ENVIRONMENTAL RULE OF LAW

First Global Report

UN environment

Justice Swatanter Kumar (Retd.)
Former Judge, Supreme Court of India
Former Chairperson, National Green Tribunal

In Ancient Indian Philosophy, the concept of Vasudev Kutumbakam, a Sanskrit phrase meaning "the world is one family", finds frequent mentions and the concept of Environmental Rule of Law, as has been ardently brought forth in the report, can be traced to this ancient concept. Natural resources should be treated as global assets as juxtaposed with national property. Environment is a universal subject and environmental rule of law demands making the right to clean and decent environment fundamental to human existence, efficacious and expeditious across the globe.

The report individuates the governance system of various countries and simultaneously presses upon the conditional differences in various aspects of Environmental Management. The four pillars of sustainable development- economic, social, environmental and peace- is a well-placed need of the hour. The melancholic undertones of the reality must not overcome the various strides that we as populace of the world are taking towards becoming environmentally aware and developing our consciousness and conscience and towards this cause. It is this light of this advancement and strengthening that this report becomes extremely relevant in today's times.

I would like to congratulate the UN Environment for coming out with comprehensive and informative "Environmental Rule of Law: First Global Report" and wish them success.

Emmanuel Ugirashebuja, East African Court of Justice

“When everything else has been tested and yielded limited success, perhaps the only remaining much needed hope for salvaging the environment can only be found in espousing the concept of environmental rule of law especially in developing countries where consequences of environmental degradation are catastrophic.”

Lord Robert Carnwath

“I very much welcome the publication of this authoritative and comprehensive report. The Environmental Rule of Law is now an established concept. There is an urgent need for it to be applied in a practical and effective way by courts and administrators throughout the world. This report will make a valuable contribution.”

Terry Tamminen, President and CEO of the Leonardo DiCaprio Foundation

“The rule of law means that no one is above the law. This new report on the Environmental Rule of Law will help us improve compliance with environmental law, which is essential to ensuring protection of constitutional and human rights. As a U.N. Messenger of Peace, Mr. DiCaprio particularly supports legal protection of environmental defenders, especially indigenous peoples. During 2016, more than 200 environmental defenders were killed in 24 countries, with intimidation and violence affecting many more; a significant number of these were indigenous peoples.”

“Many species’ survival rests upon the success of environmental rule of law, which is why an increasing number of countries are extending legal rights or legal personhood to natural systems. As the United Nations has observed, living by the rule of law is critical to peace. It is a pre-requisite to the realization of all human rights.”

David Boyd, Special Rapporteur on Human Rights and the Environment

“This compelling new report solves the mystery of why problems such as pollution, declining biodiversity and climate change persist despite the proliferation of environmental laws in recent decades. Unless the environmental rule of law is strengthened, even seemingly rigorous rules are destined to fail and the fundamental human right to a healthy environment will go unfulfilled.”

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Foreword

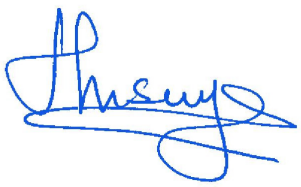
It's clear that without environmental rule of law, development cannot be sustainable. Rule of law ensures that well-designed safeguards are just that: a pillar of protection for people and planet that are the very foundation of life itself. Environmental rule of law is also a barometer for the health of government institutions that are held accountable by an informed and engaged public; in other words, of a culture of sound environmental and social values.

A clear example of its importance is Costa Rica, a nation heavily dependent on natural resources and situated in a wider region that has been too often ravaged by political strife. The country has increased life expectancy to more than 79 years, achieved 96 percent adult literacy, and built per capita income to almost US$9,000 while setting and meeting ambitious environmental goals. Moreover, it has already doubled its forest cover to over 50 percent and is on track to be climate neutral by 2021.

It's an illustration of how setting, implementing, and enforcing clear planetary boundaries is not a straitjacket, but rather a driver of innovation and health. Environmental rule of law provides agencies with the authority to act. It provides citizens with clear pathways to justice and sets a fair framework for businesses to behave sustainably.

As a result, governments are now using rights-based approaches to help meet environmental commitments and reinforce the importance of environmental law. In Nepal, for instance, citizens and non-governmental organizations made an application to Nepal's Supreme Court against a marble factory on the basis that it caused environmental degradation to the Godavari forest and its surroundings. The factory emitted dust, minerals, smoke, and sands and had polluted the water, land, and air of the area, endangering the lives and property of the local people. The Court held that Nepal's constitutional provision protecting the right to life necessarily included the right to a clean and healthy environment. It's an obvious connection – but one that is sadly often overlooked. The Court ultimately issued directives to the Parliament to pass legislation to protect the Godavari environment; that is, its air, water and people.

These kinds of rulings show that environmental protection is in the public interest and has solid legal grounding. By publishing the first global report on environmental rule of law, we hope to highlight the work of those standing on the right side of history – and how many nations are stronger and safer as a result.



Joyce Msuya
Acting Executive Director,
UN Environment

Executive Summary

If human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet. Environmental rule of law offers a framework for addressing the gap between environmental laws on the books and in practice and is key to achieving the Sustainable Development Goals.

Environmental laws have grown dramatically over the last three decades, as countries have come to understand the vital linkages between environment, economic growth, public health, social cohesion, and security. As of 2017, 176 countries have environmental framework laws; 150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions; and 164 countries have created cabinet-level bodies responsible for environmental protection. These and other environmental laws, rights, and institutions have helped to slow—and in some cases to reverse—environmental degradation and to achieve the public health, economic, social, and human rights benefits that accompany environmental protection.

The 1972 United Nations Conference on the Human Environment brought the global environment into the public consciousness, leading to the establishment of the United Nations Environment Programme. Following the 1992 United Nations Conference on Environment and Development (known as the Rio Earth Summit), many countries made a concerted effort to enact environmental laws, establish environment ministries and agencies, and enshrine environmental rights and protections in their national constitutions. By the 2012 United Nations Conference on Sustainable Development, the focus had shifted to implementation of environmental laws, which is where progress has waned.

Too often, implementation and enforcement of environmental laws and regulations falls far short of what is required to address environmental challenges. Laws sometimes lack clear standards or necessary mandates. Others are not tailored to national and local contexts and so fail to address the conditions on the ground. Implementing ministries are often underfunded and politically weak in comparison to ministries responsible for economic or natural resource development. And while many countries are endeavouring to strengthen implementation of environmental law, a backlash has also occurred as environmental defenders are killed and funding for civil society restricted. These shortfalls are by no means limited to developing nations: reviews of developed nations have found their performance on environmental issues lacking in certain respects. In short, environmental rule of law is a challenge for all countries. This Report discusses the range of measures that countries are adopting to address this implementation gap—and to ensure that rule of law is effective in the environmental sphere.

As the first assessment of the global environmental rule of law, this Report draws on experiences, challenges, viewpoints, and successes of diverse countries around the world, highlighting global trends as well as opportunities for countries and partners to strengthen the environmental rule of law.

The Report highlights the need to undertake a regular global assessment of the state of environmental rule of law. To track progress nationally and globally, it is necessary to utilize a set of consistent indicators. The Report proposes an indicator framework for environmental rule of law and highlights existing datasets that may be utilized in support of the global assessment.

The Report also calls for a concerted effort to support countries in pilot testing approaches to strengthen environmental rule of law. Such an initiative could support testing of approaches in diverse contexts, and then adapting them before scaling them up. It should also foster exchange of experiences between jurisdictions to foster learning.

In addition to these two cross-cutting recommendations, the Report highlights numerous actionable steps that States can take to support environmental rule of law. For example, States can evaluate the current mandates and structure of environmental institutions to identify regulatory overlap or underlap. States and partners can build the capacity of the public to engage thoughtfully and meaningfully with government and project proponents. They can prioritize protection of environmental defenders and whistleblowers. States may consider the creation of specialized environmental courts and tribunals, and use administrative enforcement processes to handle minor offenses. And there is an ongoing need to research which approaches are effective under what circumstances.

The benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effects are in protection of the environment, it also strengthens rule of law more broadly, supports sustainable economic and social development, protects public health, contributes to peace and security by avoiding and defusing conflict, and protects human and constitutional rights. As such, it is a growing priority for all countries.

موجز تنفيذي

إذا أراد المجتمع البشري أن يظل ضمن حدود العتبات البيئية الحرجة، فمن الضروري للغاية أن تُفهم القوانين البيئية على نطاق واسع، وتحترم وتنفذ، وأن يتمتع الكوكب وسكانه من البشر بمزايا الحماية البيئية. وتتيح سيادة القانون البيئي إطاراً لمعالجة الفجوة بين القوانين البيئة المسجلة والمتبعة بالممارسة، وتمثل عنصراً أساسياً لتحقيق أهداف التنمية المستدامة.

وخلال العقود الثلاثة الماضية، ازدادت القوانين البيئية ازدياداً كبيراً، مع نمو فهم البلدان للروابط الحيوية بين البيئة والنمو الاقتصادي، والصحة العامة، والتماسك الاجتماعي، والأمن. وحتى العام ٢٠١٧، سُنَّت القوانين الإطارية البيئية في ١٧٦ بلداً؛ وكرس ١٥٠ بلداً حماية البيئة أو الحق في بيئة صحية في دساتيرها؛ وأنشأ ١٦٤ بلداً هيئات على المستوى الوزاري لتولي مسؤولية حماية البيئية. وقد ساعدت هذه القوانين والحقوق والمؤسسات البيئية في إبطاء التدهور البيئي - وعكس اتجاهه في بعض الحالات - وفي تحقيق المنافع التي تصاحب الحماية البيئية في المجالات الاقتصادية والاجتماعية وكذلك للصحة العامة وحقوق الإنسان.

وقدم مؤتمر الأمم المتحدة المعني بالبيئة البشرية، الذي عقد في عام ١٩٧٢، مسألة البيئة العالمية إلى الوعي العام، مما أدى إلى إنشاء برنامج الأمم المتحدة للبيئة. وعقب مؤتمر الأمم المتحدة المعني بالبيئة والتنمية لعام ١٩٩٢ (المعروف باسم قمة الأرض في ريو)، بذلت كثير من البلدان جهوداً متضافرة لسن القوانين البيئية، وإنشاء وزارات البيئة والوكالات المعنية بها، وتكريس الحقوق وإجراءات الحماية البيئية في دساتيرها الوطنية. ومع انعقاد مؤتمر الأمم المتحدة للتنمية المستدامة للعام ٢٠١٢، تحول التركيز إلى تنفيذ القوانين البيئية، وهو مجال تضاءل التقدم فيه.

وفي كثير من الأحيان، لا يفي تنفيذ القوانين والأنظمة البيئية وإنفاذها بما هو مطلوب للتصدي للتحديات البيئية. وتفتقر القوانين في بعض الحالات إلى المعايير الواضحة أو الولايات اللازمة. في حين أن بعضها الآخر لا يناسب السياقات الوطنية والمحلية، ويخفق بالتالي في التصدي للحالات التي تنشأ على أرض الواقع. وكثيراً ما تعاني الوزارات المنفذة من نقص التمويل، ومن ضعفها سياسياً بالمقارنة مع الوزارات المسؤولة عن التنمية الاقتصادية أو الموارد الطبيعية. وعلى الرغم من المساعي الدؤوبة التي يبذلها كثير من البلدان لتعزيز تنفيذ القانون البيئي، ظهرت ردود أفعال عكسية أيضاً باغتيال المدافعين عن البيئة وتقييد التمويل للمجتمع المدني. ولا تقتصر جوانب العجز هذه على الدول النامية وحدها: فقد أظهرت الاستعراضات التي أجريت في الدول المتقدمة النمو قصوراً في بعض جوانب أدائها المتعلق بالمسائل البيئية.

وباختصار، تمثل سيادة القانون البيئي تحدياً لجميع البلدان. ويبحث هذا التقرير طائفة التدابير التي تعتمدها البلدان لمعالجة هذه الثغرة في التنفيذ - ولكفالة فعالية سيادة القانون في المجال البيئي.

ويستند هذا التقرير، باعتباره التقييم الأول لسيادة القانون البيئي العالمي، إلى الخبرات والتحديات والآراء والنجاحات من بلدان مختلفة في جميع أنحاء العالم، مع تسليط الضوء على الاتجاهات العالمية، وكذلك على الفرص المتاحة للبلدان والشركاء من أجل تعزيز سيادة القانون البيئي.

ويبرز التقرير ضرورة إجراء تقييم عالمي منتظم لحالة سيادة القانون البيئي. ولتتبع التقدم المحرز على الصعيدين الوطني والعالمي، من الضروري استخدام مجموعة متسقة من المؤشرات. ويقترح التقرير إطاراً للمؤشرات المتعلقة بسيادة القانون البيئي، ويسلط الضوء على مجموعات البيانات القائمة التي يمكن أن تستخدم في دعم التقييم العالمي.

ويدعو التقرير أيضاً إلى بذل جهود متضافرة من أجل دعم البلدان في الاختبار التجريبي للنُهُج الرامية إلى تعزيز سيادة القانون البيئي. ومن شأن هذه المبادرة أن تدعم اختبار النُهُج في سياقات متنوعة، ثم تكييفها قبل توسيع نطاقها. وينبغي أن تشجع أيضاً تبادل الخبرات بين الولايات القضائية لتعزيز التعلم.

وبالإضافة إلى هاتين التوصيتين الشاملتين، يسلط التقرير الضوء على العديد من الخطوات العملية التي يمكن أن تتخذها الدول من أجل دعم سيادة القانون البيئي. فعلى سبيل المثال، يمكن للدول أن تقيم الولايات الحالية للمؤسسات البيئية وهياكلها لتحديد حالات التداخل التنظيمية الكلية أو الجزئية. ويمكن للدول أو الجهات الشريكة أن تبني قدرات الجمهور على المشاركة المتأنية والهادفة مع الحكومة ومقترحي المشاريع. ويمكنها أن تعطي الأولوية لحماية المدافعين عن البيئة والمبلغين عن المخالفات. وقد تود الدول أن تنظر في إنشاء محاكم بيئية ومحاكم بيئية متخصصة، وفي استخدام عمليات الإنفاذ الإدارية للتعامل مع الجرائم البسيطة. وهناك حاجة مستمرة إلى بحث أي النهج تثبت فعاليتها وما هي الظروف التي تكون فعالة فيها.

وتحقق سيادة القانون البيئي منافع يتجاوز نطاقها القطاع البيئي. وعلى الرغم من أن معظم آثارها المباشرة تتجلى في حماية البيئة، فهي تعزز أيضاً سيادة القانون على نطاق أوسع، وتدعم التنمية الاقتصادية والاجتماعية المستدامة، وتحمي الصحة العامة، وتسهم في تحقيق السلام والأمن عن طريق تجنب ونزع فتيل النزاع، وتحمي حقوق الإنسان والحقوق الدستورية. وهي بذلك تمثل أولوية ذات أهمية متزايدة لجميع البلدان.

执行摘要

人类社会要想不逾越关键的生态临界点，当务之急就是让环境法得到普遍了解、遵守和实施，让人类和地球享有保护环境的益处。环境法治提供了一个框架，用来解决环境法理论和实践之间的差距问题，是实现可持续发展目标的关键。

在过去三十年中，随着各国逐渐了解环境、经济增长、公共卫生、社会凝聚力和安全之间的重要联系，环境法取得了长足的发展。到2017年，已有176个国家颁布了环境框架法，有150，有164个国家设立了内阁级环境保护机构。上述举措以及其他环境法律、权利和机构，已帮助减缓、在某些情况下还扭转了环境退化，实现环境保护带来的公共卫生、经济、社会和人权利益。

1972年联合国人类环境会议让公众意识到全球环境问题，使联合国环境规划署得以设立。继1992年联合国环境与发展会议（称为“里约地球问题首脑会议”）之后，许多国家一致努力制定环境法，建立环境部委和机构，并将环境权利和保护写入国家宪法。到2012联合国可持续发展会议时，重点已转向环境法的实施，因为这方面的进展有所放缓。

环境法和条例的执行和实施远不足以满足应对环境挑战的要求，这种情况十分常见。法律有时缺乏明确的标准或必要的规定任务。还有些法律不符合国家和地方的具体情况，从而无法适应当地的条件。与负责经济或自然资源开发的部委相比，环境法的执行部委往往资金上不足，政治上薄弱。虽然许多国家正在努力加强环境法的执行，但同时也发生了反弹现象：环境维护者遇害，对民间社会的资助受限。以上不足绝不仅限于发展中国家；对发达国家的审查表明其在环境问题上的表现在某些方面有所欠缺。总之，环境法治是所有国家都面临的一项挑战。本报告讨论了一系列措施，各国正在采用这些措施，以解决执行方面的这种欠缺，并确保法治在环境领域有效运行。

作为对全球环境法治情况的首次评估，本报告参考了世界各国的经验、挑战、观点和成功案例，强调加强环境法治对各国及合作伙伴而言既是机遇，也是全球大势所趋。

报告强调，需要定期进行全球环境法治状况评估。为了在国家和全球两级跟踪进展情况，就必须采用一套一致的指标。本报告提出了一个环境法治指标框架，强调可利用现有的数据集来支持全球评估。

报告还呼吁作出协调一致的努力，支持各国试行各种加强环境法治的办法。这一举措可支持在不同背景下测试各种方法，然后先对之进行调整，再扩大应用规模。它还应该能够促进不同法域之间的经验交流，以促进学习。

除了这两条跨领域建议之外，报告还强调，各国可以采取许多可行的措施，以支持环境法治。例如，各国可以评估环境机构目前的任务规定和结构，以查明重复监管的情况。各国及合作伙伴可以开展公众能力建设，使公众能够与政府和项目提议者进行有创见、有意义的接触交流。它们可以将保护环境维护者和举报人作为优先事项。各国可以考虑设立专门的环境法院和法庭，并利用行政执法程序处理轻罪。目前还需要研究哪些办法在什么情况下能够奏效。

环境法治的惠及范围远远超出了环境领域。虽然最直接的影响是环境保护，但环境法治还会更加广泛地加强法治，支持可持续的经济和社会发展，保护公众健康，通过避免和化解冲突来促进和平与安全，并保护人权和宪法规定的权利。因此，环境法治对所有国家都是日益重要的优先事项。

Résumé analytique

Pour que la société humaine ne franchisse pas les seuils écologiques critiques, il faut impérativement que les lois environnementales soient connues, respectées et appliquées le plus largement possible et que les bienfaits découlant de la protection de l'environnement profitent à l'ensemble des êtres humains et de la planète. Le principe de primauté du droit en matière environnementale sert à combler l'écart existant entre les différents droits de l'environnement, en théorie comme en pratique, et est essentiel à la réalisation des objectifs de développement durable.

Les différents droits de l'environnement se sont considérablement étoffés au cours des 30 dernières années, les pays comprenant mieux les liens profonds qui unissent l'environnement, la croissance économique, la santé publique, la cohésion sociale et la sécurité. En 2017, 176 pays comptaient une loi-cadre en matière d'environnement ; 150 pays avaient inscrit dans leur constitution la protection de l'environnement ou le droit à un environnement sain ; et 164 pays s'étaient dotés d'organes ministériels chargés de la protection de l'environnement. Ces mécanismes et d'autres lois, droits et institutions en matière d'environnement ont contribué à ralentir et, dans certains cas, à inverser la dégradation de l'environnement et à produire des bienfaits dans les domaines de la santé publique, de l'économie et des droits humains, ainsi qu'en matière sociale, qui découlent de la protection de l'environnement.

La Conférence des Nations Unies sur l'environnement de 1972 a permis de porter à l'attention du public la question de l'environnement mondial, ce qui a conduit à la création du Programme des Nations Unies pour l'environnement. Au lendemain de la Conférence des Nations Unies sur l'environnement et le développement de 1992 (également connue sous le nom de Sommet de la Terre de Rio), de nombreux pays ont mené une action concertée afin d'adopter des lois environnementales, de créer des ministères et des organes chargés des questions environnementales et d'inscrire dans leur constitution des droits environnementaux et la protection de l'environnement. Au moment où s'est tenue la Conférence des Nations Unies sur l'environnement et le développement de 2012, la priorité avait changé et il s'agissait alors d'assurer la mise en œuvre des lois environnementales, laquelle régressait.

Trop souvent, l'application et le respect des lois et des règlements en matière d'environnement sont loin d'être à la hauteur de ce qu'il faudrait faire pour remédier aux problèmes écologiques. Certaines lois ne sont pas accompagnées de normes précises ou des mandats nécessaires. D'autres ne sont pas adaptées aux contextes nationaux et locaux et, partant, ne peuvent répondre aux besoins engendrés pas les conditions sur le terrain. Les ministères chargés de l'application des lois environnementales manquent souvent de fonds et de force politique par rapport à ceux chargés du développement économique ou de l'exploitation des ressources naturelles. De plus, bien que de nombreux pays s'efforcent aujourd'hui de renforcer l'application des lois environnementales, on assiste parallèlement à un recul : des défenseur(euse)s de l'environnement sont assassinés, les fonds alloués aux organisations de la société civile sont restreints, etc. Ce constat ne s'applique absolument pas qu'aux pays en développement.

En effet, l'examen des résultats obtenus en matière d'environnement par les pays développés révèle des lacunes sur certains points. Pour résumer, la primauté du droit environnemental constitue un défi pour tous les pays. Le présent rapport se penche sur l'ensemble des mesures que les pays adoptent actuellement pour régler le problème de l'application des lois et faire en sorte que la primauté du droit soit effectivement respectée dans le domaine environnemental.

S'agissant de la première évaluation mondiale de la primauté du droit environnemental, le présent rapport s'appuie sur les enseignements tirés et les difficultés rencontrées par divers pays dans le monde, ainsi que sur leurs opinions et leurs réussites, et met en évidence les

tendances mondiales et les créneaux qui permettraient aux pays et aux partenaires de renforcer la primauté du droit environnemental.

Le rapport montre qu'il faut évaluer régulièrement la situation mondiale de la primauté du droit en matière environnementale. Pour suivre les progrès réalisés aux échelles nationale et mondiale, il importe d'utiliser un ensemble d'indicateurs constants. Le rapport propose un cadre d'indicateurs permettant d'évaluer la primauté du droit en matière environnementale et renvoie aux séries de données existantes qui pourraient faciliter l'évaluation mondiale.

Le rapport préconise également un effort concerté afin d'aider les pays à mettre à l'essai les méthodes visant à renforcer la primauté du droit en matière environnementale. Une telle initiative pourrait faciliter la mise à l'essai des méthodes dans divers contextes et leur ajustement avant leur transposition à une plus grande échelle. Elle devrait également encourager les juridictions à échanger leurs expériences afin de favoriser l'apprentissage.

Outre ces deux recommandations générales, le rapport met en avant de nombreuses mesures concrètes que les États peuvent prendre en faveur de la primauté du droit en matière environnementale. Par exemple, les États peuvent évaluer les structures et mandats des institutions environnementales afin de faire apparaître les doublons ou les lacunes réglementaires. Les États et les partenaires peuvent renforcer les moyens que le public a à sa disposition pour dialoguer de manière réfléchie et sérieuse avec les pouvoirs publics et les promoteurs de projets. Ils peuvent également faire de la protection des défenseur(euse) s de l'environnement et des lanceur(euse)s d'alerte leur priorité. Les États peuvent envisager de créer des juridictions spécialisées en matière d'environnement et de traiter les infractions mineures par le biais de procédures administratives. Par ailleurs, il reste nécessaire de déterminer quelles méthodes sont efficaces selon les circonstances.

Les bienfaits découlant de la primauté du droit en matière environnementale dépassent largement le secteur environnemental. Bien que la protection de l'environnement profite le plus directement de la primauté du droit en matière environnementale, cette dernière renforce également la primauté du droit de manière générale, favorise un développement économique et social durable, protège la santé publique, contribue à la paix et à la sécurité en évitant et en désamorçant les conflits et protège les droits humains et constitutionnels. Elle constitue donc une priorité de plus en plus grande pour tous les pays.

Краткое изложение

Для того, чтобы человечество не превысило пределы критических пороговых значений для окружающей среды, крайне важно добиваться широкого осознания природоохранных законов, их уважения и применения и чтобы положительные результаты природоохранной деятельности служили на благо людей и планеты. Верховенство природоохранного права является основой для устранения несоответствия между содержанием природоохранных законов и их применением на практике и имеет ключевое значение для достижения целей в области устойчивого развития.

За последние три десятилетия объем природоохранного законодательства значительно увеличился по мере того, как страны пришли к пониманию жизненно важных связей между окружающей средой, экономическим ростом, состоянием здоровья населения, социальной сплоченностью и безопасностью. По состоянию на 2017 год основы природоохранного законодательства имеются в 176 странах; в 150 странах положения об охране окружающей среды или о праве на здоровую окружающую среду закреплены в конституциях; в 164 странах на уровне общенациональных органов исполнительной власти созданы органы, ответственные за охрану окружающей среды. Эти и другие природоохранные законы, права и институты помогли замедлить – а в некоторых случаях и обратить вспять – ухудшение состояния окружающей среды и добиться обусловленных охраной окружающей среды положительных результатов для здоровья населения, в экономической, социальной сферах и в области прав человека.

В 1972 году на Конференции Организации Объединенных Наций по проблемам окружающей человека среды внимание общественности было привлечено к вопросам глобальной окружающей среды, что привело к созданию Программы Организации Объединенных Наций по окружающей среде. После Конференции Организации Объединенных Наций по окружающей среде и развитию 1992 года (известной как Встреча на высшем уровне «Планета Земля») в Рио-де-Жанейро многие страны предприняли согласованные усилия для принятия природоохранных законов, создания министерств и ведомств, занимающихся вопросами окружающей среды, и закрепления положений об экологических правах и охране окружающей среды в конституциях своих стран. Ко времени проведения Конференции Организации Объединенных Наций по устойчивому развитию в 2012 году акцент сместился на применение природоохранных законов, поскольку именно в этой сфере произошел спад.

Во многих случаях соблюдение и обеспечение выполнения природоохранных законов и нормативных актов не отвечает потребностям решения экологических проблем. В законодательстве могут не предусматриваться четкие стандарты или необходимые полномочия. В нем могут не учитываться национальные и местные условия и, по этой причине, не приниматься во внимание фактические обстоятельства. Министерства исполнители часто не располагают достаточными финансовыми средствами и обладают меньшей политической властью по сравнению с министерствами, отвечающими за экономическое развитие или освоение природных ресурсов. И хотя многие страны стремятся к укреплению применения природоохранного законодательства, имеет место и обратная реакция: убийство защитников окружающей среды и сокращение финансирования организаций гражданского общества. Эти недостатки характерны не только для развивающихся стран: изучение положения дел в развитых странах выявило неудовлетворительные результаты их деятельности по вопросам окружающей среды в определенных аспектах. Одним словом, обеспечение верховенства природоохранного права является трудной задачей для всех стран. В настоящем докладе рассматривается ряд мер, принимаемых странами для устранения этих различий в применении и для обеспечения эффективности верховенства права в экологической сфере.

Являясь первой оценкой по вопросам верховенства природоохранного права в глобальном масштабе, настоящий доклад подготовлен с учетом опыта, проблем, мнений и достижений различных стран по всему миру, и в нем освещаются глобальные тенденции, а также возможности для стран и партнеров в деле укрепления верховенства природоохранного права.

В докладе подчеркивается необходимость проведения регулярной глобальной оценки положения дел в области верховенства права окружающей среды. Для отслеживания прогресса на национальном и глобальном уровнях необходимо использовать набор единообразных показателей. В докладе предлагается система показателей в отношении верховенства природоохранного права и освещаются существующие наборы данных, которые могут использоваться в поддержку глобальной оценки.

В докладе также содержится призыв к согласованным усилиям по оказанию странам поддержки в экспериментальной проверке подходов к укреплению верховенства природоохранного права. Такая инициатива может обеспечить поддержку проверке подходов в различных условиях, а затем их адаптации с их последующим широкомасштабным применением. Она должна также способствовать обмену опытом между правовыми системами в целях содействия обучению.

Помимо этих двух рекомендаций общего характера в докладе освещаются многочисленные практические шаги, которые государства могут предпринять в поддержку верховенства природоохранного права. Например, государства могут провести оценку существующей сферы полномочий и структуры учреждений, занимающихся вопросами окружающей среды, для выявления случаев дублирования или пробелов в нормативно-правовой сфере. Государства и партнеры могут укрепить потенциал общественности для продуманного и конструктивного взаимодействия с правительством и инициаторами проектов. Они могут уделить первоочередное внимание защите активистов в области охраны окружающей среды и разоблачителей нарушений. Государства могут рассмотреть возможность создания судебных органов, специализирующихся на вопросах окружающей среды, и использования административных процессуальных норм в случае незначительных правонарушений. Также сохраняется необходимость изучения вопроса о том, какие подходы эффективны и при каких обстоятельствах.

Положительный эффект от верховенства природоохранного права ощущается не только в экологической сфере. При том, что оно оказывает самое непосредственное влияние на охрану окружающей среды, оно также способствует укреплению верховенства права в более широком смысле, содействует устойчивому экономическому и социальному развитию, обеспечивает охрану здоровья населения, способствует поддержанию мира и безопасности путем предотвращения и урегулирования конфликтов и обеспечивает защиту прав человека и конституционных прав. Таким образом, оно имеет все возрастающее значение для всех стран.

Resumen

Si la sociedad humana quiere mantenerse dentro de los límites de los umbrales ecológicos críticos, es indispensable que comprenda, respete y haga cumplir ampliamente las leyes ambientales, y que las personas y el planeta puedan disfrutar de los beneficios que aporta la protección del medio ambiente. El estado de derecho ambiental ofrece un marco para abordar la disparidad de las leyes ambientales en los libros y en la práctica y es fundamental para lograr los Objetivos de Desarrollo Sostenible.

En los últimos tres decenios el número de leyes ambientales aprobadas ha aumentado significativamente, en la medida en que los países han llegado a comprender los vínculos esenciales entre medio ambiente, crecimiento económico, salud pública, cohesión social y seguridad. A 2017, 176 países contaban con leyes marco en el ámbito del medio ambiente; 150 países habían consagrado la protección del medio ambiente o el derecho a un medio ambiente sano en sus constituciones; y 164 países habían creado órganos a nivel de gobierno encargados de la protección ambiental. Estas y otras leyes, derechos e instituciones ambientales han contribuido a contener –y en algunos casos revertir– la degradación del medio ambiente y a lograr numerosos beneficios en materia de salud pública, desarrollo económico y social y derechos humanos, que se derivan de la protección del medio ambiente.

En 1972, la Conferencia de las Naciones Unidas sobre el Medio Humano concienció a la opinión pública acerca del medio ambiente mundial y ello se tradujo en la creación del Programa de las Naciones Unidas para el Medio Ambiente. Tras la celebración de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo en 1992 (conocida como la Cumbre para la Tierra, de Río), muchos países desplegaron un esfuerzo concertado para promulgar leyes ambientales, establecer ministerios y organismos de medio ambiente y consagrar los derechos ambientales y la protección del medio ambiente en sus constituciones nacionales. Al momento de celebrarse la Conferencia de las Naciones Unidas sobre el Desarrollo Sostenible en 2012, el centro de la atención se había desplazado a la aplicación de las leyes ambientales, aspecto en el que se habían logrado menos progresos.

Con demasiada frecuencia, la aplicación y el cumplimiento de las leyes y los reglamentos en materia de medio ambiente no están al nivel que se necesita para hacer frente a los problemas ambientales. En ocasiones, las leyes adolecen de normas claras o mandatos necesarios. Otras no están adaptadas a los contextos nacionales y locales y, por lo tanto, no abordan las condiciones sobre el terreno. Por lo general, los ministerios encargados de la ejecución carecen de la financiación necesaria y no tienen la misma influencia política que los ministerios que tienen a su cargo el desarrollo económico o de los recursos naturales. Y, si bien muchos países se están comprometiendo a fortalecer la aplicación del derecho ambiental, también se ha producido un retroceso como resultado del asesinato de defensores del medio ambiente y de la restricción de la financiación para la sociedad civil. Esas deficiencias no se limitan en modo alguno a las naciones en desarrollo: estudios realizados en países desarrollados han indicado que su desempeño en relación con las cuestiones ambientales es deficiente en ciertos aspectos. En resumen, el estado de derecho ambiental es un desafío para todos los países. En el presente informe se analiza la gama de medidas que los países están adoptando para hacer frente a estas deficiencias en la implementación, y para asegurar que el estado de derecho sea eficaz en la esfera del medio ambiente.

Como primera evaluación mundial sobre el estado de derecho ambiental, el presente informe se basa en las experiencias, los retos, puntos de vista y éxitos de los diversos países de todo el mundo, y pone de relieve las tendencias mundiales y las posibilidades de los países y los asociados para fortalecer el estado de derecho ambiental.

En el informe se destaca la necesidad de emprender una evaluación mundial periódica de la situación del estado de derecho ambiental. Para dar seguimiento a los progresos a nivel

nacional y mundial es necesario utilizar un conjunto de indicadores coherentes. En el informe se propone un marco de indicadores en relación con el estado de derecho ambiental y se destacan los conjuntos de datos existentes que pueden utilizarse en apoyo de la evaluación mundial.

En el informe también se alienta la concertación de esfuerzos para ayudar a los países a poner a prueba enfoques dirigidos a fortalecer el estado de derecho ambiental. Esa iniciativa podría apoyar el ensayo de enfoques en diversos contextos para luego adaptarlos antes de ampliarlos a otros niveles. También debería fomentarse el intercambio de experiencias entre las jurisdicciones para promover el aprendizaje.

Además de estas dos recomendaciones intersectoriales, en el informe se destacan las numerosas medidas viables que podrían adoptar los Estados para respaldar el estado de derecho ambiental. Por ejemplo, los Estados pueden evaluar los mandatos actuales y la estructura de las instituciones ambientales para determinar superposiciones o solapamientos en materia de regulación. Los Estados y asociados pueden fomentar la capacidad de la población para participar en debates a fondo y colaborar de manera significativa con los Gobiernos y promotores de proyectos. Pueden dar prioridad a la protección de los defensores ambientales y los denunciantes de irregularidades. Los Estados podrían estudiar la creación de tribunales ambientales especializados y utilizar procesos de ejecución administrativa para enfrentar delitos menores. Hay una necesidad permanente de investigar qué enfoques resultan eficaces en diversas circunstancias.

Los beneficios del estado de derecho ambiental van más allá del sector ambiental. Si bien muchos de sus efectos recaen directamente en la protección del medio ambiente, también fortalecen el estado de derecho, de manera más general, apoyan el desarrollo económico y social sostenible, protegen la salud pública, contribuyen a la paz y la seguridad al evitar y reducir los conflictos, y protegen los derechos humanos y constitucionales. Como tal, es una prioridad creciente para todos los países.

1. Introduction

Since the 1972 Stockholm Declaration on the Human Environment, environmental laws and institutions have expanded dramatically across the globe. All countries have at least one environmental law or regulation.[1] Most countries have established and, to varying degrees, empowered environmental ministries. And in many instances, these laws and institutions have helped to slow or reverse environmental degradation.[2] This progress is accompanied, however, by a growing recognition that a considerable implementation gap has opened—in developed and developing nations alike—between the requirements of environmental laws and their implementation and enforcement. Environmental rule of law—which describes when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet—is key to addressing this implementation gap. This Report reviews countries' experiences building environmental rule of law and identifies the many options available to better give effect, and force, to environmental law, and thereby advance the attendant public health, environmental, human rights, economic, and social benefits envisioned by environmental laws.

1.1 Overview

Environmental rule of law provides an essential platform underpinning the four pillars of sustainable development—economic, social, environmental, and peace.[3] Without environmental rule of law, development cannot be sustainable. With environmental rule of law, well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values.

A shining example of this is Costa Rica, a nation heavily dependent on natural resources

1 Brown Weiss 2011, 6.
2 *E.g.*, Velders et al. 2007; Henderson 1995.
3 The four pillars are enshrined in the 2030 Agenda for Sustainable Development. UNGA 2015.

in a region that has often been ravaged by political strife. The country has increased life expectancy to more than 79 years, achieved 96 percent adult literacy, and built per capita income to almost US$9,000 while setting and meeting ambitious environmental goals, including already having doubled its forest cover to over 50 percent, and is on track to be climate neutral by 2021.[4] A study of Costa Rica's dramatic progress toward sustainable development emphasizes the importance of political consensus forged by years of implementing strong environmental controls alongside economic development that resulted in a deep respect for courts and environmental institutions, leading to the emergence and maintenance of environmental rule of law.[5] The same study notes that erosion of environmental rule of law poses one of the primary threats to Costa Rica's continued success. It finds that "lack of local governance capacity along with the difficulties of coordination between the national and subnational levels" present the biggest obstacle to continued sustainable development.[6]

This introductory chapter reviews how the implementation gap in environmental law came to be, defines environmental rule of law, discusses its benefits, considers how it can be achieved and how it evolved, and reviews the drivers of environmental compliance.

1.1.1 Trends

Environmental law has blossomed from its infancy in the early 1970s into young adulthood today.[7] Following the 1992 Rio Earth Summit, countries made a concerted effort to enact environmental laws, build environment ministries and agencies, and enshrine environment-related rights and protections in their national constitutions. Figure 1.1 shows the rapid, recent proliferation of framework environmental laws: as of 2017, 176 countries around the world have environmental framework laws that are being implemented by hundreds of agencies and ministries. Many other laws contribute to the body of environmental law, with legal instruments in 187 countries (as of 2017) requiring environmental assessments for projects that impact the environment,[8] and at least half of the countries of the world having adopted legislation guaranteeing access to information in general or environmental information in particular.[9] And, since the 1970s, 88 countries have adopted a constitutional right to a healthy environment, with an additional 62 countries enshrining environmental protection in their constitutions in some form—a total of 150 countries from all over the globe with constitutional rights and/or provisions on the environment.[10] While there are still gaps in many of the laws,[11] the substantial growth of environmental laws has been a notable achievement.

Simultaneously, there has been a dramatic growth of environmental institutions. As of 2017, 164 countries have created environment ministries or the equivalent (cabinet-level bodies with responsibility over issues explicitly including, but not necessarily limited to, environmental protection). (See Figure 1.2.) Of the remaining countries (countries without environment ministries), 22 have environmental entities with the functional role of independent government agencies and 7 have other entities with responsibility for environmental matters. The latter category includes countries with departments of the environment under ministries with broader

4 Keller et al. 2013, 82.
5 Ibid., 89.
6 Ibid., 90.
7 Bruch 2006.

8 123 countries have stand-alone legal instruments governing environmental impact assessment, and 64 have relevant provisions in other legal instruments. Banisar et al. 2012, 11; *see also* Section 3.3 of this Report. Greenland, a semi-autonomous country, also has a legal framework governing environmental impact assessment.
9 Banisar et al. 2012; *see also* Chapter 3 of this Report.
10 The right to a healthy environment is also enshrined in the Constitution of the State of Palestine. *See* Chapter 4 of this Report.
11 Excell and Moses 2017, 30.

jurisdictions that do not explicitly include environmental matters as well as entities such as councils or directorates.

While environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective. In many instances, the laws that have been enacted are lacking in ways that impede effective implementation (for example, by lacking clear standards or the necessary mandates). According to the fifth *Global Environmental Outlook*, considerable progress has been made toward meeting only 4 of the 90 most important environmental goals and objectives, and critical ecological thresholds upon which human well-being depend may soon be surpassed.[12] Many developing countries prioritize macroeconomic development when allocating government funds and setting priorities. This results in environment ministries that are under resourced and politically weak in comparison to ministries for economic and natural resource development. While international technical and financial aid has helped scores of countries to develop environmental framework laws, neither domestic budgeting nor international aid has been sufficient to create strong environmental agencies, adequately build capacity for agency staff and national judges in environmental law, or create enduring education about and enforcement of the laws. As a result, many of these laws have yet to take root across society, and in most instances, there is no culture of environmental compliance.

One of the greatest challenges to environmental rule of law is a lack of political will. Indeed, Thomas Carothers, an international expert on rule of law, has observed that "The primary obstacles to [rule of law] reform are not technical or financial, but political and human."[13] This is particularly true of rule of law in environmental contexts. Often, there is a perception that environmental rules will slow down or impede development, with too little consideration of the ways in which environmental rules contribute to sustainable development over the long term. As a result, environmental ministries are often marginalized and underfunded.

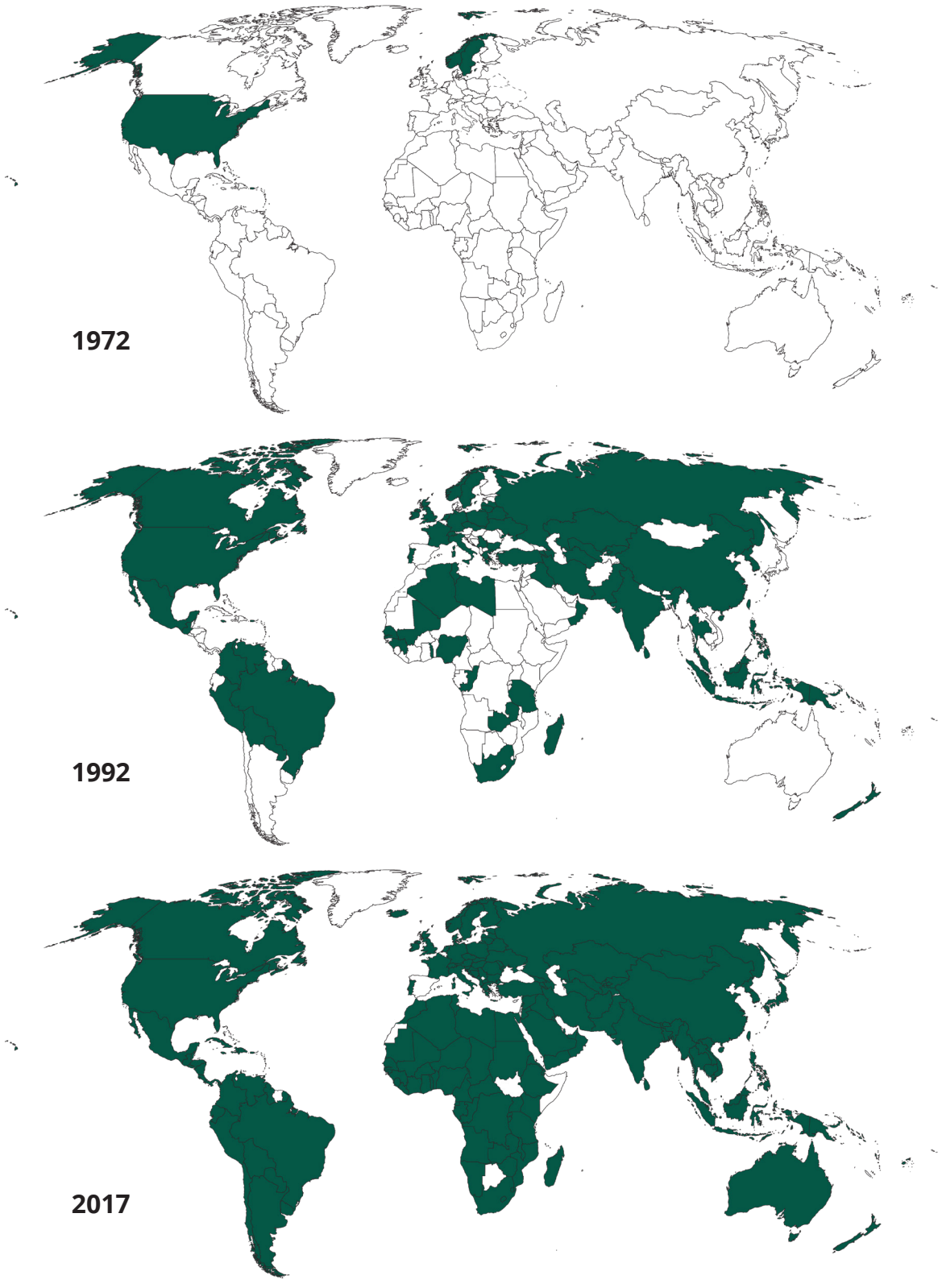
A widespread problem with the initial framework laws is that many were based on laws of other countries and failed to represent the conditions, needs, and priorities of the countries into which they were imported.[14] Moreover, framework environmental laws often lack key provisions needed for effective implementation. They often did not specify concrete outcomes or set objective goals against which to measure the laws' performance. Only a few countries, such as Kenya and South Africa, have adapted their laws to more closely reflect domestic conditions and priorities.

In addition, laws may be uneven in their content and implementation. Donor support may focus on a particular area of the environment, such as wildlife protection or climate adaptation, but neglect other important topics, like protection of the environmental health of children. This can lead to fragmented approaches that can result in robust environmental programs in some areas, and no funding or attention to other areas. Moreover, when funding lapses, once-robust government programs can suddenly collapse. This intermittent, patchwork approach can undermine environmental rule of law by not providing consistency in implementation and enforcement and by sending confusing messages to the regulated community and the public.

Shortcomings in implementing environmental law are by no means limited to developing nations. Many developed nations have adopted aggressive and comprehensive environmental laws but have stumbled in their implementation. In 2017, the European Commission published the results of the first in a series of biennial reviews of Member States' implementation of environmental

12 UNEP 2012b.
13 Carothers 1998.
14 Ristroph, 2012, 10869.

Figure 1.1: Countries with Framework Environmental Laws (1972, 1992, and 2017)



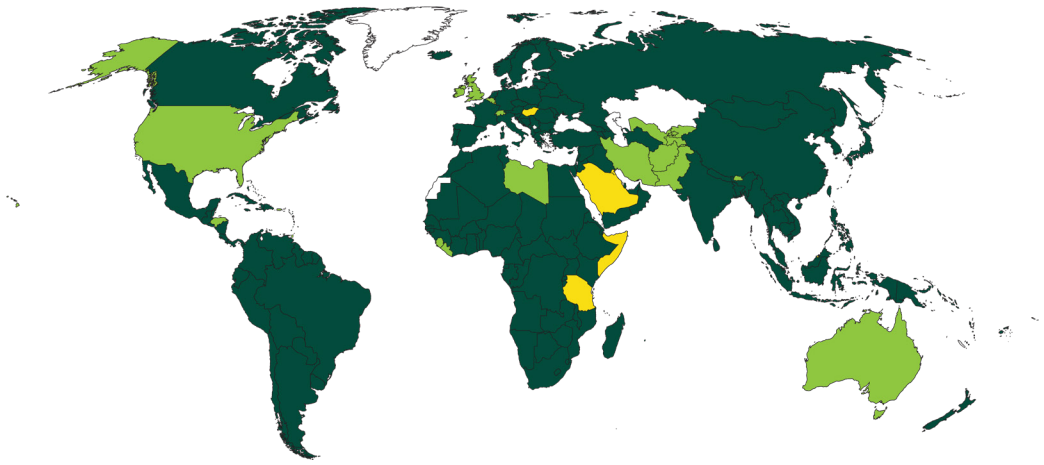
Year	Countries with national environmental framework laws
1972	Norway, Sweden, United States
1992	Algeria, Armenia, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Canada, China, Colombia, Congo, Czechoslovakia, Democratic People's Republic of Korea, France, Gambia, Germany, Greece, Guatemala, Guinea, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Kazakhstan, Kyrgyzstan, Latvia, Libya, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Palau, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Russia, Saint Kitts and Nevis, Samoa, Senegal, South Africa, Sri Lanka, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan, Venezuela, Yugoslavia, Zambia
2017	Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Eswatini, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Saint Kitts and Nevis, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe
Source: Environmental Law Institute, based on research conducted using FAOLEX, ECOLEX; and other databases. *Note*: This map shows countries with national environmental framework laws and does not include countries with national sectoral legal instruments (e.g., water act or forest code)	

law.[15] The review found that countries faced implementation gaps in waste management, nature and biodiversity, air quality, noise, and water quality and management. In particular, it found that Member States suffered from ineffective coordination among local, regional, and national authorities; lack of administrative capacity and financing; lack of knowledge and data; insufficient compliance assurance mechanisms; and lack of integration and policy coherence.[16] Similarly, reviews of U.S. Environmental Protection Agency performance concluded that not only were there substantial rates of noncompliance in several sectors, but the Agency could not even determine the extent of compliance in

15 European Commission 2017.

16 Ibid., 13.

Figure 1.2: Countries with Environmental Ministries, Agencies, and Other Bodies (2017)



Countries with environment ministries (or functional equivalent):
Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic Of Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Eswatini, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Iceland, India, Indonesia, Iraq, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Kiribati, Laos, Latvia, Lebanon, Lesotho, Liechtenstein, Lithuania, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syria, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, Uruguay, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe

Countries with independent environment agencies (or functional equivalent):
Afghanistan, Australia, Bahrain, Belgium, Bhutan, Honduras, Iran, Ireland, Kyrgyzstan, Liberia, Libya, Marshall Islands, Micronesia, Pakistan, Sierra Leone, Switzerland, Tajikistan, Trinidad and Tobago, United Kingdom, United States, Uzbekistan

Countries with other relevant government entities:
Brunei Darussalam, Hungary, Kuwait, Luxembourg, Saudi Arabia, Somalia, Tanzania

Source: Environmental Law Institute and UN Environment.

Note: This map shows countries with dedicated national ministries, agencies, or other entities dealing with environmental matters. Entities not titled as "ministries" or "agencies" were categorized into "ministry," "agency," or "other" based on their functional role in governing environmental matters. The countries shown as having environment agencies do not have a ministry (or functional equivalent) dedicated to environmental matters. Countries with both environmental ministries and agencies are shown as having ministries. The map also shows countries with other relevant government entities that may, for example, coordinate various ministries with jurisdiction over environmental matters or serve an advisory role for the head of state but are not considered part of the cabinet.

some sectors.[17] U.S. states, which implement many U.S. federal environmental laws, also fell short. While the federal government set a goal that states should inspect all major air permit holders every two years, in 2010 only 8 of the 50 states did so; and a similar goal for inspection of all major water permit holders was met by only 2 of 50 states.[18]

Countries have adopted a range of measures (discussed in this Report) to address this implementation gap. Countries have been building institutional capacity, accountability, and integrity of environmental agencies, courts, and others to help ensure that environmental laws are implemented, complied with, and enforced. Numerous studies demonstrate that improving governance through stronger institutions that are resilient and resistant to corruption results in higher per capita incomes overall, particularly in countries that rely on natural resource extraction.[19] Countries have adopted and strengthened laws ensuring transparency and public participation, including 65 out of 70 countries surveyed having at least some legal provisions for citizens' right to environmental information.[20] Countries have reinforced and publicized the linkages between human rights and the environment, which has elevated the normative importance of environmental law and empowered courts and enforcement agencies to enforce environmental requirements. Finally, countries have sought to enhance their courts by improving access to justice to resolve disputes in a fair and transparent manner. Because of the technical nature of environmental matters, over 350 environmental courts and tribunals have been established in over 50 countries around the world, including those established at the regional, provincial, or state level.[21]

While many countries are endeavoring to strengthen implementation of environmental law, a backlash against environmental law has also occurred. Resistance to environmental laws has been most dramatic in the harassment, arbitrary arrests and detentions, threats, and killing of environmental defenders—forest rangers, government inspectors, local activists, and professionals working to enforce environmental norms. Between 2002 and 2013, 908 people were killed in 35 countries defending the environment, land, and natural resources; and the pace of these kinds of killing is increasing.[22] During 2016, more than 200 defenders were killed in 24 countries.[23] From park rangers being killed in Virunga National Park in the Democratic Republic of the Congo to the 2016 murder of Berta Caceres, the leader of a Honduran nongovernmental organization, intimidation and violence against environmental implementers, enforcers, activists, and regular citizens is a significant threat to environmental law observance and the rule of law itself.

A second backlash has been to restrict efforts by civil society. Civil society plays a vital role in ensuring environmental law is implemented and enforced fairly and transparently. However, in the past 20 years, a growing number of countries have imposed legal restrictions on civil society involvement and funding. For example, some countries only allow those civil society organizations that are tightly controlled by the government to participate in environmental decision making, and these organizations do not necessarily represent the public's interests. Other countries restrict funding for civil society from foreign sources or limit the ability of foreign organizations to operate in their countries. China recently ordered over 7,000 foreign nongovernmental organizations to find a Chinese governmental correspondent to vouch for them and then to register with the police—or stop working in China.[24] These growing restrictions, shown in Figure 1.3, can also impair the ability of the public to speak up about environmental injustices and be

17 Farber 2016, 11.
18 Markell and Glicksmann 2014, 48.
19 *See* Section 2.1.2.1 infra.
20 Environmental Democracy Index 2015.
21 Pring and Pring 2016, xiii.
22 Global Witness 2014; OHCHR 2015c.
23 Global Witness 2017, 6.
24 Wong 2016.

heard when domestic political forces are aligned against them. The efforts to restrict civil society extend well beyond China, as Russia, Turkey, Viet Nam, Cambodia, and many other countries have seen similar trends recently; and in many cases, the restrictions extend beyond environmental issues.[25] Increasingly legislators, policymakers, and stakeholders are recognizing the harms being brought about by the fragmented state of environmental governance and threats to civil society and environmental defenders. To address this situation, environmental rule of law offers a conceptual and policy framework for strengthening the implementation of environmental law in a systematic and holistic manner. This conceptualization has been gaining popularity across the globe in the past several years as a way to give life to environmental laws and to build stronger rule of law across all of society.

1.1.2 Environmental Rule of Law Defined

The United Nations defines rule of law as having three related components, as shown in Figure 1.4: law should be consistent with fundamental rights; law should be inclusively developed and fairly effectuated; and law should bring forth accountability not just on paper, but in practice—such that the law becomes operative through observance of, or compliance with, the law. These three components are interdependent: when law is consistent with fundamental rights, inclusively promulgated, and even-handedly and effectively implemented, then the law will be respected and observed by the affected community.

Environmental rule of law incorporates these components and applies them in the environmental context. As such, environmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet. Environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations.[26]

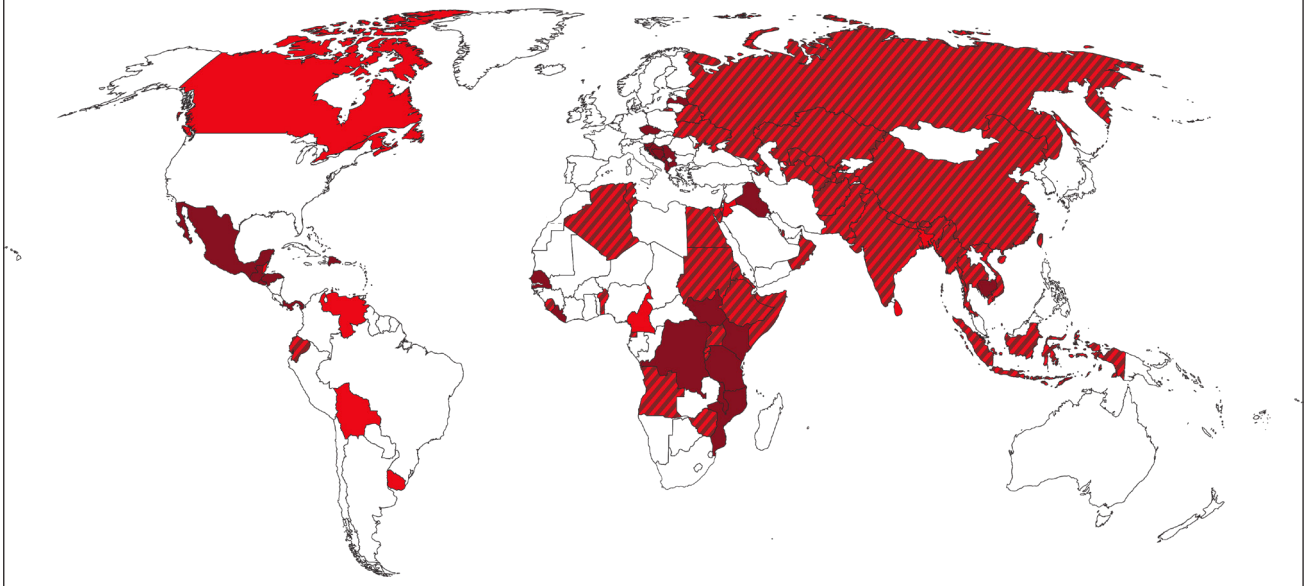
While drawing from broader rule of law principles, environmental rule of law is unique in its context, principally because environmental rule of law governs the vital link between humans and the environment that supports human life and society, as well as life on the planet. This critical importance stands in stark contrast to the politics that often surround the environment. Often environmental ministries are among the weakest ministries, with comparatively fewer staff and less political clout; yet the political economy often drives environmental violations. Why should companies invest in pollution control technologies if there is little likelihood of enforcement, the penalties are too low and can be incorporated as a cost of doing business, and there is widespread noncompliance? And what are the disincentives to grabbing land, forests, minerals and other resources, when the financial rewards are so high?

This dual challenge of the lack of incentives for environmental compliance and of the weaker capacity for implementation and

25 European Foundation Centre 2017.

26 UNEP and ELI 2016.

Figure 1.3: Countries with Legal Restrictions on Foreign Funding and Activities of Nongovernmental Organizations (2016)



Countries that have adopted legal restrictions on the activities of foreign nongovernmental organizations:
Albania, Bosnia and Herzegovina, Cambodia, Croatia, Czech Republic, Democratic Republic of the Congo, Dominican Republic, El Salvador, Guatemala, Honduras, Iraq, Kenya, Latvia, Liberia, Malawi, Mexico, Montenegro, Mozambique, Panama, Senegal, Serbia, Slovenia, South Sudan, Tanzania, The former Yugoslav Republic of Macedonia, Timor-Leste

Countries that have adopted legal restrictions on foreign funding flows to locally operating nongovernmental organizations:
Bahrain, Bangladesh, Belize, Bolivia, Cameroon, Canada, Jordan, Singapore, Sri Lanka, Uruguay, Venezuela

Countries that have adopted legal restrictions on foreign funding flows to locally operating nongovernmental organizations and restrictions on the activities of foreign nongovernmental organizations:
Afghanistan, Algeria, Angola, Azerbaijan, Belarus, Benin, Bhutan, Burundi, China, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Indonesia, Israel, Kazakhstan, Myanmar, Nepal, Oman, Pakistan, Qatar, Russia, Rwanda, Sierra Leone, Somalia, Sudan, Tajikistan, Thailand, Tunisia, Turkmenistan, Uganda, Ukraine, Uzbekistan, Viet Nam, Zimbabwe

Source: Environmental Law Institute, based on data in Dupuy, Ron, and Prakash 2016 and from Dupuy 2016.

enforcement—combined with the fundamental need all people have for clean air, food, and water—drives the need to pay particular attention to environmental rule of law.

1.1.3 The Unique Context for Environmental Rule of Law

Environmental rule of law is key to addressing the full range of environmental challenges, including climate change, biodiversity loss, water scarcity, air and water pollution, and soil degradation. It imbues environmental objectives with the essentials of rule of law and underpins the reform of environmental law and governance. Driven by these goals, the push for environmental rule of law has gone from obscurity to ubiquity. It emerges from two age-old truths. First, voluntary measures alone are not enough to ensure sustainable management of the environment upon which people and the planet depend. Binding systems of laws—with standards, procedures, rights, and obligations—are

Figure 1.4: Components of Rule of Law

necessary to avoid the tragedy of the commons.[27] Second, as with any other area of law, legal objectives can only be fulfilled when there is rule of law.[28] It also emerges from the circumstantial reality that environmental rule of law gaps stand as a major impediment to achieving environmental and sustainable development ambitions.

Environmental rule of law is key to achieving the Sustainable Development Goals.[29] Indeed, it lies at the core of Sustainable Development Goal 16, which commits to advancing "rule of law at the national and international levels" in order to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

Environmental rule of law has seven distinguishing characteristics, as illustrated in Figure 1.5, that make it both particularly important and challenging to implement. These are discussed in turn.

27 Hardin 1968.
28 Carothers 1998; Marmor 2004.
29 Akhtar 2015.

Box 1.1: Contrasting Environmental Rule of Law and Environmental Governance

While environmental rule of law and environmental governance are related, there are distinctions in objectives and scope.

Environmental rule of law focuses on ensuring compliance with and enforcement of environmental laws. Environmental governance comprises a broader set of objectives and approaches related to making and implementing decisions related to the environment—with environmental rule of law speaking particularly to the implementation.

Even when addressing similar issues, there can be distinctions. For example, environmental rule of law emphasizes civic engagement as a means to improve adherence to the law, while environmental governance takes a broader view of civic engagement (aiming to improve the quality of decision making, enhance public voice, and build civic support, as well as improve compliance and enforcement).

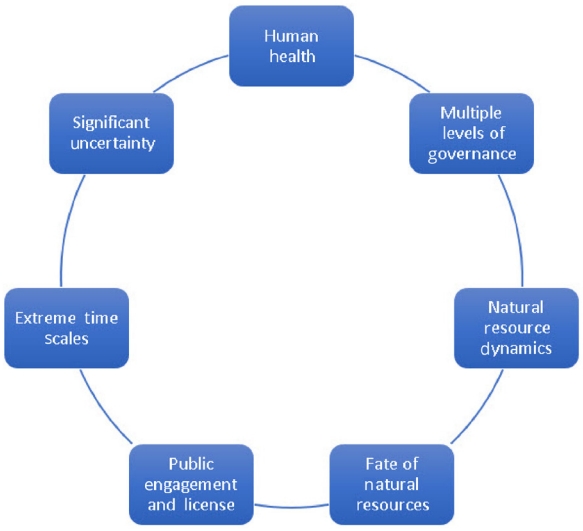
First, ***environmental rule of law is critical to human health and welfare***. It ensures adherence to the standards, procedures, and approaches set forth in the laws to ensure clean air, clean water, and a healthy environment. Environmental rule of law is also important to ensuring people's rights to access and use land, water, forests, and other resources are respected and protected, thus advancing livelihoods, food security, and dignity.[30]

30 Bosselmann 2014; Daly and May 2016.

Second, ***environmental rule of law is emphatically multidimensional***. It cuts across many forms of law and norms—from social and customary norms of villages to statutory laws of nations to voluntary standards adopted by companies. It also cuts across many levels of governance—from customary governance among indigenous peoples and rural populations to subnational, national, regional, and international government regulation. It often resides in more than one agency or ministry across several levels of government, meaning that regulation of a mine, for example, may involve the environmental, water, mining, labor, finance, social development, and justice ministries at the national and often subnational levels.

Third, environmental rule of law is shaped by and responds to significant political, economic, and social dynamics that are particular to natural resources, namely the ***tragedy of the commons*** and the ***resource curse***. For example, the limited capacity of the planet to support life with exhaustible natural resources and the tendency of common pool resources to be depleted if not managed with care both highlight the centrality of environmental rule of law in preventing the

Figure 1.5: Distinguishing Characteristics of Environmental Rule of Law



tragedy of the commons.[31] The experience of many countries endowed with significant natural resource wealth is that too often these resources prove a curse instead of a blessing, in that extraction of the resources often fosters corruption, rent seeking,[32] and inequitable distribution of the proceeds, which can lead to political strife, instability, and even armed conflict.[33] To prevent this resource curse, countries have invoked key elements of the environmental rule of law, including transparency, participation, accountability, and benefit sharing.[34]

Fourth, management of the environment also implicates the moral and ethical ***duties humans owe non-human species and resources***. Many species' survival rests upon the success of environmental rule of law. Some countries are extending legal rights or legal personhood to natural resources, such as rivers and protected areas, to reflect the customary importance they hold in their cultures.[35]

Fifth, because so many human communities depend upon natural resources for their livelihoods and welfare, and are affected by the conditions of the environment around them, and because all humans depend on clean air and water, ***public involvement*** in environmental decisions and laws is particularly important.[36] Pollution and environmental degradation tend to disproportionately affect disadvantaged populations and indigenous communities who rely on natural resources for subsistence and cultural identity. Moreover, given their particular interest in protecting their health, livelihoods, and welfare, the public has a particular interest in ensuring that projects adhere to the required environmental standards and procedures; as such, they can provide an often-needed supplement in monitoring compliance and supporting enforcement.[37] Thus, the growing recognition of the need to supply the public with access to information, meaningful participation in decision making, and access to justice and, if applicable, to obtain free, prior, and informed consent is particularly salient in environmental rule of law.

Sixth, environmental rule of law must also contend with ***uncommon timescales.*** Management decisions about natural resources and the health of ecosystems can affect many generations into the future—a timescale of many centuries and more. Frequently such decisions are irreversible, as they impact the survival of a species, the use of a finite resource, or a potential tipping point, such as the amount of greenhouse gases emitted into the atmosphere causing cascading changes.[38] Thus, environmental rule of law implicates intergenerational equity and people who are not yet born.[39] Moreover, technologies and behaviors affecting the environment are dynamic and often quickly evolving. Too often, environmental laws lag behind the environmental threats. This emphasizes the importance of adaptability and dynamic environmental laws and institutions.

Finally, environmental rule of law often depends on ***decision making in the face of significant uncertainty***.[40] Limits on current scientific understanding means that environmental matters can raise more

31 Hardin 1968; Nagan 2014; Johnson 2015. "Tragedy of the commons" refers to a situation in a shared-resource system (such as a common grazing area) where individual users acting independently and advancing their own interests behave contrary to the common good of all users by depleting or spoiling that resource and collectively degrade the integrity and health of that resource system.

32 "Rent seeking" refers to attempts to capture economic benefits without contributing to the overall economic production. Rent seeking often happens through resource capture, corruption, and patronage. Rustad, Lujala, and Le Billon 2012.

33 Auty 1993; Karl 1997; Ross 2004.

34 Adani and Ricciuti 2014; Epremian, Lujala, and Bruch 2016.

35 *See* Section 4.1.3 infra.

36 Eden 1996; Beierle 2010.

37 Greve 1990; Daggett 2002.

38 Solomon et al. 2009; Moore 2008; Scheffer, Carpenter, and Young 2005.

39 *See, e.g.,* Brown Weiss 1983; Brown Weiss 2007; Solow 1974.

40 Ebbesson 2010.

questions than answers. What is a safe level of exposure to a particular chemical? What are the long-term effects of nanotech (or other new technologies) on public health and agriculture? How much will the sea level rise by 2100? What are the long-term effects on the ecosystem if a particular species goes extinct? But circumstances often demand government action, even in the face of such uncertainty—or especially in the face of such uncertainty. One response—starting in the 1970s—was the development of adaptive management, which provides a framework for taking action in light of uncertain data and understanding.[41] Another approach has been the creation of the precautionary principle—the tenet that when confronted with a lack of information, actions should be taken that err on the side of precaution rather than increasing risk.[42]

Thus, environmental rule of law is unique in its complexity, long time horizon, operation at the cutting edge of technology and scientific understanding, its transcendent reach across environmental, economic, and social matters, and its centrality to human and non-human well-being.

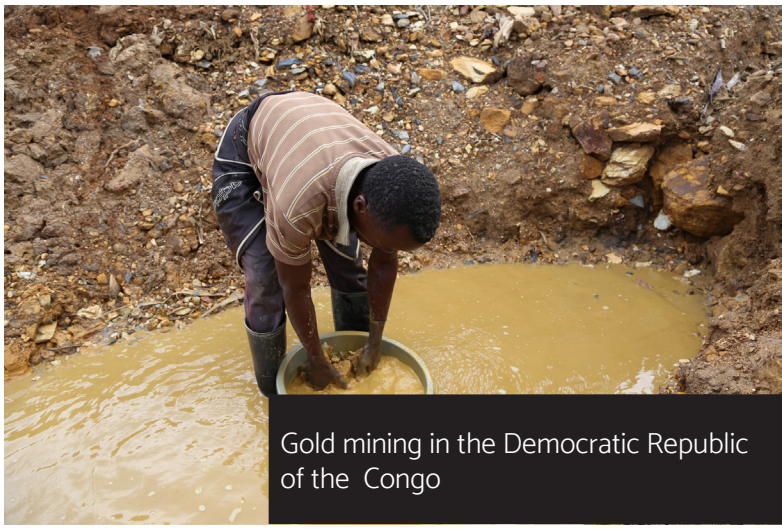
1.1.4 This Report

This Report focuses on the implementation gap between the many environmental goals, laws, regulations, and policies adopted and the on-the-ground reality of environmental conditions, compliance with environmental law, and community engagement in environmental decision making. It explains how environmental rule of law provides a framework for giving meaning to environmental laws already on the books and for helping to foster cultures of compliance with environmental law across nations.

It has become increasingly apparent that failure to implement and enforce environmental law directly threatens environmental progress and sustainability. The United Nations Environment Programme's Governing Council declared that "the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations."[43] And the first United Nations Environment Assembly called on all countries "to work for the strengthening of environmental rule of law at the international, regional and national levels".[44]

Implementing environmental rule of law is not simply about bringing violators to justice.

While enforcing existing laws is critical, ***the ultimate goal of environmental rule of law is to change behavior onto a course toward sustainability by creating an expectation of compliance with environmental law*** coordinated between government, industry, and civil society. If environmental rule of



Gold mining in the Democratic Republic of the Congo

41 Walters 1986; Ruhl 2005; Williams, Szaro, and Shapiro 2009.
42 Cameron and Abouchar 1991; Harremoes et al. 2002; Marchant 2003.
43 UNEP 2012a.
44 UNEP 2014b.

law takes root, parties will know what the laws require of them, what their rights are and how to safely exercise them, and what consequences to expect if they fail to comply. Parties who are aggrieved will have ready access to remedies for environmental violations, and the public's views on environmental issues will be both informed by government's sharing of information and reflected in governmental decisions. This culture of transparency, justice, and collaboration can build relationships and trust between stakeholders to address controversies that will no doubt arise. While environmental rule of law does not eliminate disagreements or necessarily alter differing perspectives over environmental and natural resource management issues, it does build the resiliency of government and of stakeholder relationships to resolve these differences in an organized, rational, and peaceful manner, to the benefit of the environment and of all in society.

Environmental rule of law is relevant at all levels of government, as noted by the United Nations Environment Assembly. This Report focuses predominantly on national level measures to implement and strengthen environmental rule of law. Many of the lessons and experiences discussed apply at the subnational and regional levels, and the Report refers to international, regional, and subnational practices, but it is aimed primarily at national efforts.

This Report is organized in six parts, as shown in Figure 1.6: an introduction; four substantive chapters on institutions, civic engagement, rights, and justice; and a future directions and recommendations section. This is the first global assessment of the environmental rule of law, and the four substantive chapters represent in-depth analyses of a few selected priority issues within the broader field of environmental rule of law. The methodology guiding this Report's development is explained in Box 1.2

The Institutions chapter reviews the critical role institutions, such as government agencies and courts, play in environmental rule of law and the key opportunities for building stronger environmental institutions. In particular, the chapter highlights the need for clear and appropriate mandates; coordinating across sectors and levels of government; developing the capacity of institutions and personnel; collecting, using, and disseminating reliable data; employing independent audit and review mechanisms; ensuring the fair and consistent enforcement of law; and deploying leadership and management skills to empower staff and model behavior. The chapter concludes that with the proper mix of capacity, accountability, resources, integrity, and leadership, environmental institutions are poised to greatly narrow the implementation gap in environmental rule of law.

Figure 1.6: Report Outline

The Civic Engagement chapter explores the legal and practical tools for civic engagement that continue to evolve at the international and national levels in support of more effective environmental rule of law. Civic engagement consists of providing the public meaningful access to information and engaging the public to participate in environmental decision making.[45] After reviewing the various types of civic engagement, its benefits, and challenges

45 Access to justice—the third prong of Principle 10 of the Rio Declaration—is addressed in the Justice chapter.

Box 1.2: Methodology for Developing This Report

This Report was assembled as a desk study by the Environmental Law Institute on behalf of UN Environment. It is based upon extensive research and solicitation of examples and experiences from the Montevideo focal points and from attendees at World Conservation Congress events and Law, Justice and Development Week events where the topic was discussed. The framework of this Report derives from the United Nations Environment Programme's Issue Brief "Environmental Rule of Law: Critical to Sustainable Development" as well as the United Nations Environment Programme Governing Council Decision 27/9 on advancing justice, governance, and law for environmental sustainability.[a]

Recognizing that environmental rule of law is relevant to all countries, the Report has endeavored to draw on the experiences, challenges, viewpoints, and successes of diverse countries across the world. Accordingly, examples and case studies and citations are illustrative of the dynamic or approach; often, experiences from other countries could be used instead.

Drafts of this Report were reviewed by Montevideo focal points and a number of subject matter experts.

a. The germinal article "Foundations of Sustainability" by Scott Fulton and Antonio Benjamin laid the groundwork for these later developments. *See* Fulton and Benjamin 2011.

to its implementation, the chapter discusses the meaningful ways in which States are providing access to environmental information and enhancing public participation in environmental decision making, ranging from real-time access to ambient environmental data to empowering citizens to manage local resources. It concludes that transparency and participation are central to the environmental rule of law because they can help identify when there is a violation and prevent potential future violations, as well as the broader benefits of enhancing public trust, social cohesion, and environmental governance.

The Rights chapter reviews the evolving relationship between environmental rule of law on the one hand and constitutional, human, and other rights related to the environment on the other. It traces the origins of environment-related rights (see Box 1.3) and examines the many rights, including those related to life, health, food, and water, that are closely linked to the environment. In turn, it explores how procedural rights, such as rights to information, participation in government, justice, and nondiscrimination, are themselves essential elements of environmental rule of law. The chapter then reviews the role a right to a healthy environment plays in many countries, and how enforcing the rights to nondiscrimination, free association, and free speech are necessary for environmental rule of law. The chapter also reviews environmental defenders' critical role in protecting the environment and the importance of protecting these defenders through human rights mechanisms and other approaches. It concludes that just as constitutional and human rights cannot be realized without a healthy environment, environmental rule of law is predicated upon respect for constitutional and human rights.

Box 1.3: Environment-Related Rights

There is a wide range of substantive and procedural rights related to the environment (sometimes referred to as "environmental rights").[a] These include substantive rights, such as the rights to a healthy environment, to life, and to water. They also include procedural rights, such as the rights of access to information, public participation, access to justice, and nondiscrimination.

These rights relate to the environment in two key ways. First, many rights require certain environmental conditions or inputs for their enjoyment (such as the right to life).[b] Second, many rights, especially procedural rights, are indispensable to the environmental rule of law even if the rights apply generally and are not limited to the environmental context.

These rights are recognized and protected by national constitutions and laws; international human rights law, international environmental law, and other international law; and by provincial and other subnational constitutions and laws.

In some instances, there is wide agreement on the existence and scope of an environment-related right (such as the right to water); others are more contested. Accordingly, in a particular instance, it is necessary to consider which national constitution and laws, international human rights instruments, and other international legal instruments apply (as well as subnational instruments, in certain cases).

For a more detailed analysis of environment-related rights, see the Rights chapter.

a. Shelton 1991; Boyle 2007; Boyd 2012; Feris 2017.
b. *See* Box 4.2.

The Justice chapter explores how a fair, transparent justice system that efficiently resolves natural resource disputes and enforces environmental law is critical to establishing environmental rule of law. The chapter surveys the key components of effective environmental adjudication. Parties must be able to avail themselves of the law and its protections and sanctions without undue financial, geographic, language, or knowledge barriers. The dispute resolution or enforcement process needs to be fair, capable, transparent, and characterized by integrity. Finally, remedies available through the justice process must address the harms and grievances raised, and be sufficient to deter future violations. The chapter also considers key opportunities for improving justice in environmental cases, and shares innovative practices, such as restorative justice. It concludes that while the effective and peaceful resolution of the legal issues in an environmental dispute is key, it is also important to address the underlying social and political conflicts that often drive environmental conflicts.

The Report's conclusion emphasizes that achieving sustainable development depends upon strengthening environmental rule of law. This means engaging diverse actors to conduct regular assessments on the environmental rule of law. There are significant data gaps and a need for indicators to measure, track, and report on environmental rule of law performance. The

Waste burning in Haiti

conclusion offers a framework for indicators. Finally, the conclusion provides a roadmap for implementing and tracking the effectiveness of environmental rule of law moving forward.

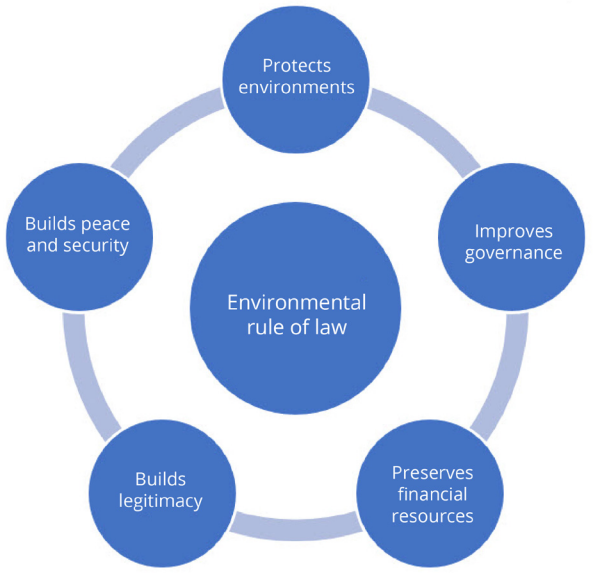
1.2 Benefits of the Environmental Rule of Law

The benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effect is in protection of the environment itself, it also strengthens general rule of law, supports sustainable economic and social development, contributes to peace and security by avoiding and defusing conflict, and protects the fundamental rights of people. Figure 1.7 captures these benefits.

Environmental rule of law protects public health as well as the environment and the sustainable use of natural resources. To be effective, wildlife conservation, climate change adaptation, pollution control, and resource management, for example, all depend on environmental rule of law. Numerous studies show that when environmental laws are enforced and a culture of compliance takes root, positive environmental results follow, such as increased wildlife populations, decreased human health impacts from air and water pollution, and improved ecosystem services, such as provision of clean drinking water.[46] These benefits are not simply the result of government action alone but are the result of a collaborative effort across society to address environmental issues. For example, the International Development Law Organization assisted in protecting environmental endowments and tourism by limiting poaching and helping to strengthen wildlife conservation and climate change adaptation laws in Kenya.[47] And initiatives such as the Kimberley Process and the Forestry Law Enforcement, Governance and Trade initiative show how companies can be active partners—and even leaders—in

46 *See* Section 2.1.2.1 infra.
47 IDLO 2014, 35.

Figure 1.7: Benefits of the Environmental Rule of Law



ensuring only legally extracted resources enter the chain of commerce.[48]

Environmental rule of law reduces corruption and noncompliance in natural resource management, which attracts investment in a country's resource sector. Experience shows that companies are more likely to comply with the law when other companies also comply and when government has made clear that compliance is expected.[49] Further, compliance efforts reward good actors by assuring them they will not be at a competitive disadvantage by investing in compliance with environmental laws. The rule of law thus reinforces positive behavior by rewarding responsible businesses, for example, in the forest sector by ensuring prosecution of illegal logging.[50]

While unsustainable development may serve short-term financial interests of particular individuals or entities, environmental rule of law plays an important role in protecting financial interests of a state's citizens and future generations over the long term, both individually and collectively. Sustainable management of natural resources and maximization of their financial value provide a foundation for long-term investment, which can serve to grow markets and expand opportunities. Environmental rule of law serves to encourage "inclusive and equitable economic growth; support investment and promote competition; provide access to information and markets for the poor and marginalized; secure land and property title; and provide mechanisms for equitable commercial dispute resolution."[51] This connection between environmental rule of law and economic growth is reflected in various development indices that link different elements of environmental rule of law both to growth in gross domestic product and to a decrease in inflation and inequality.[52] Limiting abuse of resources, such as wildlife trafficking, also preserves natural capital and cultural heritage for citizens and allows enjoyment of these resources over generations.[53] As such, environmental rule of law advances intergenerational equity, as well as intragenerational equity.

Environmental rule of law can also improve a company's bottom line by preventing and peacefully resolving conflicts. Where social conflicts escalate, they can disrupt operations and harm reputation and brand. For example, a study of the impacts of social conflicts on the bottom line of palm oil companies in Indonesia found that the tangible costs of social conflict range from US$70,000 to 2,500,000.[54] The largest direct costs were lost income arising from disrupted plantation operations and staff time diverted from other tasks to address conflict. Tangible costs represent 51 to 88

48 *See* https://www.kimberleyprocess.com; http://www.euflegt.efi.int. *See also* the International Tin Code of Conduct, whose first principle is "Maintain legal compliance...." https://www.internationaltin.org/code-of-conduct/.
49 *See* Section 2.6.1 infra.
50 Davis et al. 2013.
51 IDLO 2014, 24.
52 Kaufmann and Kraay 2008, 10.
53 UN Environment Assembly 2014; London Conference on the Illegal Wildlife Trade 2014.
54 IBCSD 2016.

percent of plantation operational costs, and 102 to 177 percent of investment costs on a per hectare per year basis. In addition, social conflicts had intangible or "hidden" costs that range from US$600,000 to 9,000,000, representing expenditures or indirect losses associated with, for the purposes of this study, risk of: conflict recurrence or escalation; reputational loss; and risk of violence to property and people.

Environmental rule of law strengthens rule of law more broadly by increasing trust in the government and solidifying its legitimacy. Strong environmental rule of law involves the public and other stakeholders in government decision making and holds decision makers accountable for the outcomes of their actions. This helps engender trust across society.[55] For example, when local communities are meaningfully informed about and engaged in natural resource management decisions, they are more likely to have a sense of policy ownership and convince others to respect the decisions. Such decisions may range in scale from village-based management plans to transnational water agreements. This kind of cooperation can help to cure significant democratic deficits. Environmental cooperation builds trust[56] and limits the power of non-state, non-citizen actors to coopt the actions of the government.[57] Legitimacy brings with it the collateral benefit of lessening criticism, resistance, and discontent. While States are often concerned about public resistance, States have begun to allow citizen and civil society participation in government decisions to avoid their disapproval and obtain their support.[58]

The United Nations has noted a final, vital benefit of environmental rule of law: "Proper management of natural resources, in accordance with the rule of law, is also a key factor in peace and security ...."[59] Evidence demonstrates, for example, that a state can prevent both local and regional unrest by protecting land rights and peacefully resolving land disputes.[60] With over 40 percent of internal armed conflicts over the last 60 years linked to natural resource issues,[61] maintaining a peaceful society depends on vindication of environment-related rights.

The myriad benefits of environmental rule of law were demonstrated by the European Commission's review of how Member States are implementing environmental law. Three of the many identified examples of what could be achieved if States fully implemented European Union environmental requirements were:

- full compliance with European Union waste policy by 2020 could create an additional 400,000 jobs and an additional annual turnover of EUR€42 billion in the waste management and recycling industries;
- if existing European Union water legislation were to be fully implemented, and all water bodies to achieve a "good" status ranking, the combined annual benefits could reach at least EUR€2.8 billion; and
- while the Natura 2000 network of protected areas already delivers estimated gains of EUR€200-300 billion per year across the European Union, full implementation of Natura 2000 would lead to the creation of 174,000 additional jobs.[62]

Thus, environmental rule of law provides environmental, economic, social cohesion, human rights, and security benefits that represent a significant return on investment.

55 Davis et al. 2013.
56 Getliffe 2002, 101.
57 Kaufmann 2015.
58 Ferris and Zhang 2003, 569; *see also* Chapter 3.
59 UN n.d.
60 Knight et al. 2012.
61 UNEP 2009.
62 European Commission 2017, 2.

1.3 Core Elements of Environmental Rule of Law

Environmental rule of law comprises many elements, as it represents the efficient and effective functioning of environmental governance across multiple levels of institutions, sectors, and actors. The United Nations Environment Programme's Governing Council identified seven core elements,[63] depicted in Figure 1.8. These are discussed in turn.

1.3.1 Fair, Clear, and Implementable Environmental Laws[64]

Environmental rule of law is premised upon fair, clear, and implementable laws.[65] Laws that are fair adhere to rule-of-law principles of "supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."[66] These principles of fairness call for all persons and entities, including the State itself, to be subject to and accountable for complying with law and for the laws to be administered and enforced with transparency.[67]

Clarity in laws ensures that they are easily understood so that their requirements are unambiguous and they can be implemented properly. Those reading the law should be able to understand the implications of the law and the obligations it imposes on both those it regulates and those who are charged with implementing and enforcing it. Additionally, laws need to clearly delineate responsibility across organizations, particularly as they relate to the enforcement of the law. For example, early environmental regulations in China were ambiguous as to who was responsible for enforcement. The national government believed it was the responsibility of local government, while local governments often did not wish to enforce environmental regulations as that would disadvantage local businesses. The Chinese government subsequently revised its laws to provide greater clarity and accountability.[68]

Laws should also be readily implementable and adapted to the national context, meaning that the approaches are effective in the particular institutional, cultural, and economic context of the country. It is also important for the laws to contain the procedures and mandates necessary to carry out the law's requirements. As discussed in Case Study 1.1, it is important for environmental laws to keep pace with technological developments as well.

Another example of a critical gap in legislation, implementation, and enforcement that enables practices with negative impacts on a country's economy to continue, environment, and health is the issue of lead paint, which is still allowed in over 100 countries. See Case Study 1.2.

Environmental laws and regulations often risk being sidelined by other legal provisions. For example, over 3,000 trade agreements contain investor-state dispute settlement

63 UNEP International Advisory Council for Environmental Justice 2015.

64 While fair, clear, and implementable laws are important to the environmental rule of law, the laws themselves are only one of several major limitations on the environmental rule of law. It is clear that gaps and thinness in drafting of environmental laws can be an important factor impeding effective implementation and enforcement. That said the substantive chapters of this Report focus primarily on other, less obvious reasons for gaps in implementing and enforcing environmental law. Focusing on the details of capacity, implementation, and enforcement is crucial to understanding the full dimensions of the environmental rule of law challenge facing countries across the globe.

65 Ibid.

66 UN 2008, 1.

67 UNSC 2004, 4; O'Donnell 2004.

68 Percival 2008.

provisions under which an investor can sue a country to protest its national laws and regulations.[69] These provisions have been used in some circumstances to fight against environmental laws and regulations that appear to be unfairly discriminatory against foreign investors.[70]

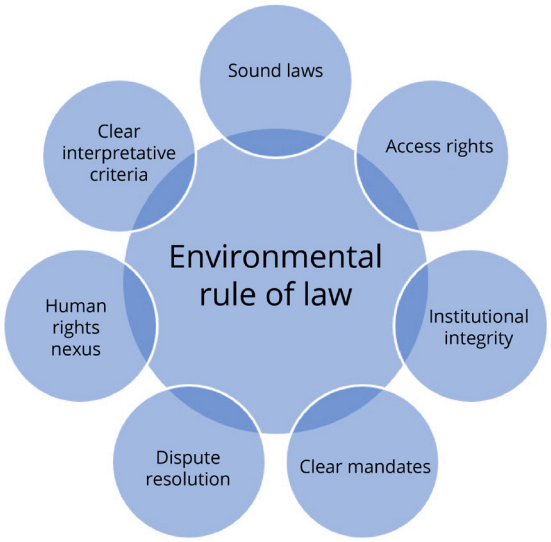
1.3.2 Access to Information, Public Participation, and Access to Justice[71]

Access to information, public participation, and access to justice are commonly known as the "access rights" and are a fundamental component of rule of law that are particularly salient to environmental rule of law. The access rights apply in the development, implementation, and enforcement of environmental laws and regulations. Because citizens' health and livelihoods are inextricably connected with environmental and natural resource management, there are strong social, economic, and political incentives for active engagement which can help to ensure that the regulated community and the government comply with environmental laws.

Access to information is the foundation for effective civic engagement. Environmental information, including ambient pollution levels and source-specific information, among other types of information, helps the public determine whether there is or might be a violation; it also informs whether and how to engage.

Public participation in environmental decision making improves the information available to decision makers, can enhance implementation, and provides a means for avoiding or resolving disputes before they escalate. It can also build public support for the outcome, and improve compliance.

Figure 1.8: Core Elements of the Environmental Rule of Law



Access to justice means that the public has ready and meaningful access to courts, tribunals, commissions, and other bodies that are charged with protecting their rights and peacefully resolving disputes. This both helps to protect the other access rights and to strengthen capacity to enforce environmental laws.

These three pillars of civic engagement build responsiveness and accountability, and as such, they are essential to environmental rule of law.

1.3.3 Accountability and Integrity of Institutions and Decision Makers[72]

Environmental institutions are the face of environmental rule of law to the public. They are responsible for implementing and enforcing the environmental laws.

69 USTR 2015.
70 Tienhaara 2006; Brower and Steven 2001.
71 These dynamics are examined primarily in Chapters 3 (Civic Engagement) and 5 (Justice), but also to some extent in Chapter 4 (Rights).
72 These issues are examined further in Chapter 2 (Institutions).

Case Study 1.1: Technological Innovations Outpace Legal Responses

It is not uncommon for technological advances to present issues not contemplated by existing environmental laws. For example, as China struggles to meet growing energy demand and reduce its use of coal, its government, in conjunction with major oil companies, has pushed aggressively to develop its shale gas resources—the largest in the world.[a]

Regulations for conventional oil and gas development also apply to shale gas, but China lacks regulations to address environmental concerns specific to hydraulic fracturing, which is a relatively new technique used to extract shale gas.[b] Rules for monitoring methane leaks do not exist.[c] The government has not implemented environmental compliance inspections broadly enough, or set water pollution penalties high enough, to deter firms from disposing of wastewater improperly.[d] Corruption challenges also undermine efforts to hold violators accountable.[e] Similar concerns plague water sourcing. Given that transporting water from afar is often more expensive than withdrawing local water—sometimes even after fines are assessed for doing so illegally—economic incentives prompt operators to deplete local water resources.[f]

As of 2012, no regulations governing the specific problems of fracking had been written, even as shale gas development proceeded.[g] In 2014, China scaled back its shale output goals due to geological challenges.[h] Yet, the industry had already taken off, with more than 600 shale gas wells drilled since 2011.[i]

a. Shelton 1991; Boyle 2007; Boyd 2012; Feris 2017.
b. Guo, Xu, and Chen2014.
c. Ibid.
d. Ibid.
e. Transparency International 2015
f. Guo, Xu, and Chen 2014.
g. Xiaocong 2015.
h. Feng 2015, 22-23.
i. *Oil & Gas Journal* 2018.

They also have a broader socio-political role, demonstrating to the public that environmental law brings about social, economic, public health, security, and environmental benefits for all. For the public to support environmental initiatives over the long term, environmental institutions and decision makers must be accountable and demonstrate integrity. Institutions instilled with integrity and accountability are more effective at delivering enduring sustainable development.[73] Institutions at all levels of governance are strengthened when they are open and accountable to their constituencies.[74]

Corruption can be an issue in all countries, regardless of how developed their institutions are.[75] That said, countries that

73 *See* Section 2.1.2.1 infra.
74 UN General Assembly 2014, para. 82.
75 Welsch 2003.

Case Study 1.2: Lead Paint: Gaps in Legislation Harming Public Health, Economies, and the Environment

There is no known level of lead exposure that is considered to be safe, and lead paint is a major global source of childhood exposure to lead. Indeed, in many countries paint is the leading source of childhood lead exposure. The staggering impacts of lead exposure include reduced childhood IQs causing lowered productivity and earning potential, with costs estimated at over US$950 billion in low- and middle-income countries. In many countries, the economic toll of lead exposure impacts GDP by 2-4 percent.[a] Moreover, scientific studies indicate a strong association between lead exposure and violent crime rates.[b]

Establishing and enforcing lead paint laws is an effective way to improve public health. Currently only one third of countries have lead paint laws. High levels of lead in paint have been found in countries that lack legal limits on lead in paint,[c] and are also found in some countries that have such laws but lack effective enforcement and compliance mechanisms.

To address this challenge, UN Environment and the World Health Organization are leading the Global Alliance to Eliminate Lead Paint (the Alliance) to help countries around the world take action. This voluntary global initiative includes national governments, the paint industry, nongovernmental organizations, and academics working together to promote laws to phase-out lead paint. The Alliance has created tools to help countries develop lead paint laws, including a lead paint elimination toolkit[d] and a guidance and model law for regulating lead paint.[e] The guidance and model law offer suggested provisions that countries can adapt to their national legal context.

Industry is actively working with the Alliance at the global and regional level. The cost of switching to non-lead paint additives is relatively low. Paint testing studies show that paint free of lead additives is available in each of the more than 40 low and middle income countries where paint was tested, and the costs of paints without lead additives are comparable to paints with lead additives.

These lead paint elimination activities provide some insights for efforts to promote the environmental rule of law. One key insight is that establishing lead paint elimination laws that are relatively simple to implement and are regionally similar protects human health, promotes compliance, and provides a level playing field for industry. The direct benefits to public health and economic development illustrate the positive value and importance of environmental rule of law. It is critically important to pay particular attention to risks affecting vulnerable sub-populations, such as children. And voluntary partnerships can build momentum toward concrete progress by focusing on a specific goal and working across sectors, with legal, environmental, and health professionals working together, alongside industry and nongovernmental organizations.

a. NYU n.d.
b. *See, e.g.*, Wright et al. 2008; Feigenbaum and Muller 2016; Mielke and Zahran 2012.
c. IPEN 2016.
d. UNEP 2015.
e. UNEP 2017.

rely substantially upon natural resources as a source of gross domestic product are particularly at risk from corruption because government usually controls access to the resources.[76] Studies comparing countries with similar social and economic conditions find that the presence of natural resource wealth in one country greatly increases the likelihood for corruption.[77] Transparency and accountability are the primary tools for preventing and punishing corruption, especially around natural resources.[78] Another important tool is independent government oversight through mechanisms such as environmental auditing, which both detects and deters corruption and helps focus government resources where they will be of most use.

Fair and consistent enforcement builds a culture of compliance across society, which helps engender respect for government institutions and rule of law. In particular, environmental rule of law takes root when leaders demonstrate clear and firm political will to implement environmental laws, even in the face of opposition and disagreement.

1.3.4 Clear and Coordinated Mandates and Roles, Across and Within Institutions

Environmental and natural resource management cut across sectors and involve many ministries, agencies, and departments. Effective environmental rule of law requires that institutions be given mandates that are straightforward and transparent; that detail the institution's jurisdiction, goals, and authority; and that are coordinated with other institutions. This allows leaders to focus institutional efforts and the public to ensure accountability.

Because so many institutions are engaged in environmental and natural resource protection, many countries suffer from regulatory overlap and underlap. This is especially the case when environmental institutions have been created in an ad hoc manner over time. Regulatory overlap occurs when more than one institution has authority over an issue, resulting in competing bureaucratic claims over that issue and potentially conflicting directives to the regulated community. Regulatory underlap occurs when no institution has clear authority over an issue, resulting in an orphan issue or cause for which there is no effective government oversight. Many countries suffer from lack of clarity in mandates and confusion of roles, which were identified as potential threats to Costa Rica's continued progress in implementing environmental rule of law, as noted in Section 1.1.[79]

76 For a review of the literature, see Paltseva 2013.
77 These same findings have been made when comparing resource-rich and resource-poor regions within the same country. Ibid.
78 For a review of the theory and emerging evidence on transparency in the management of extractive resources and their revenues, see Epremian et al. 2016.
79 Keller et al. 2013, 90.

1.3.5 Accessible, Fair, Impartial, Timely, and Responsive Dispute Resolution Mechanisms

Courts, tribunals, and other mechanisms for enforcement and resolving disputes are a key element in creating environmental rule of law. Dispute resolution and enforcement mechanisms that are fair, impartial, timely, and responsive increase the likelihood that harms to environment-related rights will be addressed, that parties will meet their environmental responsibilities, and that parties who violate environmental law will be held accountable. Furthermore, public accessibility to these mechanisms increases public confidence in the judicial process and rule of law in general. Successful courts are insulated from manipulation by having their budgets protected from political interference, their judges paid commensurately with other professions, and salary levels set by independent bodies, not politicians.[80]

In many countries, courts are clogged with extensive caseloads not related to environmental issues, so that it can take years for a case to be heard and years longer for a decision to be rendered. Environmental cases often involve harm to public health or irreversible damage to natural resources and need to be heard in a timely manner so that justice and the public interest may be served. As a result, over 50 countries have established environmental tribunals and many others utilize alternative dispute resolution mechanisms in hopes of resolving matters before they proceed in court.

1.3.6 Recognition of the Mutually Reinforcing Relationship Between Rights and the Environmental Rule of Law

Environmental rule of law is inextricably connected to constitutional and human rights. Many constitutional and human rights depend on the environment—without a healthy environment and the clean air, water, and sustenance it provides, people would not have the most basic necessities for life. Constitutional and human rights law in turn offers a framework for reinforcing and strengthening environmental rule of law as many environmental harms can be addressed through the protection of constitutional and human rights. Framing environmental matters in a constitutional or human rights context can bring heightened legal and moral authority to environmental violations as well as open additional avenues for addressing those violations.

Access rights and other procedural rights often provide critical mechanisms for achieving both substantive rights related to the environment under domestic or international law (such as the rights to a healthy environment, life, water, and food)[81] and environmental rule of law. Thus, a reinforcing relationship exists whereby environmental law relies on procedural rights to protect substantive rights that depend on the environment. For example, the procedural right of having access to a court allows a community harmed by illegal dumping to invoke environmental law and obtain a remedy that stops and remediates the dumping, thus protecting the substantive rights to life and a healthy environment.

Courts can also look to substantive constitutional or human rights as a basis for environmental claims and environmentally protective judgments when substantive environmental law is either too weak a

80 Pring and Pring 2009, 75.

81 For a discussion of rights related to the environment, please see Chapter 4 (Rights).

basis for a case or simply does not address a matter. The right to water, for example, may be invoked by a court that is addressing a water contamination case if the existing water pollution statute does not address the facts of that particular case (for example, if the particular pollutant is new and not yet regulated) or if the governmental institution responsible for enforcing the statute to bring the case fails to act. In this way, constitutional and human rights law can be invoked by the public as an important complementary basis for protecting vital environmental interests. Moreover, invocation of constitutional law or human rights treaties can elevate the profile and importance of environmental claims.

1.3.7 Specific Criteria for the Interpretation of Environmental Law[82]

It is important for governments to publish detailed guidance and policy statements that clarify environmental laws and their implementation so that stakeholders understand what is required and expected. Environmental laws are often written in broad terms to provide significant authority and discretion to implementing agencies. This allows for interpretive tailoring of laws to fit changing scientific understanding and circumstances. It is critical, however, that agencies adopt clear, implementable regulations and issue explanatory policy documents so that the regulated community and the public can understand how these laws will be implemented and what will be expected of both the regulated community and the regulators. It is also important that broadly applicable interpretations and regulations be subject to judicial review.

In addition, many countries set enforcement priorities so that certain sectors or industries will experience heightened scrutiny over the course of a year or two. By publicly announcing these priorities, industry is

put on notice to pay particular attention to its compliance activities. Experience suggests sectors increase their overall rates of compliance when they are aware of an impending government initiative.[83]

1.4 Evolution of Environmental Rule of Law

While environmental rule of law is relatively new terminology, it has rapidly gained prominence, particularly in recent years.

While some countries adopted environmental laws in the 1970s and 1980s, most adopted their framework environmental laws starting in the 1990s, following the Rio Earth Summit.[84] The 1990s also saw a rapid growth of environmental ministries and agencies.[85] From 1972 to 1992, nations entered into more than 1,100 environmental agreements and other legal instruments.[86] International and bilateral donors and partners focused money and

82 This topic is addressed in Chapter 2 (Institutions).

83 *See* Section 2.6.1 infra.
84 *See* Figure 1.1.
85 *See* Figure 1.2.
86 Brown Weiss 2011, 6.

energy in building human and institutional capacity.

By the time the 2002 World Summit on Sustainable Development was held, many countries' wherewithal for making new international commitments at global summits was exhausted. There was a sense among many that the Summit should focus on implementation of existing commitments, rather than on generating yet more commitments that countries may have difficulty implementing. This led to a focus at the Summit on voluntary public-private partnerships, which were viewed as not providing a substitute for effective environmental rule of law.[87]

In the early 2000s, the UN Environment Programme led a global initiative to develop guidelines, foster innovation, and build capacity to improve compliance with and enforcement of multilateral environmental agreements.[88] As many countries adopted environmental laws and regulations through the 1990s and implementation and enforcement lagged, civil society actors started invoking their rights granted under national constitutions and laws and pushing for greater compliance and enforcement of national environmental laws.

By the 2012 UN Conference on Sustainable Development (also known as "Rio+20"), there was substantial focus on environmental governance. *The Future We Want*, the outcome document from Rio+20, emphasized the importance of strong institutions, access to justice and information, and the political will to implement and enforce environmental law.[89] It also expanded and refined a number of the public-private partnerships and other initiatives initiated at the World Summit on Sustainable Development.[90] Moreover, the World Congress on Justice, Governance and Law for Environmental Sustainability, held in tandem with Rio+20, emphasized the environmental rule of law,[91] and helped shape the outcome of Rio+20.

Since Rio+20, there has been growing interest in and attention to the environmental rule of law. United Nations Environment Programme's Governing Council Decision 27/9, adopted February 2013 —the first international instrument to use the phrase "environmental rule of law"—calls upon the Executive Director to assist with the "development and implementation of environmental rule of law with attention at all levels to mutually supporting governance features, including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution."[92]

The first United Nations Environment Assembly in 2014 adopted resolution 1/13, which calls upon countries "to work for the strengthening of environmental rule of law at the international, regional and national levels."[93] And in 2016, the First World Environmental Law Congress, cosponsored by the International Union for Conservation of Nature and UN Environment, adopted the "IUCN World Declaration on the Environmental Rule of Law," which outlines 13 principles to serve as the foundation for developing and implementing solutions for ecologically sustainable development.[94] It declares that "environmental rule of law

87 Bruch and Pendergrass 2003. Following 2002, governments, businesses, and civil society actors increased efforts to implement public-private partnerships that fostered improved environmental governance, to give greater attention to social license, and to track actions and results.
88 *See, e.g.*, UNEP 2002; UNEP 2006.
89 UN 2012.
90 Yang 2012.
91 The declaration from the World Congress on Justice, Governance and Law for Environmental Sustainability attention to the environmental rule of law was informed by Fulton and Benjamin (2011).
92 UNEP 2013, para. 5(a).
93 UNEP 2014b, para. 4.
94 IUCN World Commission on Environmental Law 2016.

should thus serve as the legal foundation for promoting environmental ethics and achieving environmental justice, global ecological integrity, and a sustainable future for all, including for future generations, at local, national, sub-national, regional, and international levels."[95]

In 2015, the global community of nations recognized the importance of environmental rule of law to sustainable development. Sustainable Development Goal 16 emphasizes that environmental rule of law creates peaceful and inclusive societies premised upon access to justice and accountable and inclusive institutions. As such, Goal 16 cuts across all the other Sustainable Development Goals.[96]

Although explicit reference to environmental rule of law may be a relatively recent phenomenon, the elements of environmental rule of law have been gaining momentum ever since modern environmental laws started to be adopted in the early 1970s. These include specific approaches for structuring environmental institutions, engaging the public, ensuring access to justice (in part to complement what was often viewed as irregular enforcement), and development of rights and rights-based approaches in statutes, constitutions, and treaties. The framing of environmental rule of law as a formal concept has drawn upon many of these tried and true tools, integrating them into a holistic framework designed to more fully give force to the environmental laws adopted over the last few decades.

Environmental rule of law is incremental and progresses nonlinearly. There have been numerous victories, as countries across the globe have reduced pollution significantly and returned species from the brink of extinction based upon well-constructed environmental statutes that are implemented by competent, adequately funded agencies. But even countries with highly developed governance systems often struggle, taking some steps forward and some backward as circumstances change.

In fact, environmental rule of law requires constant monitoring, evaluation, and continued shaping as lessons are learned, new environmental challenges arise, and social and political priorities shift. Over time, some environmental governance functions may be more meaningfully assumed by companies with strong compliance cultures, for example through adoption and effectuation of standards of conduct and supply chain expectations, while technological advances now allow citizens to increasingly act as environmental monitors and compliance assessors. Neither of these innovations displaces traditional government functions, but they do create new opportunities and require environmental rule of law to adapt to new methods and mores to most effectively and efficiently ensure environmental outcomes.

Implementation and enforcement depend upon robust laws. Indeed, "some environmental laws are thin in ways that impede effective environmental protection. For example, some laws lack procedures for transparent and science-based standard-setting, concrete implementation mechanisms, provisions for coordination among different parts of government, provisions for judicial review or provisions for monitoring, inspection, civil enforcement, or adequate penalties."[97] For example, analysis of environmental legislation suggests that implementation of even widely accepted principles like access to environmental information is constrained by gaps in legislation.[98] And a key reason for limited traction of environmental law in India is that the laws generally do not give the government civil enforcement authority or a range of enforcement sanctions short of shutting-down pollution sources, which is often politically untenable. This gap in the law inhibits effective enforcement.[99]

95 Ibid., 2.
96 For further discussion of the Sustainable Development Goals and the environmental rule of law, see Chapter 6 (Future Directions).
97 Fulton and Wolfson 2014.
98 Excell and Moses 2017
99 Pande, Rosenbaum, and Rowe 2015.

It is important to reiterate the importance of ***ongoing development and improvement to ensure environmental laws are robust, implementable, and enforceable***.[100] China's response over the past decade to its environmental crisis provides a concrete example. Significant legal reforms enacted between 2008 and 2018 have been a key component of reform efforts that go hand-in-hand with efforts to strengthen enforcement. Prior to this wave of reform, many Chinese environmental laws lacked developed procedural and implementation mechanisms[101] and the high-level China State Council noted that "Chinese environmental protection laws and regulations are not up to the task."[102] The Organization for Economic Cooperation and Development (OECD) identified several legal reforms as critical steps for improving environmental governance in China, including making local leaders more accountable to higher-level government officials, strengthening China's pollutant permitting system, and enhancing legal authorities for market-based instruments like pollutant trading.[103] China subsequently enacted legislation and issued regulations addressing each of those issues, and has undertaken other legal reforms including expanding standing for public interest environmental litigation and revising penalty provisions to enhance deterrence of violations.[104] At least in part due to these reforms, China is starting to turn the corner on pollution control, and recent statistics show significant pollution reductions.

Countries that are refining their environmental law frameworks have reason for optimism: they have an enhanced opportunity to learn from the experience of those who went before, as legal systems borrow and learn from one another, while also bringing their own perspectives to bear to make improvements. To be successful, efforts to draft effective environmental laws should consider the need for setting realistic environmental goals and taking implementation in manageable stages in order to build confidence in law as an institution, and the importance of adapting legal drafting to the national contexts.[105]

Environmental rule of law is particularly challenging in countries affected by armed conflict. Since the end of the Cold War, more than 60 countries have experienced major armed conflict with more than 1,000 battle deaths. Consider, for example, Cambodia, which emerged from decades of war in the early 1990s. It adopted a constitutional mandate that the state protect the environment and natural resources,[106] enacted environmental statutes, including environmental impact assessment requirements,[107] and even created an environmental tribunal.[108] But Cambodia's judicial and administrative systems had

100 UNEP 2014a.
101 Wang 2007, 170-171.
102 Decision on Implementation of Scientific Development and Strengthening on Environmental Protection, http://english.mep.gov.cn/Policies_Regulations/policies/Frameworkp1/200712/t20071227_115531.htm.
103 OECD 2007, 3-4.
104 Shenkman and Wolfson 2015.
105 Bell 1992.
106 Cambodia Constitution, art. 59.
107 1996 Law on Environmental Protection and Natural Resource Management; 1999 Sub-Decree on Environmental Impact Assessment Process.
108 Baird 2016.

been decimated by war, and the country had very little capacity to translate these legal requirements into environmental actions and protections. As a result, from 1999 to 2003, no environmental impact assessments were conducted despite legal requirements to do so; and from 2004 to 2011, only 110 out of nearly 2,000 projects resulted in an assessment.[109] In 2017, Cambodia ranked "poor" on the Resource Governance Index, placing 79th out of 89 countries and 14th out of 15 Asian countries.[110] Facing the consequences of unrestrained development and protests from communities negatively impacted by resource extraction, Cambodian authorities started to reassess both their environmental law and its implementation. They are now focused on building the capacity of the country's officials and institutions to realize environmental rule of law in order to make the country's development of its vast natural resources sustainable.[111]

Countries that have experienced difficulties historically in achieving environmental progress are increasingly trying to make progress by enhancing environmental rule of law. China experienced significant public tensions arising from repeated instances of development and pollution that reflected an uneven commitment at the local level to protecting public health, the environment, and property rights, resulting in the significant overhaul of its environmental law framework and renewed efforts to build the institutional capacity and create the right incentives to achieve environmental progress.[112] And developed countries with well-established programs are also taking steps to strengthen environmental rule of law. Upon reviewing its environmental enforcement scheme, the United Kingdom recognized that it was overly reliant on criminal sanctions and implemented administrative measures for the first time, significantly changing how it implements environmental law and influences compliance behaviors.[113]

1.5 Understanding and Addressing the Drivers of Environmental Compliance and Non-Compliance

Since creating a culture of compliance is at the heart of the environmental rule of law, a growing number of countries have been seeking to act on the evolving understanding of why people and institutions comply with environmental laws, and why they do not. There are often economic, institutional, social, and psychological reasons that people choose to comply or not comply with environmental law.

There are many reasons cited for noncompliance.[114] The regulated community may not know or understand what is required for compliance. Compliance with environmental laws can be costly. Depending on the context, it may be unlikely that violations would be detected or prosecuted. Even when environmental violations are prosecuted, the penalty may be internalized

109 Schulte and Stetser 2014.
110 NRGI 2017.
111 *See generally* Schulte and Stetser 2014.
112 Wübbeke, 2014.
113 UCL 2018.
114 *See, e.g.*, INECE 2009.

as a cost of doing business, and thus prove insufficient to deter violations. When viewing the benefits of noncompliance in relation to the costs of compliance, self-interest can drive noncompliance. From the governmental side, those responsible for environmental issues are often reluctant to include other institutions in implementation and enforcement for fear of giving up power or control. For example, a study in China found that "local government officials are often extremely sensitive to potential intervention by national government authorities," who are seen only to intervene when there has been a "failure."[115]

Polluters can exploit this fear. A study across Europe found that countries with weak regulatory and auditing frameworks—a symptom and cause of weak rule of law—underreported pollution.[116] While some countries with strong legal frameworks and a robust rule of law tradition report higher pollution, these are honest reflections that, in real terms, may relate to less than their counterparts' actual pollution.[117]

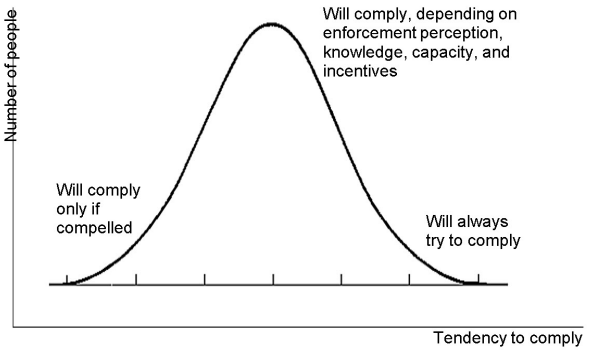
Weak environmental institutions foster noncompliance. If institutions are unable to effectively inspect, prosecute, and adjudicate environmental violations, the regulated community may reasonably believe that violations will not be punished. Weak environmental institutions can have more pernicious effects. A failure to have robust environmental institutions can create "a system of broader institutional weakness which can result in corruption"[118] that not just threatens the institutions implicated but undermines confidence in the state generally. Corruption and weak environmental institutions create an uncertain investment climate.[119] They frequently lead to the decline of a wide range of natural resources and growth of organized crime. For example, illegal wildlife trafficking is a significant source of revenue for organized crime, with about 350 million plants and animals worth US$7 to 23 billion sold on the black market every year.[120] Illegal trade in environmental contraband—including ozone depleting substances, illegal timber and minerals, wildlife, and fisheries—is estimated to be the fourth most lucrative international criminal enterprise, after drug trafficking, counterfeiting, and human trafficking.[121] This would not be possible without widespread corruption, and indeed the United Nations has shown that illegal wildlife trafficking is heavily correlated with corruption.[122]

Even when environmental law does not affect financial interests, it can nonetheless be difficult to achieve. Rule of law, and so environmental rule of law, is predicated on cooperation between state and citizen. Citizen engagement in monitoring and enforcement "disciplines public agencies" into fulfilling their legal duties, advocates for correction of failures in the law, and generally represents the interest of the people.[123] However, many nations do not have a culture or political tradition of such citizen engagement. In those States, engagement with and advocacy against the government remain difficult, even in places with a constitutional commitment to environmental protection and laws favorable to citizen engagement.[124]

Socially and psychologically, it is important to understand that the regulated community is diverse. As illustrated by Figure 1.9, most populations follow a bell curve. Within a particular population, then, some will always comply because that is the "right thing to do"; others will always try to cheat the system; and most will make a calculated decision whether to comply based on whether they believe most people comply with law and that noncompliers will be caught and

115 Ferris and Zhang 2003, 570–571.
116 Ivanova 2011.
117 Ibid., 49–70, 65–66.
118 Kaufmann 2015, 29.
119 Friedberg and Zaimov 1994.
120 Goyenechea and Indenbaum 2015.
121 UNEP and Interpol 2016.
122 London Conference on the Illegal Wildlife Trade 2014.
123 Tarlock 2001, 579–80.
124 Friedberg and Zaimov 1994, 227.

Figure 1.9: Tendency to Comply across a Typical Population



punished.[125] Recognizing this, governments increasingly utilize different strategies to target the various groups. There may be awards, priority in bidding on procurement, and tax benefits to those who always comply or go beyond compliance.[126] Environmental ministries may target persistent violators for more frequent inspection and higher penalties.[127] Ministries may also publicize the various incentives, awards, prosecutions, and penalties broadly to inform those who are deciding how much effort they want to invest in environmental compliance.[128]

Case Study 1.3: UK Nudge Unit

In 2010, the United Kingdom created the Behavioural Insights Team, known as the Nudge Unit, within the Cabinet Office. Its purpose was to improve government policy and services in a cost-efficient manner by experimenting with behavioral economic techniques so that, according to the Team, people could "make better choices for themselves."[a]

The Team experiments with psychological insights to try to change people's and institutions' behavior. For example, the Team increased payment rates of the vehicle excise duty from 40 to 49 percent by adding a picture of the vehicle for which the tax was still owed to letters sent to non-payers. They also found significant increases in on-time tax payments when notices sent to payers mentioned that most people pay their taxes on time.[b] This confirms insights drawn from behavioral economics and psychology, and seen in the literature on compliance and enforcement, that people are more likely to comply if they believe their peers are complying and will be detected and punished if they do not comply. Despite the success, however, it is also clear that such "nudges" alone are an insufficient motivator, and that traditional compliance and enforcement techniques remain necessary.[c]

In 2014, the Team was privatized as a company with ownership split equally between the government, the charity Nesta, and the Team's employees.

a. http://www.behaviouralinsights.co.uk/about-us/.
b. Service et al. 2014.
c. Rutter 2015.

125 *See generally* Simpson and Rorie 2011; Thornton, Gunningham, and Kagan 2005.
126 USEPA 2001, 2004, 2018.
127 INECE 2009; Zaelke, Kaniaru, and Kruzikova 2005.
128 Zaelke, Kaniaru, and Kruzikova 2005.

Different approaches can capitalize on social and psychological factors influencing compliance. For example, market-based approaches can reduce resistance to traditional regulatory tools, as in the case of States operating emissions trading systems.[129] And, when environmental rule of law begins to take hold, a positive feedback loop can drive it forward. Investment frequently follows the flourishing of environmental rule of law and its leveling effect in the marketplace, with economic and social benefits that benefit the whole country.[130] Studies of businesses' behavior demonstrate that if businesses perceive regulations as fair and see that they are enforced, they are more likely to comply.[131]

Behavioral psychology and behavioral economics offer innovative approaches to enhancing compliance.[132] In many instances, noncompliance is influenced by the approach that is adopted; changing that approach can change behavior, improving compliance. As discussed in Case Study 1.3, the United Kingdom created a program to explore whether legal compliance would increase with social cues and encouragements. Scholars have investigated the ability of using social norms to encourage people and companies to engage in desired behavior, such as being more energy-efficient.[133] Informing utility users of their energy use relative to their neighbors can modestly reduce energy use for example.[134] A growing number of institutions are starting to examine how to use these insights into changing environmental behavior in voluntary realms (such as whether to install energy-efficient or water-efficient technologies) may be applied in the context of compliance and enforcement.[135]

129 Bell 2003.
130 IDLO2014, 23–25.
131 Thornton, Gunningham, and Kagan 2005.
132 OECD 2017.
133 Vandenbergh 2005.
134 Rasul and Hollywood 2012.
135 *See, e.g.*, OECD 2017.

1.6 Conclusion

Environmental law and institutions have grown dramatically in the last few decades, but they are still maturing. Environmental laws have taken root around the globe as countries increasingly understand the vital linkages between environment, economic growth, public health, social cohesion, and security. Countries have adopted many implementing regulations and have started to enforce the laws. Too often, though, there remains an implementation gap.

Environmental rule of law seeks to address this gap and align actual practice with the environmental goals and laws on the books. To ensure that environmental law is effective in providing an enabling environment for sustainable development, environmental rule of law needs to be nurtured in a manner that builds strong institutions that engage the public, ensures access to information and justice, protects human rights, and advances true accountability for all environmental actors and decision makers. This Report reviews the key elements of environmental rule of law and highlights the innovative approaches being taken by many States to help it grow on their soil.

There are many important constituent elements to environmental rule of law, and these elements interact in often complex ways. As a result, ***environmental rule of law is the result of a dynamic and iterative process*** that relies on monitoring and evaluation, revision, and indicators to track progress.

While there are technical and administrative aspects, the human element is essential to environmental rule of law. It is critical to understand how the regulated community, the regulators, and the public understand and approach these issues. Enforcement of law is perhaps the ultimate expression of state political will and seriousness of purpose, and compliance is the strongest indicator of environmental rule of law. Even where compliance is pursued and achieved, it can be difficult to sustain over time without government commitment

of resources and capacity, private sector conformance, and near-constant civil society oversight. "Regulatory slippage," which can result from a widespread failure in vigilance or the weakening of the compliance obligation, signals a decay of the notion that "good citizens—and even more so, government officials—obey the law."[136] In contrast, when the regulated community sees compliance with environmental law as part of the normal course of business, they adopt a culture of compliance that becomes intolerant of noncompliance and poor environmental performance.[137] Examples include corporations that choose to meet the most protective mandatory state obligation to which they are subject in all countries or that voluntarily raise their performance bar by meeting more restrictive international standards and voluntary codes of conduct.[138]

Thus, there are competing dynamics as countries pursue environmental rule of law. On the one hand, governments need to continue working with the private sector and civil society to foster an enduring culture of compliance. At the same time, the political, economic, and social context is continually evolving, and it is necessary to adjust strategies and tools to ensure that environmental rule of law is optimized and remains at steady state.

136 Farber 1999, 325.
137 Christmann and Taylor 2001, 443.
138 Ibid.