; L. Boisson de Chazournes, S. Maljean-Dubois, 'Principes du droit international de l'environnement' (2011) *Jurisclasseur Environnement et Développement Durable* 1-20; M. Fitzmaurice, 'The International Court of Justice and International Environmental Law', in C. Tams, J. Sloane (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013), pp. 354-374; J. Juste-Ruiz, 'The International Court of Justice and International Environmental Law', in N. Boschiero et al. (eds) *International Courts and the Development of International Law. Essays in honour of Tullio Treves* (T.M.C. Asser Press, 2013), pp. 383-401; J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development* (Oxford University Press, 2015); T. Stephens, 'The development of international environmental law by the International Court of Justice', in D. Fisher (eds.), *Research Handbook on Fundamental Concepts of Environmental Law*, (Cheltenham: Edward Elgar, 2016), pp. 221-247; J. E. Viñuales, 'La Protección Ambiental en el Derecho Consuetudinario Internacional' (2017) 69 *Revista Española de Derecho Internacional* 71. These writings have all informed the present chapter. However, due to space constraints, in what follows we will refer mainly to primary sources.

unimplemented.² Secondly, treaties only bind those States that have become parties to them, and that introduces sometimes important variations in the scope of environmental agreements.³ Thirdly, there is at present no treaty formulating binding overarching principles interweaving sectorial environmental agreements.⁴ As a result, it is often necessary to go back to the level of customary norms when certain difficulties of interpretation or implementation arise. Fourthly, custom is important to conciliate a range of environmental and non-environmental interests (e.g. trade, human rights, investment, armed action) governed by different treaties.⁵ Last but not least, custom plays an important role in disputes concerning a disputed area⁶ or where there is no applicable treaty.⁷

In this context, this chapter examines two main questions. Section II analyses the process of custom formation with reference to environmental protection in order to show both the 'banality' of this process but also its peculiarities. Section III focusses on the content of customary international environmental law as recognised in the case-law, both old and new.

II. FORMATION OF CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW

A. The 'banality' of custom in international environmental law

The formation of customary international law and its consolidation as a rule of positive international law are two sides of the same coin. The concept of 'custom' refers both to the law-making process and to its end result—a legally binding norm at the global, or, more rarely, the regional, level.

² See UNEP, *Global Environment Outlook 5* (2012), chapters 2 to 6.

³ For example, the US is not a party to several important multilateral environmental agreements.

⁴ On the ongoing efforts see Y. Aguila, J. Viñuales, 'A Global Pact for the Environment: Conceptual Foundations' (2019) 28 *RECIEL*, forthcoming.

⁵ See e.g. WTO Appellate Body Report on *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998) [hereinafter *Shrimp/Turtle*], paras 114, 129; *Tatar v. Romania*, ECtHR Application No. 67021/01, Judgment (27 January 2009, Final 6 July 2009), para. 120; *S.D. Myers Inc. v. Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award (13 November 2000), para 247; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226 [hereinafter *Legality of Nuclear Weapons*], paras 29-33.

⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* ITLOS Case No. 23, Order of 25 April 2015 (Provisional Measures) [hereinafter *Ghana/Côte d'Ivoire*], paras. 68–73; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016), [hereinafter *South China Sea Arbitration*], paras 940-48.

⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665 [hereinafter *Costa Rica/Nicaragua*], para 107.

Yet, it is often problematic to capture both sides of the coin, formation and formulation. The need to identify materials reflecting the practice and the *opinio juris* necessary to show the emergence of custom – e.g. treaties, soft-law instruments, case-law, opinions of scholars, etc. – may indeed introduce a trade-off. On the one hand, the documentary basis evidencing the formation process must be sufficiently abundant, which encourages reference to a wide range of materials. On the other hand, however, relying on a wide range of materials may blur the contours of the specific norm for which authority is sought. In the environmental context, there is no better illustration than the fluctuation characterising both the formation and the content of the precautionary principle/approach/criterion.⁸ But the challenge is by no means exclusive to environmental norms. In the classic *Asylum* case,⁹ Colombia faced exactly this trade-off in trying to ascertain the existence of a customary right to unilaterally qualify the offence of the asylum-seeker with effect for both Colombia and Peru.

In the context of international environmental law, this difficulty is exacerbated by the fact that commentators sometimes overstate their case by citing the largest possible number of opinions, treaties, and recommendations in order to convince themselves that the recognition of the binding character of a norm is not just a moral imperative but an observable fact. Yet, the materials thus gathered yield an unclear picture. The prevention principle may be presented as a ‘principle of sustainable development’¹⁰ or as ‘precaution’,¹¹ or a range of ‘principles’ with limited connection with actual practice may be formulated in a declaration.¹² It is a truism to say that, whereas academic commentary may help to elucidate the existence of custom, it cannot substitute itself for actual ‘practice’. Understanding which environmental norms have genuinely become customary norms is therefore a painstaking exercise in which the observer must find her or his way despite the thick fog of diverse and diverging views, activist stances and, sometimes unconsidered scholarly conclusions.

Of course, even when taking general international law as a starting-point, the well-known theory of the ‘two elements’ of State practice and *opinio juris*, which taken

⁸ See G. Le Moli et al., ‘Whither the Proof? The Progressive Reversal of the Burden of Proof in Environmental Cases before International Courts and Tribunals’ (2017) 8 *JIDS* 644.

⁹ *Asylum case (Colombia v. Peru)*, ICJ Reports 1950, p. 266, at 277.

¹⁰ *Arbitration regarding the Iron Rhine (‘Ijzeren Rijn’) Railway between The Kingdom of Belgium and The Kingdom of the Netherlands*, Award of 24 May 2005, UNRIIA XXVII 35 [hereinafter *Iron Rhine arbitration*], para 59.

¹¹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2009), Rule 44.

¹² ILA, Committee on Legal Aspects of Sustainable Development, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, New Delhi, 70th Session, 2002.

together are supposed to be necessary and sufficient for the creation of an international customary norm, should be considered with great care as representing an overly simplistic explanation of a complex social process.¹³ At the origin of a customary norm is a mixture of State practice, *opinio juris*, and express or tacit expression of consent. While, in theory, a State's persistent objections to a custom could be argued to prevent such a rule from becoming binding upon that State, that has not been the case in practice, even when more than one State objected to a norm. An apposite illustration is the initial resistance of some major flag States to the creation of the exclusive economic zone (EEZ) in the early 1980s, even though it was already recognised as part of customary international law well before the entry into force of the UN Convention on the Law of the Sea.¹⁴ A key consideration in this regard is the fact that a State's behaviour rarely remains coherent and comprehensive enough in the long-term to achieve the theoretical result of not being bound by the rule.¹⁵

It has also been argued that the formation process of customary international environmental law is unique because of its reliance on negotiations undertaken within the framework of international organisations and on an ever-increasing body of soft law instruments. Historically, this phenomenon was due to the fact that the production of 'soft law' was introduced into this field sooner than in others. Softness here refers not only to the nature of the relevant instruments (recommendations or declarations) but also, at times, to the content of the norms (guidelines or standards), even if they are incorporated in binding instruments (treaties).¹⁶ However, the emerging importance of 'soft law' in the early 1970s could also be observed in other contexts, such as the law of decolonisation¹⁷ or the norms dealing with permanent sovereignty over natural resources.¹⁸ The fact that some environmental norms, such as the

¹³ P.-M. Dupuy, 'L'unité de l'ordre juridique international: Cours général de droit international public' (2002) 297 *Recueil des cours* 9-490, at 157-179.

¹⁴ UN Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Part VI. On the example of the EEZ see J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYBIL* 11, at 11-13. See generally P. Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 *ICLQ* 779.

¹⁵ P.-M. Dupuy, *L'unité de l'ordre juridique international*, at 174 ff.

¹⁶ P.-M. Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420.

¹⁷ UNGA Resolution 1514 (XV) of 14 December 1960; Resolution 1541 (XV) of 15 December 1960; Resolution 2625 (XXV), of 24 October 1970; *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12, paras 57-58.

¹⁸ UNGA Resolution 523 (VI) of 12 January 1952; Resolution 1314 (XIII), 12 December 12, 1958; Resolution 1803 (XVII) of 14 December 1962; *Kuwait v. The American Independent Oil Company (AMINOIL)*, 21 ILM 976, paras 90(2) and 143.

prevention principle, may have received their more accepted formulation in the outcome document of an intergovernmental conference such as the Stockholm Conference on the Human Environment or the Rio Conference on Environment and Development does not affect the very nature of the law-making process.

It remains very difficult, sometimes impossible, to determine exactly at what point a particular rule has moved from the status of a mere statement in a soft-law instrument to that of a binding customary norm independent from such instrument but authoritatively stated therein. A relevant consideration in answering this question is the process by which the norm has been generated, which may be more or less 'disciplined' as a result of institutionalised diplomacy, thereby offering a more detailed cartography of the statements and *opinio juris* of States at different stages of the negotiations. Another factor is the changing political assessment of States regarding the authority of the norm produced by this process. This authority depends—regardless of whether it is created through a harder or softer process—upon the belief of States that the norm has become binding. In turn, this belief may result from the perception that it has become politically too costly to challenge the binding character of the norm or, in other words, that it is not worth continuing to challenge the existence of a norm or to persevere in denying its applicability to a given situation. Such shifts in the practice of States tend to be noticeable, either because they are expressly emphasised by State representatives or because the absence of active objection is conspicuous. More often than not, however, the moment of 'transition' will be retrospectively set by a body, e.g. an intergovernmental conference, a body of an international organisation, or an international tribunal, as having taken place at some point in the past. But, again, environmental custom is no different in this regard than other norms of general international law.

The fact that the process of formation of customary norms of environmental protection is the same for other norms of general international law does not mean that this process may not present some peculiarities in the context of environmental norms. One prominent feature of international environmental law is the need for constant adjustment of some broadly defined norms, such as the prevention principle, by reference to technical standards reflecting the evolving scientific understanding of a question. This is important because the level of 'due diligence' required by the principle is thus allowed to evolve without the need for a new assessment of the customary grounding of the principle. Formation and formulation remain two sides of the same coin, but one side – formulation – is partly reliant on standards that change over time. Often, the relevant standards are adopted by a competent international organisation, e.g. the regulations adopted by the International Seabed Authority with regard to the standard of environmental protection that must be ensured by entities

conducting activities in the Area.¹⁹ These evolving standards may also arise from the amendment of the annexes of multilateral environmental agreements. For example, the appendices of the Convention on the International Trade of Endangered Species (CITES),²⁰ which may be amended by a qualified majority of States present and voting, have been relied upon in international adjudication to interpret the content of both treaty and customary norms.²¹

However, what the two foregoing illustrations suggest is not a difference of nature in the processes of formation of environmental custom but some theoretical and practical challenges in its ascertainment. As discussed next, customary environmental law presents some difficulties in this regard, at three main levels: the relationship between treaties and custom; the relationship between soft-law and custom; and the relationship between general principles, normative concepts, and custom.

B. Peculiarities of customary international environmental law

1. Relationship between treaties and custom

One defining feature of international environmental law is the development of hundreds of treaties, whether global, regional or bilateral, on a range of sectorial areas, such as the marine environment, international watercourses, transboundary air pollution, ozone depletion, climate change, the protection of species, spaces or biodiversity or, still, the regulation of dangerous substances and activities.²² From the standpoint of the formation of custom, the adoption of these treaties presents a difficult – yet classic – ambiguity. On the one hand, those in favour of protecting the will of the State argue that if a treaty has been negotiated as a *lex specialis*, it is precisely because the parties to this agreement thought it necessary to explicitly set out the rules that would be binding upon them. The treaty thus provides evidence of the absence of any general custom or principle in the field. Others instead will seek to rely on the same treaties as evidence of State practice capable of contributing to the creation of a customary norm.

¹⁹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Case No. 17 [hereinafter *Responsibilities in the Area*], paras 131-135.

²⁰ Appendices I, II and III, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 UNTS 243, 3 March 1973.

²¹ See *Shrimp/Turtle*, above n. 6, para. 130; *South China Sea Arbitration*, above n. 6, paras 947-48.

²² P-M. Dupuy and J.E. Viñuales, *International Environmental Law* (Cambridge University Press, 2015), chapters 4-7 [hereinafter *Dupuy/ Viñuales*].

The possibility that a treaty may generate a customary norm was expressly recognised by the ICJ in the *North Sea Continental Shelf* case, in 1969.²³ In this case, the Court identified the conditions for a treaty provision to become a norm of customary international law. The treaty provision at stake must be 'of a fundamentally norm-creating character', and benefit from 'widespread and representative participation' including that of 'States whose interests [are] specially affected.'²⁴ Legally speaking, the migration of an obligation from the restricted scope of a treaty, limited to a particular group of States, to that of general international law is neither theoretically nor technically impossible. This issue was further considered by the Court several times, most prominently, in the *Nicaragua* case,²⁵ when the ICJ reiterated that customary norms may emerge that are identical to, and coexist with, treaty obligations.²⁶

This is not to say, however, that eager commentators can solve the problem of establishing a customary environmental norm by merely citing a sufficient number of treaties containing references to it. In fact, even the fulfilment of the criteria laid down by the Court in 1969 is insufficient for this purpose. Other contextual and sociological conditions, including political ones, must be the balance and combination of which can hardly be given definitive formulation.

2. *Relationship between 'soft law' and custom*

The notion of 'soft law' has been a decisive factor in the very rapid development of new norms and principles over the past 50 years in international environmental law. The 1972 Stockholm Declaration²⁷ initiated a process of normative development that was expanded and consolidated at the 1992 Rio Conference, with the adoption of the Rio Declaration on Environment and Development.²⁸ Since then, the focus has been

²³ *Case Concerning North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, p. 3, para. 71.

²⁴ *Ibid.*, paras. 72-73.

²⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, p. 14 [hereinafter *Nicaragua*].

²⁶ *Ibid.*, para. 175.

²⁷ Declaration on the United Nations Conference on the Human Environment, 16 June 1972, 11 ILM 1416 (1972) (Stockholm Declaration). See L. Sohn, 'The Stockholm Declaration on the Human Environment' (1972) 14 *Harvard International Law Journal* 423.

²⁸ Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26. Rev.1, (Rio Declaration). See J. E. Viñuales, 'The Rio Declaration on Environment and Development. Preliminary Study', in Viñuales (2015), above n. 1, pp. 1-64.

on organising the implementation of existing law, most notably through the adoption of Sustainable Development Goals (SDGs) in 2015.²⁹

These soft-law instruments are but some prominent examples of an heterogeneous body of non-binding instruments with different origins and implications. Within this body, it is important to distinguish those adopted by experts acting in their personal capacity from those negotiated by State delegations. Unlike the latter, the former cannot be relied upon to establish the existence of custom. This said, they may have a profound normative impact, as illustrated by 1966 Helsinki Rules on the Uses of the Waters of International Rivers developed in the context of the International Law Association,³⁰ which are at the roots of both the 1997 New York Convention on the Non-Navigational Uses of International Watercourses³¹ and, more generally, of the customary norms in this field.³² Regarding the resolutions adopted by State delegations, they provide better evidence of the expression of a potential *opinio juris*. It is indeed possible to consider them as indications of how the law may evolve, since national delegations negotiate them while continuously weighing their normative potential. On the other hand, resolutions adopted by experts enjoy a sort of residual legitimacy since they reflect primarily the experts' contribution to the rationalisation and clarification of international law. In sum, resolutions adopted by States indicate how international law *may* evolve, whereas those adopted by experts indicate how international law *should* evolve.

Here again, the long-standing debate as to whether the accumulation of programmatic soft-law instruments may help in the progressive affirmation of the emergence of a binding norm is not specific to international environmental law. The problem lies, here as elsewhere, with the discrepancy that more often than not remains between what States say and what they actually do. Expressions of *opinio juris* that are not sufficiently sustained by practice do not take us particularly far in terms of customary law.³³ Faced, then, with diverse and inconsistent practice in terms of preventing the pollution of a shared natural resource, for example, the question is

²⁹ Resolution 70/1, 'Transforming our World: The 2030 Agenda for Sustainable Development', 21 October 2015, UN doc A/RES/70/1.

³⁰ Helsinki Rules on the Uses of the Waters of International Rivers; adopted by the International Law Association at its 52nd conference, Helsinki, 20 August 1966, International Law Association, Report of the Fifty-second Conference, London, 1967, p. 56.

³¹ See United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 36 ILM 700.

³² See S. Bogdanovic (ed.), *International Law of Water Resources, Contribution of the International Law Association (1954-2000)* (Boston: Kluwer, 2001).

³³ *Nicaragua*, above n. 25, para 184.

to decide whether it is nevertheless possible to ascertain the existence of a positive rule of customary international law. In *Nicaragua*, the ICJ shed light on this question:

'The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule'³⁴

This assessment is sufficient, in our view, to put to rest some views that, in their good faith attempts to be innovative, do little more than to blur the already complex process of identifying the elements of practice and *opinio juris* capable of sustaining the existence of a customary norm. The ILC has recently clarified this process, in a manner that, aside from some controversial elements, is an accurate representation of how the formation of customary law is understood.³⁵

3. *Relationship between general principles, normative concepts, and custom*

Another well-known issue is the confusion that may arise from the terminology used to refer to certain norms of customary environmental law. References to a 'principle' (e.g. the prevention principle) or a concept (e.g. the concept of sustainable development) may introduce some hesitation as to whether such norms are based on 'custom' or on some other source of international. Yet, these hesitations can be easily dissipated.

Consider, for example, the prevention principle. References to its statement in the *Trail Smelter*³⁶ arbitration overlook the fact that, in this case, the arbitral tribunal relied on the domestic judicial practice of Switzerland and the United States in disputes among 'quasi sovereign' States, which was possible because Article VI of the *compromis* referred to 'the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice'. The initial recognition of this principle by the ICJ, in the *Corfu Channel* case,³⁷ maintained some measure of ambiguity in that it spoke of 'certain general and well-

³⁴ *Ibid.*, para. 186.

³⁵ ILC Report, 'Identification of customary international law', Text of the draft conclusions as adopted by the Drafting Committee on second reading, 70th session, A/CN.4/L.908 (2018).

³⁶ *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82 [hereinafter *Trail Smelter*], p. 1965.

³⁷ *Corfu Channel case (UK v. Albania)*, ICJ Reports 1949, p. 4.

recognized principles'.³⁸ Yet, subsequently the ICJ made abundantly clear that it is a customary norm.³⁹ The key point is that, irrespective of the variations in the terminology, the norm derives its legally binding character from the same type of process.

As for the nature of normative concepts, again, the use of the term 'concept' is not intended to tell what source underpins the norm but only the broad way in which it is formulated. Normative concepts can and do rest on customary law. The best example of such a phenomenon is provided by the 'concept' of 'sustainable development'⁴⁰. As such, this concept is more of a *Weltanschauung*, implying a programme of action rather than a general principle in itself. Nevertheless, its legal authority depends on its recognition as a binding norm at the international level. Sustainable development as a concept may perform different functions, such as the conciliation of economic and social development with environmental protection or the interpretation of certain norms. However, due to its broad formulation, it is unable to perform a 'decision-making' function, unlike several other principles such as prevention.⁴¹

III. ENVIRONMENTAL PROTECTION IN GENERAL INTERNATIONAL LAW

A. Out of the fog

A large part of the academic work devoted to customary international environmental law rehearses a range of theoretical arguments without genuinely engaging with the simpler – but much harder to answer – question of what norms have reached customary status and what is their specific content. That is partly justified by the thick fog that has coated this issue for many years. Yet, the fog is slowly dissipating, and it is now possible to see clearer.

In late 2015, the ICJ made a significant contribution to this question. In a single paragraph of its judgment in *Costa Rica/Nicaragua*, it summarised the core of customary international environmental law:

'to fulfil its obligation to *exercise due diligence in preventing significant transboundary environmental harm*, a State must, before embarking on an activity having the potential adversely to affect the environment of another State,

³⁸ *Ibid.*, p. 22.

³⁹ See below section III.B.

⁴⁰ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7 [hereinafter *Gabčíkovo-Nagymaros*], para. 140.

⁴¹ *Dupuy/Viñuales*, above n. 22, chapter 3.

*ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment [...] If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk*⁴²

This clarification effort has great merits as well as some problems. As a general matter, it must be noted that the customary international law of environmental protection is not limited to those customary norms with specific environmental content, such as the norms identified in the excerpt reproduced above.⁴³ There is a significant portion of customary law that is not specific to environmental protection (e.g. the customary law of State responsibility for internationally wrongful acts,⁴⁴ the recognition of obligations *erga omnes*,⁴⁵ certain configurations of norms that confer a status over a resource or an area,⁴⁶ or a range of human rights provisions⁴⁷) and, yet, its relevance to advance this purpose makes this body of norms no less important than some specifically environmental norms.

However, within the confines set for this chapter, we will concentrate on the primary norms identified by the aforementioned paragraph of the *Costa*

⁴² *Costa Rica and Nicaragua Cases*, above n. 7, para 104 (italics added).

⁴³ This basic point has been overlooked in the more recent scholarship, but it was clearly perceived at the dawn of international environmental law. See I. Brownlie, 'A Survey of International Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179, at 179 stating that: '[a]lthough the position may soon change, general international law (or customary law) contains no rules or standards related to the protection of the environment as such. Three sets of rules have major relevance nonetheless. First, the rules relating to state responsibility have a logic and vitality not to be despised or taken for granted. Secondly, the territorial sovereignty of States has a double impact. It provides a basis for individualist use and enjoyment of resources without setting any high standards of environmental protection. However, it also provides a basis for imposition of State responsibility on a sovereign State causing, maintaining, or failing to control a source of nuisance to other States. Thirdly, the concept of the freedom of the seas (and its clear equivalent in the case of outer space and celestial bodies) contains elements of reasonable user and non-exhaustive enjoyment which approach standards for environmental protection, although they are primarily based upon the concept of successful sharing rather than conservation in itself'.

⁴⁴ See P.-M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (Paris: Pédone, 1976).

⁴⁵ See Viñuales (2008), above n. 1, pp. 235-244 (discussing the 'first wave' of ICJ cases).

⁴⁶ Such is the case of the concepts of 'common area', 'common heritage' and 'common concern' as applied to characterise the status of certain resources and areas. See J. Brunnée, 'Common Areas, Common Heritage, and Common Concern', in D. Bodansky, J. Brunnée, E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 552-73.

⁴⁷ See the chapter by John Knox in this volume.

Rica/Nicaragua case. Other norms and concepts are discussed elsewhere in this volume.

B. The prevention principle and the duty of due diligence

The prevention principle can be considered as the cornerstone of international environmental law. Its customary grounding is widely recognised in the case-law,⁴⁸ and in many ways it embodies the historical continuity from the early years of international environmental law to our present understanding. Its own transformation from a horizontal ‘private law’ logic to a vertical ‘public law’ logic emphasising the protection of the environment *per se* can be used as a proxy for the wider transformation undergone by international environmental law. In this transformation, the significantly older ‘duty of due diligence’⁴⁹ played a key role, which has been authoritatively recognised by the ICJ⁵⁰ and the Seabed Chamber of the International Tribunal for the Law of the Sea (ITLOS).⁵¹ Before undertaking the analysis of the prevention principle as a customary norm, it is therefore necessary to clarify how it is interlocked with the duty of due diligence.

These two norms very largely overlap, but not entirely. The first difference stems from the broader scope of the duty of due diligence, which applies to several types of harm and risk other than environmental harm or risk thereof. The second difference is that, as emphasised in the *Trail Smelter* arbitration, the prevention principle concerns only harm of a certain magnitude (‘material’ harm⁵² or ‘significant’ harm⁵³)

⁴⁸ *Legality of Nuclear Weapons*, above n. 6, para. 29; *Gabčíkovo-Nagymaros*, above n. 40, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14 [hereinafter *Pulp Mills*], para. 101; *Costa/Rica Nicaragua*, above n. 7, para. 104, 118; *Iron Rhine arbitration*, above n. 10, para. 59, 222; *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 (Islamic Republic of Pakistan v. Republic of India)*, PCA, Partial Award (18 February 2013) (*Indus Water Kishenganga – Partial Award*), paras. 448-451; *Ghana/Côte d’Ivoire*, above n. 6, para 71; *South China Sea Arbitration*, above n. 6, paras 941. See generally L.-A. Duvic Paoli and J. E. Viñuales, ‘Principle 2: Prevention’, in Viñuales, above n. 1, pp. 107–38; L.-A., Duvic Paoli, *The Prevention Principles in International Environmental Law* (Cambridge University Press, 2018).

⁴⁹ *Alabama claims of the United States of America against Great Britain*, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, RIAA XXIX, pp.130-132 [hereinafter *Alabama Arbitration*].

⁵⁰ *Pulp Mills*, above n. 48, para 101.

⁵¹ *Responsibilities in the Area*, above n. 19, paras. 125–35, particularly paras. 131 and 135.

⁵² *Trail Smelter*, above n. 36, p. 1980.

⁵³ See Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, 12 December 2001, GA Res. 56/82, UN Doc. A/RES/56/82 (*ILC Prevention Articles*), art. 2(a); *Pulp Mills*, above n. 48, para. 101.

or risk of thereof.⁵⁴ By contrast, the duty of due diligence is not thus limited. Hence, action/inaction that results in harm or risk to the environment that is below the threshold of significance required for a breach of the prevention principle remains governed by (and could potentially constitute a breach of) the duty of due diligence. For example, a State may be required, under the duty of due diligence, to take precautionary measures, even in the absence of scientific certainty as to the existence of risk of significant harm.⁵⁵ Such requirement would not flow from the prevention principle, which only operates when there is risk (and not merely uncertainty). Nor would it flow, in the absence of an applicable treaty, from the precautionary approach/principle, whose customary grounding is still debated. Aside from these two differences, the two norms converge to such a degree that, as far as environmental protection is concerned, the duty of due diligence operates as a component of the prevention principle.

The most representative formulation of the prevention principle as a customary norm can be found in Principle 2 of the Rio Declaration:

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

This formulation includes the three main components of the principle, i.e. the underlying right to exploit natural resources, the duty not to cause harm to the environment of other States, and the duty not to cause harm to the environment beyond national jurisdiction. But this formulation is not complete. It omits two important components of the principle, namely the characterisation of the harm as ‘significant’ and the requirement to minimise ‘risk’ thereof, which implies that the principle may be breached even in the absence of harm. These two components are found in the Draft Articles on Prevention adopted in 2001 by the UN International Law Commission,⁵⁶ and they partly reflect the articulation between the prevention principle and the duty of due diligence. Yet, the Draft Articles have their own shortcomings, including a narrow spatial scope limited to ‘transboundary’ harm,⁵⁷ which recalls the

⁵⁴ ILC Prevention Articles, above n. 53, art 3.

⁵⁵ See *Responsibilities in the Area*, above n. 19, paras. 125–35, particularly paras. 131 and 135.

⁵⁶ *ILC Prevention Articles*, above n. 53, Arts 2(a) and 3.

⁵⁷ *Ibid.*, Art 2(c).

aforementioned horizontal logic, and a potentially confusing sequence between prevention, the duty to conduct an EIA and the duty of cooperation.⁵⁸

Even when combined, the Rio Declaration and the Draft Articles remain unclear regarding three key aspects of the customary norm, which have been fleshed out in the case-law. One is its *applicability* irrespective of the powers exercised by a State over a given area, which could potentially include, in addition to the environment in other States and the environment beyond national jurisdiction, also a State's own territory or areas where it exercises sovereign powers over the exploitation of natural resources.⁵⁹ The second is the *level of diligence* that must be displayed by the State of origin. Such level depends on three main criteria, namely the gravity of the outcome that may result from negligence,⁶⁰ the capabilities of the State of origin,⁶¹ and the historical moment at which diligence is assessed.⁶² The latter is particularly noteworthy because it is a proxy for what can reasonably be required under the scientific and technological knowledge prevailing at a given point in time. That, in turn, provides a direct entry point into the content of the customary norm to a range of technical regulations, often of a soft-law nature, that are generally referred to as 'standards'. The third aspect highlights the requirement to exercise due diligence not only when adopting suitable regulations to prevent environmental harm but also to ensure that they are *effectively implemented*.⁶³ However, diligence in ensuring implementation does not mean that the mere occurrence of harm is sufficient for the prevention principle to be breached. In the absence of fault, there is no breach. This conclusion was reached in the *Alabama arbitration* in connection with some specific

⁵⁸ *Ibid.*, Arts 7 and 8, applied in *Costa Rica/Nicaragua*, above n. 7, para 104.

⁵⁹ See *Ghana/Côte d'Ivoire*, above n. 6, para 68-73; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No 21 [hereinafter *IUU Advisory Opinion*], paras. 111, 120; *South China Sea Arbitration*, above n. 6, para 927.

⁶⁰ See *Alabama arbitration*, above n. 49, p. 129; *Responsibilities in the Area*, above n. 19, para. 117. This is acknowledged in the commentary to the *ILC Prevention Articles*, when it is stated that 'degree of care required is proportional to the degree of risk involved in the business,' *ILC Prevention Articles*, above n. 53, commentary to Art. 3, para. 18

⁶¹ This is only partially admitted to avoid important loopholes in the due diligence system. See *Responsibilities in the Area*, above n. 19, paras. 158–9 (where the Chamber only admitted the possibility that the requirement to adopt precautionary measures may be graduated according to the capabilities of States). The commentary to the ILC Articles also reflects this criterion, *ILC Prevention Articles*, above n. 53, commentary to Art. 3, para. 13.

⁶² *Responsibilities in the Area*, above n. 19, para. 117.

⁶³ *Pulp Mills*, above n. 48, para. 197; *Responsibilities in the Area*, above n. 19, paras. 115 and 239; *ILC Prevention Articles*, above n. 53, commentary to Art. 3, para. 10.

vessels⁶⁴ as well as, in 2016, in the *South China Sea arbitration*, with respect to some specific instances of environmental damage.⁶⁵

The prevention principle has many conceptual implications, some of which have been legally recognised. A sub-set of the latter concerns two procedural duties specifically recognised as separate norms of customary international law, namely the duty to conduct an EIA and the duty of cooperation.

C. The duty to conduct an environmental impact assessment

The origins of the duty to conduct an EIA can be traced back to the 1969 National Environmental Policy Act in the United States.⁶⁶ The technique then spread around the world becoming one of the most representative regulatory tools in comparative environmental law.⁶⁷ At the international level,⁶⁸ it was first incorporated in some treaties, most notably the Espoo Convention⁶⁹ and the Madrid Protocol on the Antarctic Environment,⁷⁰ and formulated in Principle 17 of the Rio Declaration in the following terms:

‘Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority’

The ICJ first recognised this duty as part of general international law in the *Pulp Mills* case,⁷¹ and then confirmed its stance in 2015 in the *Costa Rica/Nicaragua* case.⁷² As with the prevention principle, the formulation in Principle 17 of the Rio

⁶⁴ *Alabama arbitration*, above n. 49, p. 132 (discussion relating to the vessel ‘Retribution’).

⁶⁵ *South China Sea Arbitration*, above n. 6, paras. 972-975; see further *Pulp Mills*, above n. 48, para. 187; *Responsibilities in the Area*, above n. 19, para. 110; *ILC Prevention Articles*, above n. 53, commentary to Art 3, para. 7.

⁶⁶ National Environmental Policy Act, 42 USC, chapter 55.

⁶⁷ N. A. Robinson, ‘EIA Abroad: The Comparative and Transnational Experience’, in S. G. Hildebrand and J. B. Cannon (eds.), *Environmental Analysis: The NEPA Experience* (Boca Raton: Lewis, 1993), pp. 679–702.

⁶⁸ See N. Craik, ‘Principle 17: Environmental Impact Assessment’, in Viñuales (2015), above n. 1, pp. 451–70.

⁶⁹ Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309 (Espoo Convention), Appendix III, para. 1.

⁷⁰ Protocol to the Antarctic Treaty on Environmental Protection, 4 October 1991, 30 ILM 1455 (Madrid Protocol).

⁷¹ *Pulp Mills*, above n. 48, para 204.

⁷² *Costa Rica/Nicaragua*, above n. 7, para 104.

Declaration calls for some additional comment on its content, spatial scope of application and interaction with other norms, particularly the prevention principle and the duty of cooperation.

The content of the norm is the most complex part. First, some minimal content was identified at the time the norm was recognised, such as a focus on ‘activities’ (rather than on policies or plans),⁷³ the need to conduct the EIA ‘prior’ to the approval decision of the competent authority and to monitor impact throughout the life of the project,⁷⁴ and the characterisation of the level of ‘risk’ at stake. On the latter issue, the English, French and Spanish versions do not use equivalent language. The English version of Principle 17 as well as the Draft Articles on Prevention refer to ‘significant adverse impact’, which may suggest that what is targeted is the risk of ‘significant’ environmental harm covered by the prevention principle. This is also the terminology used by the ICJ in the English version of its judgment in the *Pulp Mills* case. Yet, the terms used in the French and Spanish versions differ from those used under the prevention principle. Principle 17 refers to ‘effets nocifs importants’ (by contrast with the French version of the Draft Articles on Prevention, which define the harm linked to prevention as ‘significatif’) and the ICJ speaks of ‘impact préjudiciable important’⁷⁵ or ‘risque de dommage transfrontière important’.⁷⁶ The Spanish version of Principle 17 uses the adjective ‘considerable’ to qualify the risk of harm, whereas the term used to characterise the harm targeted by the prevention principle in the Draft Articles is ‘sensible’. These ambiguities suggest that the duty to conduct an EIA has its own trigger. Significant harm or risk thereof activate the prevention principle but something more would be needed to trigger the duty to conduct an EIA. A second source of complexity regarding the content relates to the somewhat elliptical statement of the ICJ that:

‘it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.’⁷⁷

⁷³ Craik, above n. 68, p. 456.

⁷⁴ *Pulp Mills*, above n. 48, para 205.

⁷⁵ *Pulp Mills*, above n. 48, para 204.

⁷⁶ *Costa Rica/Nicaragua*, above n. 7, para 104.

⁷⁷ *Ibid.*

This assertion is disconcerting because for a customary norm to emerge a sufficiently uniform body of practice is needed and, if there is practice, there must be some minimum content. Leaving content largely – albeit not entirely – in the hands of States may have suited the facts of that specific case, but it is problematic because it paves the way for abuse. This problem is compounded by the fact that, as we discuss later, the ICJ has conditioned the procedural duties of notification and consultation to the results of the EIA.

Regarding the spatial scope of application of the norm, the ICJ recognised it in a ‘transboundary context’, i.e. between two States, particularly on a ‘shared resource’.⁷⁸ But the formulation of Principle 17 of the Rio Declaration refers generally to ‘activities that are likely to have a significant adverse impact on the environment’, without any specific spatial limitation, and the application of the duty to activities that may harm areas beyond national jurisdiction has been expressly recognised in the case law.⁷⁹

With respect to the interactions between the duty to conduct an EIA and other related norms, it is important to emphasise the problem introduced by the sequential interpretation of the duties to conduct an EIA and to notify and consult. In *Costa Rica/Nicaragua*, the ICJ considered that the latter are only triggered once the risk of significant transboundary harm has been confirmed – unilaterally – by the conduct of an EIA in the State of origin, the contents of which are also to be defined unilaterally. The ICJ seems to have followed the sequence in Articles 7 and 8 of the Draft Articles on Prevention, but this is a narrow and problematic reading of this instrument. As a general matter, such understanding places too much power on the State that has an interest in developing the activity. It gives this State the unilateral power to decide whether to conduct the EIA, to define the EIA’s content and to actually conduct it. Secondly, it overlooks the fact that, by necessity, such unilateral powers are inconsistent with the existence of a right, correlative to the duty to conduct the EIA, for the State affected to require this procedure on the basis of its own assessment of the risk. Thirdly, it is difficult to see how the procedural step of notification would be conditioned upon the unilateral conduct of an EIA given that the very Draft Articles on Prevention, in Article 4, generally require concerned States to cooperate, and this duty is part of general international law. How could such cooperation take place in good faith if the affected State is not made aware, by notification, of the proposed activity, even before the EIA has been conducted. Fourthly, Article 9 of the Draft Articles, which relates to ‘consultations’, is broad and encompasses situations where no EIA

⁷⁸ *Pulp Mills*, above n. 48, para 204-5; *Costa Rica/Nicaragua*, above n. 7, para 104.

⁷⁹ *Responsibilities in the Area*, above n. 19, paras. 145, 148; *South China Sea Arbitration*, above n. 6, paras. 947-948.

and/or notification have taken place. The commentary refers to consultations following notification as one among several other situations where consultations may take place⁸⁰ and, like Article 4, it emphasises the customary duty of cooperation in good faith.⁸¹ Finally, the status of certain shared resources such as international watercourses specifically require cooperation among the watercourse States as an integral part of the equitable and reasonable utilisation principle.⁸² It is only within this broader context that the conduct of an EIA and the duty of notification must be read.⁸³

The position of the ICJ in *Costa Rica/Nicaragua* on the sequence of the duties arising from general international law must therefore be nuanced. It must be interpreted not as a normative sequence between the duties of EIA and cooperation in general but only as a logical – descriptive – sequence between the conduct of the EIA and communication of the relevant information through notification.

D. The duty of cooperation

In the foregoing paragraphs, we have made reference to several aspects of the duty of cooperation. This duty is not limited to the environmental context; it has a much broader scope of application.⁸⁴ In the environmental context, two main strands of the duty can be identified. The first, which enjoys wide recognition in general international law, concerns the duty to cooperate in a transboundary context. Aspects of this duty are formulated in Principles 19 and 18 of the Rio Declaration and more generally recognised in the case-law.⁸⁵ The second strand concerns cooperation ‘in a spirit of global partnership’,⁸⁶ and it remains purely conceptual except in those cases where it has been fleshed out in treaty processes.

For present purposes, the starting-point of our analysis is the formulation of the duty in Principle 19 of the Rio Declaration:

⁸⁰ *ILC Prevention Articles*, above n. 53, Commentary ad art. 9, para 4.

⁸¹ *Ibid*, para 4.

⁸² UN Convention 1997, above n. 31, arts 5(2), 8 and 9.

⁸³ *Ibid.*, Art 12.

⁸⁴ See general description in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment (1 October 2018), still unreported, para 87; see Resolution 2625 (XXV), of 24 October 1970; *North Sea Continental Shelf*, above n. 23, para. 85; *Legality of Nuclear Weapons*, above n. 6, paras. 98-103; *Gabčíkovo-Nagymaros*, above n. 40; *Pulp Mills*, above n. 48, paras. 77, 102, 144-146; *Costa Rica/Nicaragua*, above n. 7, paras. 104, 106; *IUU Advisory Opinion*, above n. 59, para. 139-140; *Ghana/Côte d'Ivoire*, above n. 6, para 73; *South China Sea Arbitration*, above n. 6, 946, 184-985.

⁸⁵ *South China Sea Arbitration*, above n. 6, paras 946, 984-985.

⁸⁶ See Rio Declaration, Principles 7 and 27.

‘States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith’⁸⁷

The trigger of the duty of cooperation remains somewhat ambiguous. This is not immediately apparent in the English formulation of Principle 19, which uses the term ‘significant’, much like the prevention principle. Yet, the French formulation uses a terminology (‘effets transfrontières sérieusement nocifs sur l’environnement’) which seems to be closer to the ‘effets nocifs importants’ required under Principle 17. In the French version of its judgment in the *Costa Rica/Nicaragua* case, the ICJ relied on a slightly reformulated version of the terminology of Principle 17 as the trigger of the duties to notify and consult (referring to ‘risque de dommage transfrontière important’).⁸⁸ Reliance on the trigger of Principle 17 does not necessarily mean that the duty of cooperation, including notification and consultation, may not be triggered earlier when there are other elements suggesting the existence of risk, even if not yet ascertained through an EIA. The key issue here is therefore not the EIA itself but the existence of risk. This is expressly contemplated in Articles 4, 9 and 12 of the Draft Articles on Prevention. As noted in the commentary to Article 4, ‘[t]he requirement of cooperation of States extends to all phases of planning and of implementation’ because, among other reasons, the State likely to be affected ‘may know better than anybody else ... which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem’.⁸⁹ It has indeed been long held that the assessment of transboundary impact of an activity cannot be under the exclusive remit of the State of origin.⁹⁰

Regarding the content of the duty of cooperation, it includes the procedural duties to notify and consult, but also other forms of cooperation, such as the possibility to request the assistance of a relevant international organisation,⁹¹ regular exchange of

⁸⁷ See L. Boisson de Chazournes and K. Sangbana, ‘Principle 19: Notification and consultation on activities with transboundary impact’, in J.E. Viñuales (2015), above n. 1, pp. 492–507.

⁸⁸ *Costa Rica/Nicaragua*, above n. 7, paras 104, 108, 168.

⁸⁹ *ILC Prevention Articles*, above n. 53, commentary ad art 4, para 1.

⁹⁰ *Lake Lanoux Arbitration (Spain/France)*, RIAA, vol. XII (1957), p. 281, [hereinafter *Lake Lanoux*], para 21.

⁹¹ *ILC Prevention Articles*, above n. 53, commentary ad art 4, para 5 and 6.

information on a shared resource,⁹² consultations in the absence of notification,⁹³ etc. Thus, the duty of cooperation is not limited to the duties to notify and consult. With respect to notification, its purpose is to sufficiently and officially inform the affected States of the situation in order to proceed with the cooperation efforts.⁹⁴ For this reason, the duty is not met by the mere fact that the information is publicly available⁹⁵ or that the notification has been made by a private entity.⁹⁶ The addressees of the notification include the authorities of the affected State, which are in charge of conducting the consultations, but also, potentially, a relevant international organisation.⁹⁷ The moment and content of the notification must be adequate to pursue the consultations usefully and in good faith.⁹⁸

As for the consultation process as such, States must genuinely consult with each other in good faith.⁹⁹ Although the requirement to consult does not amount to conditioning the activity to the consent of the affected State, it does have some important practical consequences. While the consultations are ongoing, it would be a breach of the duty of cooperation to grant approval to the activity in question.¹⁰⁰ Moreover, the purpose of the consultations is not entirely open-ended. Article 9 of the Draft Articles on Prevention specifies that consultations shall be conducted 'with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof'. This can be interpreted as an obligation to cooperate 'to achieve a precise result',¹⁰¹ although the result is broadly defined. All in all, given the temporal extension, the bilateral nature and the precise result aimed by the consultations, this duty can be considered to be the core of the duty of cooperation in an environmental context, as well as a clear expression of the due diligence required by the prevention principle.

⁹² *ILC Prevention Articles*, above n. 53, Art 12.

⁹³ *Ibid.*, Art 11.

⁹⁴ *Ibid.*, paras. 113, 115.

⁹⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Reports 2008, p. 231, para. 150.

⁹⁶ *Pulp Mills*, above n. 48, para. 110.

⁹⁷ *Ibid.*, paras. 90, 119 and 121.

⁹⁸ *Ibid.*, para. 120.

⁹⁹ *Lake Lanoux*, above n. 90, para. 22.

¹⁰⁰ *Pulp Mills*, above n. 48, para 144.

¹⁰¹ *Legality of Nuclear Weapons*, above n. 6, para 99; *Obligation to Negotiate Access to the Pacific Ocean*, above n. 84, para 87.

IV. CONCLUDING OBSERVATIONS

The analysis in this chapter has shown that, despite some peculiarities, the process of formation of customary norms of environmental protection is rather banal, in that it unfolds much like the process of customary law formation in general.

The development of such process has resulted in the emergence and refinement of a close-knit core of customary norms consisting of one principle (prevention) and three related duties, i.e. the duty of due diligence as the heart of the prevention principle and the procedural duties to conduct an EIA and to cooperate in good faith, including through notification and consultation. The interconnections among these norms are complex and cannot be reduced to a mere sequence. This customary core finds expression above all in the 1992 Rio Declaration, in Principles 2, 17, 19 and 18, as well as in some other *loci* reflecting general international law, such as the ILC codification efforts and a growing body of case-law. Thus, it appears that customary international environmental law is finally coming out of the thick fog in which it was coated for decades. Commentators should take note of this important development and endeavour to further consolidate and clarify these norms.

If the ongoing process towards the adoption of a Global Pact for the Environment is successful, it will certainly be a major contribution to such consolidation process. Yet, as noted in the introduction, general international law has a distinctive role to play alongside treaties. As far as environmental protection is concerned, it will serve *inter alia* to provide some discipline to the pervading promise of sustainable development.¹⁰² No development can be genuinely sustainable if, at the very least, the core customary norms of environmental protection are not fully met.

¹⁰² See the chapter on Sustainable Development by J. E. Viñuales in this volume.