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List of Abbreviations

ABNJ	Areas beyond national jurisdiction
BBNJ	Marine Biodiversity of Areas Beyond National Jurisdiction
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties
EIA	Environmental Impact Assessment
ESG	Environmental Social Governance
ESS	Environmental and Social Safeguard
ESIA	Environmental and Social Impact Assessment
ESMP	Environmental and Social Management Plan
ESMS	Environmental and Social Management System
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior, and Informed Consent
GCF	Green Climate Fund
GEF	Global Environment Facility
GIIP	Good International Industry Practice
ICJ	International Court of Justice
ICOMOS	International Council for the Preservation of Monuments
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFI	International Financial Institution
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
NEPA	United States National Environmental Policy Act
OHCHR	Office of the High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
SEA	Strategic Environmental Assessment
SDG	Sustainable Development Goal
UN	United Nations
UNCEB	United Nations System Chief Executives Board for Coordination
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Convention on the Law of the Sea
UNDG	United Nations Development Group
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEMG	United Nations Environment Management Group
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change

UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UN-HABITAT	United Nations Human Settlements Programme
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNIDSR	United Nations Office for the Disaster Risk Reduction
WBG	World Bank Group
WFP	World Food Program
WHO	World Health Organization
WIPO	World Intellectual Property Organization

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Chapter One Introduction

Following decades of commitment to good faith and the vision for a better world, international organizations have in recent years expanded their efforts and investments in developing rules, standards, and conformity assessments for their own governance, programming, and management concerning environmental and social sustainability and impact. The recognition of the necessity reflects the progressive development of international environmental law over the past decades and the emerging customary law guiding the transboundary and domestic behaviours of international legal entities – be it States or international organizations – towards regulations that extends beyond the existing principle of preventing harm to introduce the duty of adopting precautionary measures and achieving sustainable development goals.

Essentially, international environmental law – including the legal norms and processes that address transboundary, regional, and global environmental issues – pertains to a broad spectrum of issues and challenges generally arising from anthropogenic impacts on the natural environment. The characteristics of these international environmental problems, coupled with scientific insights of them, construct specialized treatment as described in international legal literature and in practical applications. The rapid and sometimes unpredictable evolution of environmental issues perpetually raises questions about the uncertainty of hazards that transcend jurisdictional boundaries, highlighting the need for adaptable solutions and operations that address the social, political, and economic dimensions of the human-nature relationship. In this context, international environmental law must be able to effectively process multiple interconnections, advocate for sustainable development, manage the concerns and cooperation between industrialized and developing countries with the principle of common but differentiated responsibilities, and balance contemporary interests and priorities *vis-à-vis* those significant implications for future generations of humanity.[1]

Throughout the course, the significance and efficacy of Environmental Impact Assessments (EIAs) have been consistently reaffirmed. Notably, in the most recent *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction* (hereafter referred as "the BBNJ Agreement") adopted in June 2023, an environmental impact assessment is defined as "a process to identify and evaluate the potential impacts of an activity to inform decision-making."[2] This rather brief and open definition underscores a paradigmatic shift in perceiving

[1] Brunnée 2016, p. 1
[2] BBNJ Agreement, para. 7, Article 1, Part I *General Provisions*

the EIA methodology. It is no longer viewed merely as an instrument for averting potential environmental harm as it was originally conceptualized in the 1970s, but rather as an integral component of strategic planning that positively incorporates EIA into project development and outcome simulation.

When addressing the entities to conduct EIAs, sovereign States are often perceived as primary actors. Compared with States, international organizations may present a distinct set of expectation, rationales, resources, foundation of obligations, substantive and procedural duties when stepping into the process of leading an EIA. The terms used by international organizations may differ to include various requirements, methodologies, and impacts considered necessary for environmental and social safeguarding and monitoring risks associated with the functions of governance, programming and management by international organizations.[3]

It is appropriate to hope that thorough consideration of the complexities of international responsibility will encourage all actors, including international organizations, to act responsibly.[4] While international organizations, as subjects of international law, do not possess the comprehensive competencies that States do. Instead, they operate under the "principle of speciality", meaning they are empowered with specific powers by the founding States, which are defined by the collective interests those States aim to promote through the organization.[5] Consequently, to determine that an international organization has violated an international obligation, it must first be established that the organization is subject to that obligation. A significant issue in attributing responsibility to international organizations is the applicability of international obligations to these entities. It has been posited that the primary challenge in implementing a regime of international responsibility for international organizations lies in defining the scope of the fundamental rules that apply to them.[6]

Hence the thesis will examine the extent to which international organizations[7] shall adopt the obligations of EIA as mandated by international environmental law when addressing, funding

[3] See infra note 45 on the clarifications of governance functions, programme functions and management functions of UN entities. The list of references concerning the management framework documents adopted by the international organizations enclosing their commitments to conduct environmental and social impact assessment can be found in the Bibliography of the thesis.
[4] Ragazzi 2013, p. 247
[5] ICJ *Advisory Opinion on Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, p. 16, para. 25
[6] Craik 2023, p. 107
[7] On the definition of "international organizations", refer back to the ILC *First Report on the Settlement of International Disputes to Which International Organizations are Parties*, A/CN.4/756, p. 15-36, para. 31-63, that "'[i]nternational organizations'" are often also referred to as 'public international' or 'intergovernmental'

and implementing their development programmes and projects. Given the prevalent practice among international organizations to integrate environmental impact assessments with social impact assessments (ESIA) into a unified framework, this thesis will also address social safeguard measures and risk management strategies, while focus on the EIA obligations of international organizations as stipulated by Multilateral Environmental Agreements (MEAs), donor agreements, and self-imposed regulations unilaterally declared by the organizations, as well as the interaction of these obligations with States and the broader international community.

Given the extensive number of international organizations, the thesis will focus on the United Nations (UN) and its system-wide entities as the primary subjects of research, based on their representativeness in the community of international organizations, their significant relevance to the research topic, and the wealth of accessible documentation in the area. The thesis will mainly employ legal analysis as the research methodology, examining various primary sources including international treaties, customary international law, principles of international environmental law, documents outlining the rules of international organizations,[8] and existing international standards etc. in the relevant fields, for comparing, outlining, and developing a comprehensive understanding and analysis of the research question.

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organizations. In addition, the expressions 'agencies' or 'specialized agencies', for international organizations having specific relations to the United Nations, or 'international institutions", especially in the form of international financial institutions, are used to denote international organizations." As well as in the ILC *Draft articles on the responsibility of international organizations*, Article 2, para. (a) "'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities", with further discussions provided on the definition and international legal personality of international organizations by Commentary (1) – (15) of the ILC *Draft articles on the responsibility of international organizations*, pp. 49-51

[8] On the definition of "rules of international organizations", the codification of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, Article 2, para 1 (*j*) relates it to "the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization." A slightly different notion is provided by the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character* – its Article 1, para 1 (34) reads the meaning of "rules of international organizations" as "the constituent instruments, relevant decisions and resolutions, and established practice of the Organization." While the Institut de Droit International adopted in Article 2 (c) of its resolution on the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties in its Yearbook of the 1995 Lisbon session 1995 the following conceptualization: "'Rules of the organization' means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization." The ILC *Draft articles on the responsibility of international organizations*, eventually, took the meaning of the term of "rules of the organization" in particular as "the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization", with further discussions provided by Commentary (16) – (19) of the ILC *Draft articles on the responsibility of international organizations*, pp. 51-52. For arguments of State representatives on the term, see ILC *Second report on responsibility of international organizations*, 2004, A/CN.4/541, para. 20-26

Following the approach, after Chapter One *Introduction* the thesis will commerce with reviewing the historical development of EIA within MEAs at the international level and across the UN system by its entities. Also, it will highlight the principles of international environmental law, reflecting the approaches and strategies adopted by UN agencies in establishing and implementing environmental and social standards in their development programmes and projects. Thereafter, Chapter Three will scrutinize the legal foundations obligating international organizations, including UN entities and prominent international financial institutions, to scope their substantive duty to conduct ESIAs, and correspondingly, the procedural and operational requirements associated with these obligations. In Chapter Four, the thesis will explore three sources of obligation for international organizations to undertake ESIAs: self-imposed unilateral regulations following MEAs and customary international law to govern the actions and inactions of the organizations, donor requirements for funding development programmes and projects of UN entities, and UN's mandate to assist Member States in fulfilling State obligations under MEAs taking the EIA requirements under the BBNJ Agreement as an example. The thesis will propose a concise conclusion and open discussions for future consideration in Chapter Five.

Chapter Two Historical development of ESIA at the international level

2.1 EIA developed and confirmed at the international level

2.1.1 EIA obligations in multilateral environmental instruments

Transboundary EIA commitments have been reflecting the overall trends to adopt and apply multiple legal instruments to substantiate the obligation or structure strong persuasive value between States, sub-State and non-State actors.[9] The first legislation related to EIA was the *National Environmental Policy Act* (NEPA) adopted by the United States in 1970, in which federal agencies are required by Section 102 in Title I to incorporate environmental considerations in their planning and decision-making processes through a systematic and interdisciplinary approach to assess the environmental impact of and alternatives to the major federal actions that could significantly affecting the environment.[10] Soon after the enactment of NEPA, the advantages of EIA were acknowledged by the international community,[11] promoted by the United Nations Conference on the Human Environment (UNCHE) and partially reflected in an early *travail préparatoire* of the *Declaration of the United Nations Conference on the Human Environment* (also known as *Stockholm Declaration*),[12] though later were taken out from the final version of the document.[13]

The untaken draft article regarding EIA was brought back as Principle 4 of the United Nations Environment Programme (UNEP) *Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*. Being the first concrete international instrument on

[9] Craik 2008, p. 88

[10] For more details, see <https://www.epa.gov/nepa/what-national-environmental-policy-act> accessed 13.08.2024

[11] Craik 2008, p. 88. The World Bank followed the US model mandated by NEPA, and enacted its Safeguard policy (Operational Directive 4.00) in 1989. For more details see Dann and Riegner 2019, p. 541

[12] See *Report of the United Nations Conference on the Human Environment*, 1972, A/Conf/48/14/Rev.1, Part Three Proceedings of the Conference, Chapter X *Action on the Reports on Committees and of the Working Group*, Section D. *Working Group on the Declaration on the Human Environment*, p. 66, para. 331: “It referred to the General Assembly for consideration the text of principle 20 as contained in document A/CONF.48/4: ‘Relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever they believe, or have reason to believe, that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdictions.’”

[13] The basic tone at the UNCHE Stockholm Conference echoed in the era of 1972, before the age of conceptualizing sustainable development and when the international community was divided and competing for new global economic order under the dichotomy of economic development vs. environmental protection. The overwhelming focus on the differences between developed countries and developing countries and their diverging views on the subjects of development and environment caused concerns of developing countries over the possible constraints and burdens that the draft article would bring on their right to develop. See Brunnée 2008, p. 1, also Craik 2008, p. 91

the subject, it confirms EIA as a matter of positive measure, in that “States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.” Besides, the role of international organizations participating in the EIA exercise was outlined in Principle 10 drafted by UNEP, that “States sharing a natural resource should, when appropriate, consider the possibility of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to the conservation or utilization of such natural resource.”[14] Nevertheless, Principle 10 reflects a rather passive stance during the late 1970s regarding the involvement of international organizations in addressing environmental issues, as their engagement in conducting EIAs was contingent upon invitations from States, when deemed appropriate and feasible.

The outcomes of the numerous inter-governmental conferences held from 1978 to the early 1990s, where many draft principles and guiding documents were produced by the participating actors with the facilitation of international experts, aimed at achieving the highest attainable level of legally binding norms and served as a foundation for their subsequent development and adoption.[15] Shortly thereafter, the necessity of EIAs as effective technical and legal instruments was affirmed by various multilateral environmental agreements and international organizations during the period. UNEP continued its efforts to identify EIAs as a valuable method for integrating environmental and natural resources utilization into planning and programme implementation, which culminated in the adoption of the UNEP Council Decision 14/25, which endorsed the goals and principles of EIAs developed by the working group of experts on environmental law. The Council Decision also requests the UNEP Executive Director to advance international cooperation and consensus on applying the EIA goals and principles to development projects and future international agreements, and calls for enhanced notification for information exchange, recommendations, and consultations with Member States and relevant international organizations, including multilateral development banks, to share experiences in the area to further elaborate agenda setting.[16] The propositions in the UNEP Council Decision was subsequently endorsed by the United Nations General Assembly (UNGA) Resolution A/RES/42/184.

[14] UNEP *Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, p. 1098-1099
[15] Thürer 2009, para. 14
[16] UNEP Council Decision *Environmental Impact Assessment*, p. 77-78

On the other hand, the *World Charter for Nature*, prepared by the International Union for the Conservation of Nature (IUCN) and adopted by the UNGA Resolution A/RES/37/7, establishes a lower threshold compared to the UNEP Draft Principles for requiring a significant risk affecting another State to trigger an EIA. The *World Charter for Nature* mandates that activities with the likelihood to "disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance".[17] The shift from "significant risk" to "disturbance to nature" suggests that an EIA could be necessary for a broader range of actions and impacts due to the expansive and ambiguous interpretation of "may disturb", thereby elevating the necessity for conducting EIAs to the highest possible level.[18]

Such tendency, however, was not immediately reflected in the final codification of subsequent MEAs. For instance, Article 206 of the *United Nations Convention on the Law of the Sea* (UNCLOS) stipulates that States, upon having reasonable grounds to believe (and logically, first knowing or foreseeing)[19] that their planned activities may cause substantial pollution or significant and harmful changes to the marine environment, are obligated to initiate an EIA on the potential effects of the activities under the jurisdiction of the State. Additionally, Article 205 of UNCLOS requires States to communicate reports to the competent international organizations at appropriate intervals. The UNCLOS provisions supporting the application of EIA to prevent marine pollution were articulated in qualitative and somewhat ambiguous terms, similar to numerous other MEAs by the time of the UNCED *Rio Declaration on Environment and Development* (hereafter referred as "the Rio Declaration") released in 1992. Principle 17 of the Rio Declaration confirms that EIAs, initially considered as a national instrument "shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Similar language

[17] *World Charter for Nature*, p. 4, para. 11(c)
[18] Craik 2008, p. 92
[19] Article 206 of UNCLOS reads: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205." Here the "believing" of States with reasonable grounds has triggered controversial debates – see the relevant discussions in this thesis under Chapter 2.2 on the precautionary approach, in Chapter 3.2 about ESIA procedural and operational requirements, as well as in Chapter 4.3 regarding capacity building under BBNJ.

can also be found in the *United Nations Convention on Biological Diversity* (CBD) and *United Nations Framework Convention on Climate Change* (UNFCCC).[20]

The requirement for conducting appropriate EIAs allows States of origin interpretative flexibility in determining the extent to which such assessments are feasible. The decision on whether an EIA is necessary is made by competent national authorities, which may depend on the existence and functionality of relevant domestic legislation. For instance, in the critical areas of conserving biological diversity and combating climate change that now have become integral components of nearly all EIAs, limitations persist, relying on the good faith of Contracting Parties to implement comprehensive EIA procedures to the greatest extent possible when their proposed projects or measures might have significant adverse effects. The objectives, prioritized in a hierarchical order, are to avoid, minimize, mitigate, or adapt to these effects.

Since the *Rio Declaration*, EIA obligations have been incorporated into subsequent treaties, addressing a broader range of environmental subject areas, and have been confirmed and accepted by the international community through various bilateral, regional and multilateral binding instruments,[21] notably including the *United Nations Convention on Environmental Impact Assessments in a Transboundary Context* ("Espoo Convention"). Unlike other binding Conventions that primarily outline a provision on EIA and concretize the relevant implementation roadmap in subsequent operational documents, the Espoo Convention was negotiated to directly impose the EIA obligation and its implementation steps on the Contracting Parties. Initially involving Eastern and Western countries, the Convention has

[20] See Article 14(1) of CBD: "Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures; (b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account." Also see UNFCCC, Article 4(1)(f): "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: … (f) [t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change."

[21] Examples include *Convention on the Protection and Use of Transboundary Watercourses and Lakes*, Articles 3(1)(h) and 9(2)(j); *North American Agreement on Environmental Cooperation*, Articles 2(1)(e) and 10(7)(a); *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*, Article 12; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, a.k.a. "Aarhus Convention", Article 6

extended to non-UNECE countries following the treaty amendment in 2001.[22] The direct obligation not only specifies the types of activities and the criteria for identifying those likely to cause significant adverse environmental impacts, thereby necessitating assessment and appropriate measures (Article 2; Appendix I and III), also clarifies the scope, content, and procedural requirements for the inquiry, consultation, and notification process, as well as post-project analysis for an EIA (Article 3, 4, 5 and 7; Appendix II, IV and V).[23]

The Espoo Convention distinguishes itself from most other treaty-based EIA obligations in that, although it initially focused on addressing environmental and water issues within the UNECE countries, it has since evolved to cover a broader range of environmental topics. Unlike discrete international environmental regimes aimed solely at preventing marine pollution, conserving biodiversity, or mitigating climate change, the Espoo Convention addresses cross-cutting environmental issues and activities with uncertain impacts.[24] The evolution reflects the progressive development of international environmental law from the mid-1990s into the 21st century. Despite the remaining fragmentation in their codification, operation, and effectiveness, the extensive treaty provisions and their growing acceptance by States have facilitated the mainstreaming of EIA, transitioning from a supportive tool for specific areas with transboundary environmental concerns to an essential, integrated technical and procedural solution for global commons. Throughout the process, the obligation to conduct EIAs has emerged as a duty beyond merely preventing harm, aligning with risk assessment commitments and methodologies adopted in various areas of international law, as it will be further discussed and summarized in Chapter 3.1.

Moreover, credits should also be given to the gradually improved technical feasibility and reliability of conducting EIAs within given contexts, thanks to a large number of informative documents provided by the competent and experienced international organizations, such as the UNEP *Environmental Impact Assessment and Strategic Environmental Assessment: Towards*

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[22] By 01 April 2012 the Espoo Convention has 30 signatories and 45 Parties. See <https://web.archive.org/web/20120401150128/http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en#1> accessed 13 August 2024

[23] On requiring continuous EIA prior to and during the project operation, see also the Separate Opinion of Vice-President Weeramantry for the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), p. 111: "I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring."

[24] Craik 2008, p. 102

an Integrated Approach, and the *Recommendations of the Council on the Assessment of Projects with Significant Impact on the Environment* of the Organisation for Economic Co-operation and Development (OECD). Although the recommendations and guidelines are, by their very nature, non-binding, their normative significance undoubtly continues to clarify the relationship and interaction between EIA substantive requirements and procedural obligations, including providing and amplifying uniform structure and standard features of EIA processes to be introduced under various circumstances,[25] which makes the efforts to explore and strengthen the coordination and cooperation between different international legal entities (States and international organizations) on the relevant topic both necessary and possible.

Having briefly reviewed the development of EIA as an instrument at the international level and the approaches of States interacting with international organizations in the area, the next part will investigate how the UN system and agencies, showcasing among other international organizations, have been responding to the emerging calls from Member States for a more result-oriented and cost-effective methodology to enhance the complementarity between the analytical and normative activities, and the programming and operational roles of the UN, as indicated by the Secretary-General in his *Report on Environment and Human Settlements* (A/53/463).[26] Therefrom, UN agencies should have their own requirements and approaches to incorporate EIA norms into their organizational agenda for safeguarding environmental and social sustainability.

2.1.2 Environmental and Social Safeguards established across the UN system

Pursuant to the UNGA Resolution A/RES/53/242 that supports the proposal of the UN Secretary-General to establish an environmental management group as part of his *Report on Environment and Human Settlements*,[27] the United Nations Environment Management Group (UNEMG) was established in 2001, consisting currently 52 UN specialised agencies, UN

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[25] Ibid, p. 107. See more detailed discussion under Chapter 3.
[26] UNSG Report *Environment and human settlements*, p. 4
[27] See UNGA Resolution *Report of the Secretary-General on environment and human settlements*, p. 3, para. 5, "*The General Assembly… Supports* the proposal of the Secretary-General regarding the establishment of an environmental management group for the purpose of enhancing inter-agency coordination in the field of environment and human settlements, and requests the Secretary-General to develop, in consultation with the Member States and members of the Administrative Committee on Coordination, the mandate, terms of reference, appropriate criteria for membership and flexible, cost-effective working methods of the proposed environmental management group and to submit them to the General Assembly for consideration at its fifty-fourth session;"

programmes and organs, and secretariats of multilateral environmental agreements.[28] UNEMG fosters UN system-wide coordination, promotes effectiveness of UN agencies' work dedicated in those issues identified by the international environmental agenda with a collective manner and coherent capacity of engagement, and advances environmental and social sustainability in their governance, programmes and projects, operations and facilities through streamlined management and measures responding to the issues.[29]

The UN system-wide strategies and collaboration showcase and highlight the inter-linkages between emerging issues in the context of the UN Sustainable Development Goals (SDGs) and MEAs, and inspire prompt and valid knowledge and information sharing on specific issues to encourage compatible solutions to common problems.[30] Taking advantage of the establishment and basis of the *Framework for Environmental and Social Sustainability in the UN System*,[31] the inter-agency Consultative Process on Advancing the Environmental and Social Sustainability in the UN System has been working under UNEMG since 2016 to provide mechanisms and opportunities for delivering one common approach of environmental and social standards for the programmes and projects delivered in the UN system.[32] The efforts were confirmed at the 24th meeting of senior officials of UNEMG in October 2018, where it called to develop a UN internal sustainability vision and strategy beyond 2020, targeting to ensure the leadership aspirations of the UN system with regards to the internal environmental and social sustainability, and to confirm the UN alignment of its own performance with the principles that UN has been pioneering in the international community.[33] The approach echoed both with the request from the UN Secretary-General to intensify the UN ambition and efforts to combat climate change from within, and also with the external voices from Member States demanding UN to lead by the example of self-evolution. Moreover, such actions prove to be in close consistency with the requirements for safeguarding environmental and social impacts in

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[28] For a full list of UNEMG member organizations, see <https://unemg.org/about-emg/emg-members/> accessed 13 August 2024
[29] UNEMG 2015, p. 1
[30] Ibid, p. 9
[31] *A Framework for Environmental and Social Sustainability in the UN System*, jointly prepared by UNEMG members, is an earlier document outlining the propositions for a common UN system-wide approach, rationale and objective for UN entities to internalize environmental and social sustainability measures, and propose collective actions be undertaken towards environmental and social safeguards. See the document UNEMG 2009, p. 10.
[32] See under <https://unemg.org/modelapproach/> accessed 13 August 2024
[33] UNCEB *Summary of deliberations, Addendum, Strategy for sustainability management in the United Nations system, 2020–2030, Phase I: Environmental sustainability in the area of management*, p. 3, para. 2

the UN-implementing programmes and projects that are supported by international financial institutions (IFIs) or multilateral funding mechanisms.[34]

Building on the progress and experience gained from the collective efforts UN entities over the past decade in measuring, reducing and offsetting the environmental and social impacts of their operations,[35] the sustainability management framework within the UN system was proposed to be divided into two stages for the period of 2020 to 2030. Phase I focuses on integrating environmental sustainability into the UN management domain, emphasizing the ongoing initiatives since 2019 with the aim at reducing environmental impacts through systematically assessing the environmental risks and benefits associated with UN deliveries and incorporating the considerations into the decision-making processes of all United Nations entities. Further, Phase II targets to solidify the commitments made across the UN system by comprehensively addressing and reporting on the environmental and social sustainability of their: a. policies and governance; b. programming and projects; and c. facilities and operations,[36] as part of the implementation of the *UN Sustainability Strategy*.[37] The system-wide exercise of support must be reinforced by the establishment of an institutional focal point at each UN entity.

It is noteworthy that, in the aforementioned three areas, the United Nations System Chief Executives Board for Coordination (UNCEB) conducted a gap analysis to provide valid assessments and a feasible roadmap to achieve the UN system's goal of mainstreaming environmental sustainability into its daily practices. At the level of environmental governance, the necessary human and financial resources to support the mechanisms for coordinating environmental sustainability across or within the UN system have yet to be secured, in order to generate solid and trackable results. Consequently, the extent of achievement and maintenance of environmental and sustainability management currently to relies on the goodwill and creativity of individual UN agencies, who while as competent budgetary entities, are constrained by their respective short-term financing cycles and processes, absence of a framework for accountability and reporting, and unintegrated performance evaluation measures.[38]

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[34] Ibid, p. 3, para. 1-3. See more analysis under Chapter 4.2
[35] Ibid, p. 3, para. 5
[36] Regarding managing facilities and operation across the UN system, ISO 14001 on Environmental Management Systems, together with its Annex 14031, was endorsed by the High-level Committee to serve as a reference. See ibid, p. 5, para. 21 and footnote 3
[37] Ibid, p. 4, para. 13-15
[38] Ibid, p. 8, para. 32-36

Such fragmentation is also evident in the design and delivery of UN programmes and projects, where the UN interventions are asked to address environmental and social impacts to the farthest extent. However, the valuable resources allocated for adopting and applying environmental and social safeguarding measures often served the compliance with specific donor requirements on an ad-hoc basis. Such practice inherently exposes individual programmes and projects implemented by UN entities, the relevant UN agencies, and the entire UN system to financial and reputational risks.[39] Also driven by the above described trend of EIA development at the international level involving States and international organizations, a shift has gradually emerged, calling for donor investment in environmental and social protection to move beyond fragmented, project-based, and site-specific solutions implemented by individual UN programmes and projects. Instead, it advocates for a tandem of establishing, implementing, reporting and evaluating a comprehensive intra-organizational environmental and social management framework applicable to all interventions undertaken by UN agencies, supported by a well-functioning synergy and coordination mechanism across the UN system.[40]

Such efforts are being made at various levels. As early as 2012, Member States affirmed their demand in the UNGA Resolution A/RES/66/288 *The future we want*, appealing for UN system-wide coherence and coordination to ensure its appropriate accountability to Member States through promoting the UN cooperative efforts to reinforce and report on the integration of economic, social and environmental dimensions of sustainable development within the UN system under the existing inter-agency mechanisms and strategies. The objective is to be achieved by exchanging relevant and useful information among the UN agencies, mobilizing funds and supportive programmes, and maintaining close cooperation with IFIs and other relevant organizations.[41] The role of the UN system and entities in supporting to mainstream and achieve the environmental and social sustainable goals have been further re-confirmed in the *2030 Agenda for Sustainable Development* (UNGA Resolution A/RES/70/1), the *Declaration on the commemoration of the seventy-fifth anniversary of the United Nations* (UNGA Resolution A/75/L.1.) and the *Quadrennial comprehensive policy review of operational activities for development of the United Nations system* (UNGA Resolution A/RES/75/233).[42]

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[39] Ibid, p. 8, para. 38-40
[40] See more discussion infra under Chapter 4.2
[41] UNGA Resolution *The future we want*, p. 15, para. 78
[42] UNCEB *Summary of deliberations, Addendum, Strategy for sustainability management in the United Nations system, 2020-2030, Phase II: Towards leadership in environmental and social sustainability*, p. 3, para. 4

Additionally, UNCEB released the Phase II strategy document for sustainability management across the UN System for the period 2020-2030. The document serves as an addendum to the summary of deliberations and provides a comprehensive vision, principles,[43] targets, and outputs for enhancing the environmental and social sustainability management framework at both the UN system-wide level and the individual UN entity level. The Table 1 below highlights the key considerations and guiding strategies to be translated into feasible and grounded internal rules and regulations of UN agencies, and facilitates the identification and benchmarking of critical points for measurement, audit, and accountability of UN system and entity actions and deliveries across all their functions:[44]

Table 1: Highlights of functional outputs of UN environmental and social design, intervention and evaluation

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
UN system-wide coordination	Tracking and reporting of environmental and social sustainability performance of UN in a comprehensive manner	Governance, programme, and management functions	• An entity, or coalition of entities identified to take ownership of the Phase II Strategy, steering its implementation, and facilitating public reporting • Qualitative and quantitative reporting across the functions of governance, programme and management with all sustainability principles • Establishment aligned with the UN topic-specific

[43] The involved environmental and social sustainability principles relate to People *(Applying a human rights-based approach in all our work; Leave no one behind; Pursue gender equality and empower women; Protect the health, safety and security of all; Uphold labour rights), Planet (Protect and restore biodiversity and ecosystems; Prevent pollution and maximize resource efficiency; Take action on climate change), Peace (Prevent conflict; Reduce disaster risk, and foster resilience), and Partnership (Be transparent, inclusive, and accountable)*. More discussions on their legal implications will be provided in the following sections. See ibid, pp. 4-8, para. 12

[44] The table is summarized from ibid, pp. 9-11, para. 16-26, and Annex 3 *Draft proposal for a scorecard to measure progress towards the suggested entity-level outputs*, pp. 19-22

[45] See ibid, p. 4, para. 10 (a) - (c) regarding the categorizations of: Governance functions include policy development, strategic planning, organizational setup, leadership, enterprise risk management, performance management, reporting, and audit. Programme functions include planning, implementation, monitoring and evaluation of programmes and projects. Management functions include facilities management, human resources management, financial management, procurement and supply chain, travel, events management, and ICT.

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
			reporting processes in place for the strategies, frameworks, and action plans to avoid duplication and to foster coherence • Feeding into regular reporting requests and requirements to Member States
	Facilitation of knowledge sharing on the integration of environmental and social sustainability principles across the UN system-wide coordination work	Governance, programme, and management functions	• Knowledge exchange confirmed to strengthen connections between the inter-agency initiatives already in place on the specific aspects of sustainability • Successful experiences on integrating and mainstreaming environmental and social sustainability within UN entities, or synergizing between entities to be shared inside of the UN system and with relevant external partners, to foster greater transparency, cohesion, comparability, and continuous improvement
UN individual entity	Mainstreaming environmental and social sustainability across all the functions	Governance function	• To develop what environmental and social sustainability means for the UN entities with its specific mandate, and recorded in their internal governance documents • Support of senior management of the entity secured and backed by

Level of functioning and output management	**Functional outputs**	**Under governance, programme and/or management function(s)**[45]	**Highlights of design, intervention and evaluation**
			implementation plan and budget. • Built on or integrating existing commitments on specific aspects of sustainable management
	Defining environmental and social sustainability standards for the own work of UN entities	Governance function	• Within its own operational context, clearly defining quality standards, indicators, and targets for the environmental and social sustainability of its work • Complete set of environmental and social sustainability standards of the entity covering all the principles described, developed in consultation with relevant stakeholders and made publicly available
	Mechanism in place for the comprehensive tracking and public reporting of its environmental and social performance	Governance, programme, and management functions	• Comprehensive report on entity performance in the priority dimensions of environment and social sustainability, preferably on an annual basis, and by building on the established reporting mechanisms • Reporting to be transparent and to provide meaningful opportunities for relevant stakeholders to review and share their views • To inform entity-level tracking and reporting in agreement with the scorecard and outcome indicators for environmental and social sustainability on a voluntary base

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
	Procedures in place to ensure the mainstreaming of environmental and social sustainability across its programming	Programme function	• To build procedures into each stage of the programme cycle (design, implementation, monitoring, and evaluation) to ensure the compliance of its programmes and projects with the entity's environmental and social standards at all times • Environmental and social risks and impacts of programmes and projects identified and managed through appropriate due diligence processes
	Procedures in place to ensure that its implementing partners adhere to the environmental and social standards of the entity when delivering UN programming[46]	Programme function	• Approach, framework, or procedures in place to provide guidance to implementing partners on the environmental and social standards of the entity, use due diligence to prevent or mitigate environmental or social harm with the environmental and social management systems in place • Equally puts mechanisms in place that can be activated in case implementing partner fails to adhere to the environmental and social standards of the entity. Ideally, all agreements with implementing partners and fund recipients should outline the roles of all the parties in complying with the

[46] The functional output is essential when a UNCEB member also become an implementing partner to another UNCEB member – see relevant discussion under Chapter 4.2.

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
			entity's environmental and social standards.
	Procedures in place to ensure that primary suppliers apply the UN environmental and social standards	Management function	• Aspiring UN procurement of goods and services to integrate sustainability considerations and committed to public reporting • Defining sustainable procurement, producing set of sustainable procurement indicators, and Supplier Code of Conduct to raise awareness and strengthen the use of these instruments to further integrate sustainability considerations in the procurement policies and processes of UN entities
	Procedures in place to evaluate and continually improve the environmental and social sustainability of the UN entity	Programme functions	• The pathway towards leadership in environmental and social sustainability management is complex and calls for constant evaluation and adaptive learning. The entity-level tracking and reporting of sustainability needs to be used to evaluate the progress of the entity towards its sustainability standards and targets, and to make adjustments to the processes put in place. This iterative cycle of constant evaluation and adaptive learning is central to good management and can be applied to all the aspects of sustainability (although it may have to be tailored to the different functional areas). The Sustainability Strategy I

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
			already includes the commitment that all entities will put an environmental management system in place to gradually improve the environmental performance of their management functions.
	Appropriate human and financial resources in place to ensure the mainstreaming of environmental and social sustainability across all the functions	Management function	• Mobilizing human resources, with clear accountabilities and adequate financial resources, to promote environmental and social sustainability and coordination across all the functional areas of the entity • Dedicate human resource for sustainability capacity building, coordination, internal accountability of personnel on the delivery of sustainability commitments etc.
	Mechanisms in place for accountability and remedy on the issues of environmental and social sustainability	Governance function	• Introduce mechanisms to allow stakeholder groups to hold internal (between the governing body, management, and employees of the entity) and external (towards the governments and people) accountability system on the delivery of the environmental and social sustainability commitments • Mechanisms for accountability in place to commensurate to the severity and likelihood of environmental and social risks that the entity incurs • To ensure affected parties have access to effective

Level of functioning and output management	Functional outputs	Under governance, programme and/or management function(s)[45]	Highlights of design, intervention and evaluation
			remedy through legitimate, transparent, and accessible grievance redress processes and mechanisms

Upon the requirements in the Phase II strategy endorsed by UNCEB for sustainability management across the UN System during the period of 2020-2030, UNEP has been releasing the *Greening the Blue Report* to provide the UN system-wide and entity-level data annually on their environmental impacts and management functions, and highlight the progress made by the UN entities through their efforts in promoting sustainability.[47] The below diagram presents the UN system-wide statistics for the status 2022 on the progressive development within the UN entities, to address the current environmental and social safeguards in their functional areas:[48]

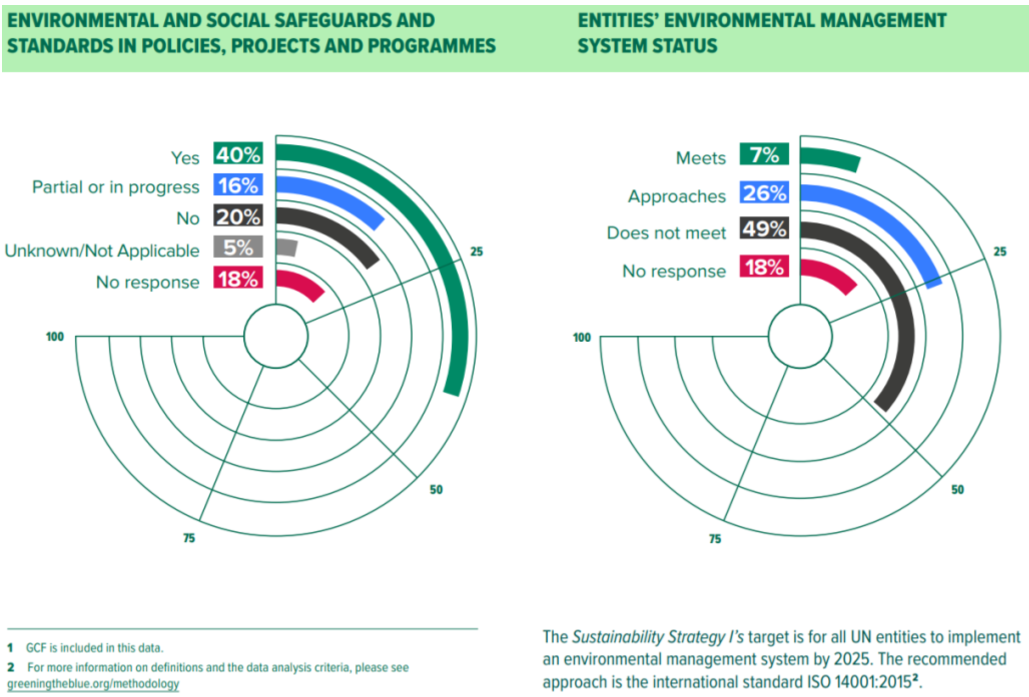

Figure 1 UN system-wide statistics (2021) on the status of UN entities' environmental and social safeguards

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[47] UNEP *Greening the Blue Report*, p.1

[48] Ibid: p.7. For a completeness report on the environmental management system for each UN entities, the latest available data for 2021 could be found under <https://cdn.unenvironment.org/gtb/public/202212/UN_Entities_Reporting_Completeness_2021_data.pdf?_ga=2144379063.366799077.1690831184-1119266657.1688225209>, accessed 31.07.2023

Another critical normative product released by UNEMG[49] in accordance with the strategy guidelines from UNCEB is the UN Model Approach. The next part will use the toolkit document as an example to showcase the norm of environmental and social sustainability safeguard across the UN system, presenting the applicable management framework and impact assessment conducted with the mainstreamed principles in international environmental law, and its relevant endorsement and compliance by the UN entities.

2.2 Reflection through the principles of international environmental law

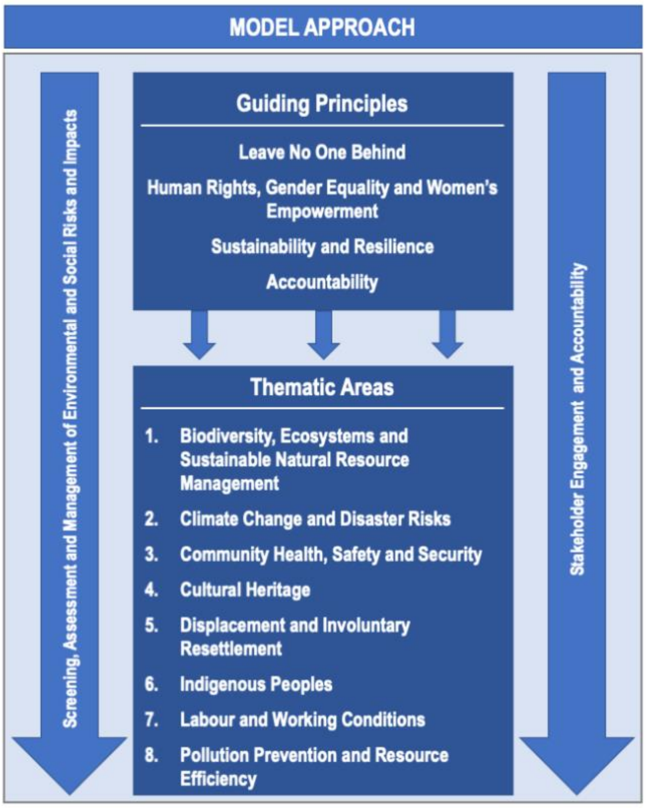

Figure 2 Logic design of the UN Model Approach

Published in July 2019 by UNEMG, the document *Moving towards a Common Approach to Environmental and Social Standards for UN Programming* (hereafter referred as "UN Model Approach") serves as a guiding and benchmarking reference to set forth a comprehensive package of thematic requirements and processes that are typically to be addressed at the entity level (see Figure 2). Drawing from the wide range of normative and operational expertise across the UN system, it builds upon the valuable insights gained from the previous experiences, and targets to enhancing the sustainability and accountability of UN-entity programming and fostering its better coordination and cooperation with national governmental and non-governmental counterparts for the programming, implementation and evaluation, which should be in compliance with safeguarding human and environment from potential negative effects of the proposed interventions, and ensure access and opportunities of relevant stakeholders to be involved and engage in the entire process of UN programming with effective channels to have their voices

[49] The work of development was co-chaired by UNDP and IFAD, and consulted and co-drafted with FAO, ILO, UNEP, UNICEF, UN-Habitat, WFP and other UN agencies. See UNEMG 2019, p. 4, para. 7.

heard and respected.[50] Each UN entity is encouraged to harmonize its environmental and social standards and safeguards with those outlined in the UN Model Approach on a voluntary basis, to make sure the alignment with their specific mandates, internal governance systems for programming and risk management as well as other commitments and obligations they hold particularly pertaining to environmental and social sustainability.[51]

Under Chapter 2.1, the citations from the multilateral agreements outline most of the EIA provisions conceptualized with the objective of preventing transboundary harm. Throughout the history of developing international environmental law, the duty to prevent harm and the extended "no harm" rule or preventive principle were among the first to be recognized and adopted by international communities. The classic guiding philosophy behind this is that a State's use of sovereignty over environmental resources within its territory should not infringe upon the equal rights and entitlements of others. The obligation to conduct due diligence to prevent transboundary harm has been widely accepted as customary international law and a general principle of international law, with multiple confirmations by, for instance Principle 21 of the *Stockholm Declaration of the United Nationals Conference on the Human Environment*,[52] Principle 2 of the *Rio Declaration of Environment and Development*,[53] and the *Draft Articles on Prevention of Transboundary Harm*[54] and *Report on the Protection of the Atmosphere*[55] of the International Law Commission (ILC).

In this regard, when the requirement to conduct an EIA has become one of the main environmental protection techniques, naturally it is necessary to ensure that the environmental impact assessment is carried out in accordance with the principle of harm prevention,[56] as recognized by the jurisprudence of the International Court of Justice regarding the *Pulp Mills* case, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa*

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[50] UNEMG *Model Approach to Environmental and Social Standards*, p. 6, para. 1

[51] Ibid, p. 6, para. 3

[52] Article 21 of the Stockholm Declaration states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[53] Principle 2 of the Rio Declaration reads: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[54] ILC *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, Article 3: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."

[55] See ILC *Third report on the protection of the atmosphere*, pp. 343-346, para. 20-33

[56] Ndiaye 2018, p. 28

Rica).[57] The commitment is also affirmed at both the UN-system and -entity levels through the regulatory UN Model Approach designed to ensure that their development and humanitarian efforts are in alignment with the robust UN environmental and social standards and related accountability mechanisms,[58] and the interventions do not inadvertently harm to the environment.[59] Yet this is just the starting point. The UN Model Approach further advocates taking a risk-informed path when addressing environmental and social risks and impacts, extending beyond merely avoiding harm[60] by reinforcing precautionary measures against challenges potentially affecting biodiversity, ecosystems and communities when faced with serious threats despite lacking full scientific certainty.[61]

To ensure the knowledge or foreseeability of significant harm on environment is considered either as a key subjective condition of the due diligence to carry out an EIA (as in UNCLOS Article 206), or as the result of a properly conducted EIA to guide further actions.[62] Both rely heavily on the scientific capacity and accuracy that the EIA should support. The value of EIA is demonstrated through its combination of the precautionary principle with the preventive principle against environmental damage, and by allowing public participation.[63] On the one hand, the enabling boundaries of EIA are well recognized by the precautionary approach, and hence, an alternative solution could possibly be sought. On the other hand, when understanding the precautionary approach mainly as a "procedure" for managing risks and influencing further

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[57] See the ICJ Judgment of 20 April 2010 on *Pulp Mills*, p. 83, para. 204: "[t]he obligation to protect and preserve … has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource." See also the ICJ *Judgment of Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, pp. 45-46, para. 104, and p. 59, para. 153. In the latter the ICJ holding reiterates that "a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity."

[58] See more relevant discussions in Chapter 3.

[59] UNEMG *Model Approach to Environmental and Social Standards*, p. 3, para. 3. For the duty to do no harm by multilateral development banks, see Richard 2017, p. 329

[60] Ibid, p. 9, para. 18

[61] Ibid, p. 20

[62] See also the ICJ *Order for the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, para. 5: "by virtue of specific treaty undertakings (in the *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region of 25 November 1986* or 'Noumea Convention') and customary international law derived from widespread international practice, France has an obligation to conduct an environmental impact assessment before carrying out any further nuclear tests […] in accordance with the 'precautionary principle' very widely accepted in contemporary international law."

[63] ILC *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, Commentary to Article 7, para 4, p. 158

decision making, as argued by some scholars, EIA plays a pivotal role in establishing a solid foundation for a comprehensive and objective risk assessment to support the process. Furthermore, if the application of the precautionary principle involves shifting the burden of proof, EIA will then hold a central position in collecting the necessary information to prove the due diligence of the involved parties engaging in the potentially risky situations and their knowledge of the impact of their activity.[64]

In practical scenarios, lacking in time, competencies and/or resources could impede the attainment of robust and well-founded scientific evidence through conducting an EIA. However, these limitations should not serve as an excuse to delay the implementation of effective preventive measures. The adoption of a precautionary approach does not necessitate a strong factual correlation to contemplate whether the conduct should be suspended. Instead, it seems to dictate the duty of means rather than outcomes.[65] The expanding from a "no harm" stance to the precautionary principle proves advantageous in managing the absence of absolute scientific certainty and the limitations of human capacity to anticipate long-cycle and residual risks, irreversible environmental damage from planned activities, and waste of resources. Consequently, numerous United Nations agencies choose to adopt the precautionary approach in their environmental and social safeguards to align with the UN Model Approach, particularly evident in areas of biodiversity protection, natural habitat management, resource efficiency promotion, and pollution prevention to address significant environmental and social challenges.[66]

The adoption of a precautionary approach by UN entities in leading EIAs is also supported by the close interconnectedness between the approach and the UN's mandate to advance sustainable development. Precaution is central to sustainable development in emphasizing the commitment of States, international organizations and civil society to avoid activities that may cause significant loss or damage to natural resources and ecosystems, especially when facing scientific uncertainty. Sustainable development requires the precautionary approach to aim at environmental protection and sustainable utilization of natural resources, to invoke programming based on clearly defined criteria and well established objectives, in deliberation

[64] Trindade 2015, p. 17, para. 2

[65] See the *Rio Declaration*, Principle 15: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[66] See for instance IFAD *Social, Environmental and Climate Assessment Procedures*, volume 1, p. 12; UNDP *UNDP's Social and Environmental Standards (SES)*, p. 66; and UNEP *Environmental, social and sustainability framework*, p. 7, where precautionary approach is explicitly expressed to be taken.

of all possible means during the EIA process (including, in some cases, deciding not to proceed with a proposed activity), and establishing accountability mechanisms for any harm caused.[67] The key element of the linkage is the shared temporal dimension between the sustainable development and precautionary approach, both targeting to protect future generations and preserve the Earth from environmental degradation and resource depletion caused by human activities.[68] This highlights a gradual paradigm shift since the 1980s, when EIA focused solely on preventing transboundary harm, to a more inclusive approach in recent decades addressing the concerns related to global commons and impacts that extend beyond the limitations of national jurisdictions and state responsibilities.[69]

The International Tribunal for the Law of the Sea (ITLOS) was among the first to ascertain that "the obligation to conduct an environmental impact assessment is a direct obligation under the Convention[70] and a general obligation under customary international law."[71] The duty to conduct EIA, encompassing all its essential elements – preventive principle; precautionary approach; sustainable development; treaties, customary international law, and general principles of international law as legal basis; notification, cooperation and public participation; its internalisation and integration into domestic ruling and decision-making processes etc. – has progressively developed over the past forty years. It is now widely accepted as both unanimous requirement by States and the international community, and as inherent determination confirmed by the UNCEB Strategies and the UN Model Approach for the UN system and entities to follow. Some of the indispensable EIA elements have been discussed above, some will be explored in further chapters, while several in international environmental law that support or are supported by EIA, such as the duty to cooperate, are in no need of elaboration given the very nature and mission of the UN system and entities. The next chapter will examine the substantive and structural composition of ESIAs currently adopted and applied by UN agencies, addressing the main body of the thesis and the research question.

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[67] International Law Association, *New Delhi Declaration of principles of international law relating to sustainable development*, Article 4.1 and 4.2, para. 5
[68] Trindade 2015, p. 18, para. 4
[69] ITLOS *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* 2011, p. 51, para. 148
[70] i.e. UNCLOS
[71] Ibid, p. 50, para. 145

Chapter Three ESIA adopted and applied by international organizations

3.1 Substantive scope of ESIA by international organizations and the legal basis

Pursuant to the decisions of UNCEB and the proposed UN Model Approach, each UN entity articulates its strategic commitment to advancing the *2030 Agenda for Sustainable Development*. The commitment is to be achieved through the implementation of systematic measures for conducting ESIAs embodied in their ruling environmental and social safeguards. The individual environmental and social management frameworks form the foundation of the UN entities' obligations, ensuring that environmental and social sustainability is integrated into the programming, evaluation and reporting processes of each UN entity, aiming to maximize environmental and social opportunities and benefits for relevant stakeholders and Member States, and striving to avoid, minimize, mitigate and manage adverse environmental social and risks.[72]

In the course of formulating and executing environmental and social safeguard strategies, UN entities acknowledge, adopt and apply both binding and non-binding international legal instruments as essential governance and guidance. Among those, international conventions pertinent to environmental conservation, notably the MEAs delineated in Chapter 2.1.1 – including the *Espoo Convention*, UNCLOS, UNFCCC, CBD – are prevalently referred by international organizations to contextualize and stipulate their ESIA commitments and requirements.

Another pivotal source for solidifying ESIA knowledge and operational standards is the regulatory and managerial requirements set by IFIs for the programmes and projects seeking their financing. The requirements impose the ESIA obligation directly on international organizations as project implementing partners or indirectly through borrowing States. Prominent examples of the IFIs include the World Bank, regional development banks, and multilateral financial mechanisms such as the Global Environment Facility (GEF)[73] and the

[72] *UNDP's Social and Environmental Standards*, p. 4

[73] GEF was established through a partnership among the World Bank, UNEP, and UNDP. The World Bank serves as the Trustee for the GEF. The creation of GEF visions to serve as grant and concessional financing mechanism to achieve the objectives of the major environmental treaties adopted at the Rio Conference, including CBD, UNFCCC, the *Stockholm Convention on Persistent Organic Pollutants*, the *United Nations Convention to Combat Desertification*, the *Minamata Convention on Mercury*, the *Montreal Protocol on Substances that Deplete the Ozone Layer*, as well as a number of multilateral agreements on international waters and transboundary water systems. The Rio Conference identified IFIs as key actors in the global blueprint for achieving sustainable development – see <https://www.thegef.org/partners/conventions> accessed 12 August 2023, also Di Leva 2010, p. 347, 373

Green Climate Fund (GCF)[74].The IFIs operate within the framework of multilateral environmental agreements, and support to fund sustainable development initiatives in developing countries and transition economies, with the aim of generating global environmental common goods.

The third major source of ESIA is international soft law,[75] such as the UNEP *Environmental Impact Assessment and Strategic Environmental Assessment*[76] and the CBD Draft EIA Guideline.[77] The documents, though are not formally binding, strive to cover as comprehensive as possible the generic elements of good practice that are internationally accepted and widely applicable, thereby holding strong persuasive value to demonstrate their prominence and the consensus surrounding their adoption.[78] Furthermore, customary international law formed through consistent State practices, along with the principle of *opinio juris*, contribute to establishing valid criteria and proposing effective measures for UN entities to manage environmental and social impacts and risks. Such measures include protecting the customary sustainable use of biological resources in respect of biodiversity, clarifying customary tenure rights and collective or communal land ownership, and identifying customary cultural heritage, rights and distinctiveness as key characteristics of indigenous peoples.[79] Ultimately, the influence of customary international law may lead to the recognition of such criteria independently from their treaty incorporation "by virtue of the obligation of due diligence if international support is sufficiently widespread and representative."[80]

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[74] GCF was launched at the 17th Conference of the Parties (COP) of UNFCCC in 2011 to contribute to the achieving the ultimate objective of UNFCCC through promoting "the paradigm shift towards low-emission and climate-resilient development pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change, taking into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change". See Decision 3/CP.17 *Launching the Green Climate Fund* in *United Nations Framework Convention on Climate Change*, Conference of the Parties *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Addendum Part Two: Action taken by the Conference of the Parties at its seventeenth session, Contents: Decisions adopted by the Conference of the Parties*, as well as under <https://www.greenclimate.fund/sites/default/files/document/governing-instrument.pdf> accessed 12 August 2023

[75] Despite that it is hard to precisely define "soft law", the thesis opts to include under the category of "soft law" resolutions, programmes of action, recommendations, adopted reports of international organizations or by international conferences, and non-binding annex to legally binding agreements. See Thürer's explanations under "Soft Law" of the *Max Planck Encyclopaedias of International Law*, 2009, para. 2 and para. 10

[76] See UNEP *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach*, available under <https://wedocs.unep.org/bitstream/handle/20.500.11822/8753/Environmental_impact_assessment.pdf?sequence=3&amp%3BisAllowed=> accessed 12 August 2023.

[77] i.e. UNEP *Impact assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*

[78] Craik 2008, p. 88

[79] Generally stated by the UN Model Approach

[80] Murase 2016, p. 11, para, 23

Table 2 below presents the results of the screening efforts of this thesis, which examines: 1) which UNEMG members[81] and examples of IFIs have released their own full-fledged environmental and social safeguards/management framework, characterized as rules and regulations of the international organization, both *de jure* and *de facto*;[82] and 2) in those published documents, what relevant international treaties, IFI guiding requirements, soft laws, customary international law, and other meaningful normative instruments and international best practices are explicitly cited as the substantive basis for defining applicable principles and standards in the thematic areas mainstreamed by ESIA:

Table 2. Substantive scope[83] of ESIA by international organizations[84] and the relevant international legal/normative instruments

Principles/ Standards of Thematic Areas	Examples of adopting funding institutes	Examples of adopting international organizations	Relevant international treaties/ soft laws/ customary international law/ international best practices/ norms
Access and spatial justice		UN-HABITAT	• UNGA Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*
Accountability, grievance and conflict resolution mechanisms	GEF	FAO, UNDP, UNFPA, WFP	• *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (*"Aarhus Convention"*) • Article 19 of the *Universal Declaration on Human Rights*

[81] Lists of the UNEMG member organizations can be found under <https://unemg.org/about-emg/emg-members/> accessed 29 August 2024

[82] A list of the released comprehensive environmental and social safeguards/management framework by the international organizations quoted in Table 2 could be found under the Bibliography – *Management framework documents adopted by the international organizations enclosing their commitments to conduct ESIA* at the end of this thesis.

[83] The scope describes a mixture of principles and standards at different intra-organizational levels (the governance level, programme level and management functional level, see supra note 45). Besides, although international human rights law and all of the issues related to its system are not the topic covered by this thesis, their relevance to the environmental and social management frameworks of the international organizations are nevertheless provided in the matrix, because of their significance to the conceptualization and envisagement of protecting social rights as another pillar of ESIA. Correspondingly, the right to a healthy environment and the duty to protect and preserve the environment for present and future generations have been recognized as part of the international human rights law (see, for instance, the *African Charter on Human and People's Rights*, Article 16 *Right to Health*, and Article 24 *Right to Satisfactory Environment*). Therefore, conducting impact assessments facilitates to ensure the compliance with those rights and promote sustainable development aligning with the relevant human rights obligations.

[84] The screening exercise for the international organizations/IFIs enlisted in Table 2 is based on the publicly accessible information and documents with respect to their environmental and social safeguarding measures relating to the programme function. It should be noted that certain documents and measures implemented by some international organizations remain internal and are not publicly accessible, as referenced in the *Greening the Blue Report*, supra note 48, Chapter 2.1.2.

			• Article 25 of the *International Covenant on Civil and Political Rights* • Article 5(c) of the *International Convention on the Elimination of All Forms of Racism* • *Convention on the Elimination of All Forms of Discrimination Against Women* (multiple articles) • Articles 12,13, 15 of the *Convention on the Rights of the Child* • Articles 3 and 29 of the *Convention on the Rights of Persons with Disabilities* • *UN Declaration on the Rights of Indigenous Peoples* (multiple articles) • Article 2 of the *Declaration on the Right to Development* • *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation* • Principle 10 of the *Rio Declaration and Bali Guidelines* • *UNHRC Guiding Principles on Business and Human Rights*
Biodiversity conservation, ecosystems protection, and sustainable management of living natural resources	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF,[85] WFP	• *Convention on Biological Diversity* • *Cartagena Protocol on Biosafety* • *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* • *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, CBD Decision* • *Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species, CBD Decision VI/23, Annex* • *CBD Voluntary Guidelines on Biodiversity-inclusive Impact Assessment, CBD Decision VIII/28* • *Convention on Conservation of Migratory Species*

[85] The Environmental and Social Standards of UNICEF were expected to be finalized in late 2023, and the development of the UNICEF projects has been already informed by the learnings therefrom. See UNICEF *Emergency Social Protection Enhancement and COVID-19 Response Project (ESPECRP) (P173582) and Additional Financing (P177020) Environmental and Social Management Framework*, 2022, p. 4, footnote 3.

			• *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and CITES Appendices* • *International Treaty on Plant Genetic Resources for Food and Agriculture* • *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)* • *World Heritage Convention* • *Convention to Combat Desertification* • *International Plant Protection Convention* • *International Convention for the Regulation of Whaling* • *United Nations Supplier Code of Conduct* • *IFC Good Practice Note on Improving Animal Welfare in Livestock Operations*
Climate change mitigation, adaptation and disaster risk reduction	GEF	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF, WFP	• *United Nations Framework Convention on Climate Change,* and Kyoto Protocol and Paris Agreement • *Montreal Protocol and Kigali Amendment* • *Sendai Framework for Disaster Risk Reduction* • UNGA Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*
Community health, safety, security and conflict sensitivity	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF, WFP	• *UNECE Convention on the Transboundary Effects of Industrial Accidents* • *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage* • *UNIDSR, Words into Action Guidelines: Implementation Guide for Man-made and Technological Hazards* • *UNISDR, Words into Action Guidelines: Natech Hazards and Risk Assessment* • *World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines)* • *UNECE/WHO Protocol on Water and Health* • *WHO guidance on health impact assessments*

			• *FAO Manual on Small Earth Dams: A Guide to Siting, Design and Construction*
Compliance with applicable domestic and international laws		UN-HABITAT	• *Universal Declaration of Human Rights* and other international human rights instruments • UNGA Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*
Cultural heritage	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF	• *Convention on the Protection of Copyright and Neighbouring Rights* • *Convention on the Fighting Against the Illicit Trafficking of Cultural Property* • *Convention on Protection of Cultural Property in the Event of Armed Conflict* • *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* • *Convention on the Protection of the World Cultural and Natural Heritage* • *Convention for the Protection of the Underwater Cultural Heritage* • *Convention on the Safeguarding of the Intangible Cultural Heritage* • *Convention for the Protection and Promotion of the Diversity of Cultural Expressions* • *Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* • *ICOMOS Guidance on Heritage Impact Assessments for Cultural World Heritage Properties* • *IUCN*[86] *World Heritage Advice Note on Environmental Assessment*
Financial intermediaries and direct investments	IFAD, World Bank		
Gender equality and women's and girl's		FAO, UNDP, UNFPA, UN-	*Convention on the Elimination of All Forms of Discrimination against Women*

86 Regarding the ESIA conducted by IUCN, see <https://www.iucn.org/sites/dev/files/iucn_esms_esia_guidance_note.pdf> accessed 07 August 2023

empowerment, including handling and responding to sexual harassment, and prevention of gender-based violence, sexual exploitation and abuse		HABITAT, WFP	
Human rights and protection (including for disadvantaged or vulnerable individuals or groups, and persons with disabilities)	GEF	FAO, UNDP, UNFPA, UN-HABITAT, WFP	• *Charter of the United Nations, Article 1, para. 3* • *International Convention on the Elimination of All Forms of Racial Discrimination* • *International Covenant on Civil and Political Rights* • *International Covenant on Economic, Social and Cultural Rights* • *Convention on the Elimination of All Forms of Discrimination against Women* • *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* • *Convention on the Rights of the Child* • *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* • *International Convention for the Protection of All Persons from Enforced Disappearance* • *Convention on the Rights of Persons with Disabilities* • *Universal Declaration of Human Rights* • *United Nations Development Group (UNDG) Statement of Common Understanding of the Human Rights-Based Approach to Development Cooperation and Programming* • *UN Basic Principles on the Use of Force and Firearms by Law Enforcement officials* • *UN Code of Conduct for Law Enforcement Officials* • *Voluntary Principles on Security and Human Rights*

			• *International Code of Conduct on Private Security Providers*[87]
Indigenous peoples	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF	• *United Nations Declaration on the Rights of Indigenous Peoples* • *United Nations Development Group Guidelines on Indigenous Peoples' Issues* • *Convention concerning Indigenous and Tribal Peoples in Independent Countries* • *ILO Convention 169 on Indigenous and Tribal Peoples* • *CBD The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD Decision X/42*
Labour, working conditions and decent work	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF	• *UN Convention on the Rights of the Child, Article 32.1* • *ILO Convention 87 on Freedom of Association and Protection of the Right to Organize* • *ILO Convention 98 on the Right to Organize and Collective Bargaining* • *ILO Convention 29 on Forced Labour and its Protocol of 2014* • *ILO Convention 105 on the Abolition of Forced Labour* • *ILO Convention 138 on Minimum Age (of Employment)* • *ILO Convention 182 on the Worst Forms of Child Labour and ILO Worst Forms of Child Labour Recommendation (No. 190)* • *ILO Convention 100 on Equal Remuneration* • *ILO Convention 111 on Discrimination (Employment and Occupation)* • *ILO Convention 155 on Occupational Safety and Health* • *ILO Convention 161 on Occupational Health Services* • *ILO Convention 167 on Safety and Health in Construction* • *ILO Convention 184 on Safety and Health in Agriculture*

[87] See *UNDP Social and Environmental Standards*, p. 26, footnote 68.

			• *ILO Convention 176 on Safety and Health in Mines* • *UN Convention on the Rights of the Child, Article 32.1* • *UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* • *UN Convention against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the "Palermo Protocol")* • *ILO Declaration on Fundamental Principles and Rights at Work* • *ILO Guidelines on Occupational Safety and Health Management systems* • *UN Common System Occupational Safety and Health Framework* • *IFC General Environmental Health and Safety Guidelines (EHSGs) on Occupational Health and Safety*
Land acquisition, land tenure, restrictions on land use, involuntary physical and economic displacement and resettlement	IFAD, GEF, GCF, World Bank	FAO, UNDP, UNEP, UNFPA, UN-HABITAT, UNICEF	• *UN Committee on Economic, Social and Cultural Rights, General Comment No. 7: The right to adequate housing, Art. 11(1): Forced evictions* • *UN Basic Principles and Guidelines on Development-based Evictions and Displacement* • *UN Habitat/OHCHR, Forced Evictions, Fact Sheet No. 25/Rev.1* • *FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* • *OHCHR/UN Habitat, The Right to Adequate Housing* • *Universal Declaration of Human Rights* • *International Covenant on Economic, Social and Cultural Rights*
Leave no one behind and reaching the furthest behind first – inclusiveness		FAO, UNDP, UNFPA, UN-HABITAT	• *Guiding Principles for UN Sustainable Development Cooperation Frameworks* • *ILO Declaration on Fundamental Principles and Rights at Work* • *UNCEB Leaving No One Behind: A Shared United Nations System Framework for Action*

Resource efficiency, waste and pollution prevention and management, (zero-carbon development)	IFAD, GEF, GCF, World Bank	FAO, UNDP UNEP, UNFPA UN-HABITAT, UNICEF, WFP	• *Montreal Protocol on Substances that Deplete the Ozone Layer* • *Minamata Convention on Mercury* • *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* • *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* • *Stockholm Convention on Persistent Organic Pollutants* • *UNECE Convention on Long-range Transboundary Air Pollution* • *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* • *Guidelines for good practices in relation to the human rights obligations related to the environmentally sound management and disposal of hazardous substances and wastes* • *World Bank Group's Environmental, Health and Safety Guidelines* • *UNDP's Guide for Integrating the Sound Management of Chemicals into Development Planning* • *WHO/FAO International Code of Conduct on Pesticide Management* • *FAO/WHO Guidelines on Highly Hazardous Pesticides* • *WHO Recommended Classification of Pesticides by Hazard* • *FAO Voluntary Guidelines for Sustainable Soil Management* • *FAO/WHO Guidelines on Management Options for Empty Pesticide Containers* • *FAO and ITPS (Intergovernmental Technical Panel on Soils) Protocol for the assessment of Sustainable Soil Management* • *UNEP Strategic Approach to international Chemicals Management*
Screening, assessment, management and monitoring of	GEF, GCF	FAO	*UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context* and its *Protocol on Strategic Environmental Assessment*

environmental and social risks and impacts			
Sustainability and resilience		FAO, UNDP, UNFPA, UN-HABITAT	• *Rio Declaration on Environment and Development, Principle 15* • UNGA Resolution *Transforming our world: the 2030 Agenda for Sustainable Development* • *UN Common Guidance on Helping Build Resilient Societies*
Stakeholder engagement and information disclosure	World Bank	FAO	• *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (*"Aarhus Convention")*, and its *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums* • *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement")* • Article 19 of the *Universal Declaration on Human Rights* • Article 25 of the *International Covenant on Civil and Political Rights* • Article 5(c) of the *International Convention on the Elimination of All Forms of Racism* • *Convention on the Elimination of All Forms of Discrimination Against Women* (multiple articles) • Articles 12,13, 15 of the *Convention on the Rights of the Child* • Articles 3 and 29 of the *Convention on the Rights of Persons with Disabilities* • *UN Declaration on the Rights of Indigenous Peoples* (multiple articles) • Article 2 of the *Declaration on the Right to Development* • *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation* • Principle 10 of the *Rio Declaration and Bali Guidelines*

			• *UNHRC Guiding Principles on Business and Human Rights* • *UNECE Good practice recommendations on public participation in strategic environmental assessment prepared under the Protocol on SEA in consultation with the Aarhus Convention constituencies*

3.2 Procedural and operational commonalities of managing environmental and social impacts by international organizations

The architecture of the safeguard frameworks for environmental and social impact and risks in the UN entities presents more convergence than divergence. Generally aligning with the structure outlined in the UN Model Approach (Figure 2 under Chapter 2.2), the UN agencies have designed or adjusted their frameworks to include: a) an overarching regulation statement with general objectives, commitments and guiding principles; b) a series of thematic safeguard standards and requirements, complete with methodologies and measurable criteria; and c) a set of execution procedures and processes for streamlining.[88] After reviewing the first two parts, this subchapter will continue to examine how to operationalize the two supporting pillars of environmental and social safeguard framework: screening, assessment and management of environmental and social risks and impacts; and stakeholder engagement and accountability.[89]

When initiating each new programme or project, with the preliminary information of its type, nature, proposed location, possible scale etc., the screening exercise should start, case by case, to identify the potential significance and level of environmental and social risks – including direct, indirect, cumulative, and transboundary impacts, as well as those related to associated facilities – within the given scope of the planned UN interventions. The outcome will be the assignment of a risk category.[90] The screening and categorization process should occur as early

[88] Jenkins 2018, p. 4, para. 9
[89] Observation on the existing framework documents shows some of the international institutions – such as GEF, GCF and FAO – present certain thematic areas, including *Screening, assessment, management and monitoring of environmental and social risks and impacts*; *Stakeholder engagement and information disclosure*; and *Accountability, grievance and conflict resolution mechanisms* as stand-alone safeguard standards, while others present these elements as cross-cutting procedural dimensions. See ibid, p. 4, para. 11
[90] See *World Bank Environmental and Social Framework*, Module 2 – *Assessment and Management of Environmental and Social Risks*, p. 5. Also refer to Article 5 *Screening* of the *Protocol on Strategic Environmental Assessment to the Espoo Convention* <https://unece.org/DAM/env/eia/documents/legaltexts/protocolenglish.pdf> accessed 16 August 2024

as possible in the programme or project envisaging phase, continue through distinct planning stages, well in advance of the approval of planned activities, and be updated accordingly. [91]

The result of individual risk categorization will often lead to one of the three risk levels – High, Moderate, or Low. Each level will be accompanied by specific scoping arrangements to plan the focus of environmental and social impact assessment, outlining the methods to be used, the data and information to be collected and consolidated, the level of efforts to be engaged for capturing a thorough understanding, the appropriate and feasible options available for mitigating risks and managing impacts, and the preparation of Terms of Reference for conducting the environmental and social impact assessment, analysis or management plan:[92]

- Programming or projects that are categorized as high-risk are those anticipated to have a potential to cause significantly irreversible, cumulative or unprecedented adverse environmental and social impacts. These programming or projects may also raise substantial concerns among potentially affected communities and individuals, and/or their effects may extend beyond the defined scope and area of the programming or projects. When a project is classified as high-risk, it will trigger comprehensive forms of actions, including necessitating the UN entity to lead and carry out a thorough Environmental and Social Impact Assessment or a Strategic Environmental and Social Assessment, based on which a formal and full-fledged Environmental and Social Management Framework or Commitment Plan should be developed to cover the entire cycle of the programming or project.[93]
- Programming or projects classified as moderate-risk are those evaluated with the potential to result in limited, predictable, and reversible negative environmental and social impacts within the scope of the programming or project. The classification of a programming/project as moderate-risk may encompass a wide range of activities varying according to the predicted extent of the environmental and social risks and impacts, including conducting targeted and profound environmental and social impact analysis, applying mitigating or corrective measures in a fit-for-purpose management plan that aligns with recognized international best practices, and enhancing prompt and constant stakeholder consultation and public notification, among others.[94]

[91] UNEMG *Model Approach to Environmental and Social Standards*, p. 18, para. 6-7
[92] See *World Bank Environmental and Social Framework*, Module 2 – *Assessment and Management of Environmental and Social Risks*, p. 5. Also refer to Article 6 *Scoping* of the *Protocol on Strategic Environmental Assessment to the Espoo Convention*.
[93] UNEMG *Model Approach to Environmental and Social Standards*, p. 19
[94] Ibid, pp. 18-19

- Programming or projects classified as low-risk are those estimated to have minimal or negligible negative and controversial environmental and social risks and impacts. When a project is categorized as low-risk, it typically does not require further environmental and social analysis or additional measures. However, the guiding principles of the UN Model Approach, stakeholder engagement, and access to complaint and grievance processes are still applicable.[95]

The table below offers a summary of how the UN agencies categorize their programmes and projects. It also outlines the corresponding actions required to be taken for managing environmental and social risks and impacts:[96]

Agency	Screening/Categorization		Assessment	Management
FAO	High	Significant, irreversible, cumulative	Full ESIA	Env/Social Commitment Plan (reflect ESIA, incl RAP, IPP, etc.))
	Moderate	Not unprecedented, limited footprint, remedied	Env/Social Analysis	Env/Social Commitment Plan (reflect E/S Analysis)
	Low	No or minimal impacts, not controversial	no further analysis	No additional measures
IFAD E/S	Cat A	Significant, sensitive, irreversible, unprecedented	Formal ESIA/ESMF	ESMP, RAP, IPP, FPIC implementation plan
	Cat B	Less adverse, site-specific, remedied	Further E/S analysis	ESMP, either stand-alone or output of analysis
	Cat C	Negligible or no impacts	No further assessment	No additional measures
climate	High	Highly vulnerable to CC hazards	In-depth climate risk analysis	Recommendations for risk management
	Moderate	Moderately sensitive to CC risks	Basic CC analysis/address in design	Make practical adjustments in design
	Low	Not likely vulnerable	No further analysis	No additional measures
UNDP	High	Significant, irreversible, significant concerns	Comprehensive ESIA, SESA, ESMF	Comprehensive ESMP, incl. RAP, IPP, etc.
	Moderate	Limited, readily identifiable, remedied	Targeted assessments	Targeted management measures and plans, good practice
	Low	Minimal or no impacts	No further analysis	No additional measures
UNEP	High	Significant, possibly irreversible	Full Env, Social, Econ Assess (ESEA)	ESEA develops effective management plan (incl RAP, IPP)
	Moderate	Less significant in scale	Limited analysis	Apply good practice, possible management plan req
	Low	Negligible	No further study	No additional measures
UNICEF	High	Significant, possibly irreversible	Full Social/Env Impact Assess (SEIA)	Social and Env Management Plan (SEMP)
	Moderate	Less significant in scale	Limited analysis	Apply good practice, possible SEMP req
	Low	Negligible	No further study	No additional measures
UNIDO	Cat A	Significant, irrev, sensitive, diverse, unpreced, broader area	ESIA	ESMP
	Cat B	Less adverse, fewer in number, site-specific, not irreversible	Minimize through good practice	Apply good practice, may require ESMP
	Cat C	Minimal or no impacts	No further study	No management plan, but apply disclosure/acctblty
	Cat No Project	Adverse impacts on critical habitats or PCR; banned chems/ pesticides; invol. resttlmnt; forced, trafficked, child labor		
UNOPS	List C	High adverse impacts	Conduct detailed risk assessment	Develop management plans. Full Health/Safety and Social/ Env management plans per country category
	List B	Moderate or unknown adverse impacts	Conduct detailed risk assessment	Develop management plans. Full H&S and S&E management plans per country category
	List A	Minimal or no adverse impacts		All projects req. at least short-format H&S and S&E manag plans

Figure 3 Programme and project categorization of UN agencies, and corresponding actions to be taken for managing environmental and social risks and impacts

Both the UN Model Approach and the individual environmental and social impact regulations of the UN entities decide to adopt a risk-based strategy to enhance the effectiveness and efficiency of their risk management processes, including preparing plans for identifying specific mitigation measures, calculating associated costs, monitoring indicators to evaluate outcomes, and validating institutional responsibilities and reputation. The established entity-specific mandatory rules and procedures stress in commonality to benchmark their embodied environmental and social standards to enable sound and sustainable implementation of the planned initiatives in a mitigation hierarchy that prioritizes the anticipation and avoidance of adverse environmental and social risks and impacts. If avoidance is not feasible, efforts should

[95] Ibid, p. 18
[96] Jenkins 2018, p. 9

be made to minimize or reduce harmful impacts and risks. Once the risks and impacts have been minimized or reduced, attempts are made to mitigate them within a limited scope. Any remaining residual negative impacts are then assessed, and if technically and financially viable, compensation or offsetting measures are employed.[97]

The four-step risk assessment hierarchy facilitates to ensure that the scope and depth of the environmental and social impact analysis, along with its management measures, are developed in proportion to and in commensurate with the nature and magnitude of the identified adverse risks and impacts of the programme/project activities.[98] In practice, most UN entities conduct an initial screening to obtain preliminary results from the risk categorization before deciding to proceed with a comprehensive ESIA. The necessity of an ESIA for a UN project/program depends on the outcome of the initial screening, to ensure that the level of the assessment and management required is proportionate to the level of risk that the programme/project presents. The approach encourages the environmental and social management measures to be adaptable to changing circumstances throughout the entire project cycle, and allows flexibility for more effective management of potential risks and impacts.[99]

The methodology prioritizes the allocation of an international organization's limited budgetary, human and other resources, for undertaking environmental and social analysis, assessments and developing management measures focusing primarily on high-risk programs or projects,[100] less so on moderate-risk portfolios, and not allocating resources to low-risk ones. Furthermore, the methodology also ensures that within a single programme or project implemented by a UN entity, potential adverse impacts do not disproportionately affect vulnerable or marginalized communities and individuals, therewith to guarantee fair treatment and equitable benefit-sharing among stakeholders to the greatest extent possible.[101]

Another key strategy to promote equitable treatment and active participation of programme/project beneficiaries is to foster stakeholder engagement and their timely access to

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[97] UNEMG *Model Approach to Environmental and Social Standards*, p. 20
[98] Ibid, p. 19
[99] Craik 2008, p. 88
[100] UNEMG *Model Approach to Environmental and Social Standards*, p. 21. The development and operation of a full-fledged official Environmental and Social Management Plan during the full programme/project cycle would require the human and financial resources in place to support mitigation measures and implementation schedule; environmental and social monitoring on baselines, performance indicators and reporting mechanisms; related institutional or organizational arrangements; provisions for stakeholder consultations and disclosure of information; capacity development and training measures etc. See also the *Environmental Health and Safety Guidelines* of World Bank containing normally acceptable and applicable performance levels and measures across a wide range of sectors.
[101] Ibid, p. 17

relevant and understandable information about the planned activities and their potential environmental and social risks and impacts. The process of identifying, consulting, and involving stakeholders should commence as early as possible during the stage of programme/project design, starting with an analysis to identify various individuals, groups, or organizational representatives who are currently or likely to be affected by the planned activities, or those whose interest may be relevant to the activities, as stakeholder groups. Also, the identification process should pay special attention and consideration to marginalized and disadvantaged groups, including women, youth, the elderly, persons with disabilities, indigenous communities, and ethnic minorities. Their unique engagement needs, including the requirement for Free, Prior, and Informed Consent (FPIC), should be taken into account.[102]

Based on the result of stakeholder identification and analysis, a Stakeholder Engagement Plan shall be developed and implemented, outlining the timing and methods for engaging stakeholders, and specifying how and when impact and risk information will be communicated throughout the programming cycle. Further, mechanisms must be established for communicating stakeholders' needs, capturing their viewpoints and opinions, and integrating them into the ongoing process of ESIA identification and management. The engagements need to be conducted in a meaningful, effective, and culturally sensitive manner, based on transparent and comprehensible information disseminated well in advance. Details of the received feedback are to be thoroughly documented and shared with all relevant parties. Maintaining a healthy and constructive relationship between UN entities and stakeholders along the full lifecycle of the UN-led programmes and projects is crucial for their successful implementation, which includes using the information from monitoring, results evaluation, continuous information disclosure, and public stakeholder consultation to improve project approaches and outcomes.[103]

The UN Model Approach emphasizes that individual UN entities should adopt an Independent Accountability Mechanism (IAM) to serves as a supplemental avenue at the entity level for addressing concerns raised by stakeholders affected by programming/projects and reviewing alleged or potential violations of the entity's environmental and social safeguards. The IAM should be established and operated independently from direct programming management, ensuring impartiality, transparency, accessibility, responsiveness, and no cost to the parties

[102] Ibid, p. 24
[103] Ibid, pp. 24-25. See also the *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums*.

involved. Both problem-solving and compliance review systems within the IAM should promptly acknowledge receipt of complaints, provide responses, actively work with complainants to resolve issues, maintain comprehensive records of cases while respecting confidentiality, and take steps to minimize the risk of any retaliation against complainants. The existence and accessibility of the IAM should be proactively promoted to all stakeholders involved in programming. It is essential to note that such mechanisms do not preclude the availability of other relevant or applicable judicial or administrative remedies when necessary.[104]

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[104] Ibid, p.27, para. 8. For instance, FAO regulates its programme and projects to enhance the UN development system's accountability in collectively supporting States to achieve the 2030 Agenda, through: "(a) aligning its programmes and projects with national priorities and national accountability mechanisms; (b) strengthening national and local mechanisms, institutions and processes to monitor and report on SDG implementation; (c) building upon and extending greater transparency, and improved measurement and reporting on results; (d) enabling active and inclusive stakeholder engagement and participation in decision-making, including providing access to effective complaints and grievance processes; (e) supporting the development and use of quality, accessible, timely and reliable disaggregated data for development results; (f) increasing consultation and inclusion in the design, implementation and uptake of accessible grievance mechanisms." See FAO *Framework for Environmental and Social Management*, para. 23. Other independent accountability mechanisms or grievance mechanisms of international (financial) institutions for addressing concerns and seeking remedies for alleged violations of environmental and social obligations may include: the Inspection Panel of the World Bank Group, for receiving complaints the from individuals or communities affected by World Bank-funded projects and investigating whether World Bank has complied with its established regulations and procedures, including environmental and social safeguards, under <www.inspectionpanel.org> accessed 16 August 2024; the IFC Compliance Advisor Ombudsman, to conduct investigations, and offer dispute resolution services and recourse for those individuals and communities who are affected by IFC-funded projects, under <https://www.cao-ombudsman.org/> accessed 16 August 2024; the Accountability Mechanism of Asian Development Bank, which comprises the Compliance Review Panel and the Office of the Special Project Facilitator to handle complaints related to ADB-financed projects, including environmental and social issues, under <https://www.adb.org/who-we-are/accountability-mechanism> accessed 16 August 2024; the Independent Consultation and Investigation Mechanism of Inter-American Development Bank (IDB), tasked to investigate the complaints related to IDB-supported projects and environmental and social issues, under <https://mici.iadb.org/en> accessed 16 August 2024; the Independent Review Mechanism of African Development Bank, for conducting investigations into the complaints concerning AfDB-financed projects, including environmental and social matters, under <https://www.afdb.org/en/about-us/organisational-structure/independent-review-mechanism-irm> accessed 16 August 2024; etc. For more details and review on the international grievance mechanisms of the multilateral development banks, see Park 2020: *Environmental Recourse at the Multilateral Development Banks*
One example in the UN system would be the Social and Environmental Compliance Unit (SECU) located in the independent Office of Audit and Investigations of UNDP, and its Social and Environmental Standards associated to accountability mechanisms. Its Annual Report of 2022 provides information regarding UNDP's investigation in the allegations of noncompliance. The 12 active cases as of 31 December 2023 mainly show the ESS-related project shortcomings including lack of adequate consultations with communities during the design phase; violations of indigenous people's to FPIC processes; unsuccessful monitoring and assessment of subproject activity performances; inadequate inclusion of ESS requirements in the procurement processes; no reflection on experiences and risk warnings from the stakeholder consultations; failure to properly investigate private sector counterparts prior to signing agreements; using substandard quality of Environmental and Social Assessment studies. For more details see https://www.undp.org/sites/g/files/zskgke326/files/2023-06/SECU%20Annual%20Report%202022_EN.pdf accessed 16 August 2024; also under <https://www.undp.org/accountability/audit/secu-srm/social-and-environmental-compliance-review> for SECU, and UNDP's Social and Environmental Compliance Review and Stakeholder Response Mechanism under <https://www.undp.org/accountability/audit/social-and-environmental-compliance-review-and-stakeholder-response-mechanism> accessed 16 August 2024.

Having reviewed the substantive legal basis from international law and the common structure of UN entities' environmental and social impact management frameworks, the next chapter will analyse the primary sources of UN agencies' obligations to conduct environmental and social safeguards, including impact assessments. It will also examine how the obligations interact and intertwine with the UN system's commitments to its Member States, the international community, and the organization itself.

Chapter Four Sources of international organizations' obligations to conduct ESIA

Chapter Two and Chapter Three have examined how the duty of conducting environmental and social impact assessment has been established at the international level and across the UN system supported by treaties, customary international law, rules of international organizations, soft law etc. The key question remains: why are international organizations, specifically UN agencies referred in this thesis, obligated to conduct ESIA?

Upon an initial examination, it may be contended that with respect to the impact assessment obligations established by MEAs, although UN entities are robust advocates and facilitators in their development, implementation and review, they do not typically become direct parties to the treaties. The conventional acts of the international organizations represent only a rather limited proportion of their juridical activity, compared with the fact that they much more frequently are bound by the unilateral acts of acceptance, approval, accession or ratification of the conventional instrument.[105] Relevantly, Chapter Two and Chapter Three present certain forms to manifest the establishment of such unilateral obligations for the UN entities through their rules and strategies to comply with the treaty requirements and customary international law for conducting ESIAs to ensure the consistency of their operations and initiatives.

The second source of obligations for UN entities to conduct ESIA arises from the legal agreements with the purpose to finance UN development programmes and projects. Loan agreement, for instance, may stipulate explicit requirements from donor to manage environmental and social impact throughout the entire lifecycle of the UN development programmes and projects directly or indirectly funded by the donor. Typical representatives of such donors include multilateral and regional development banks, IFIs, and occasionally, governments from developed countries.

Furthermore, given the obligations and commitments of the UN entities to their Member States, and recognizing that States are the primary contracting parties to the MEAs and thereby hold international obligations to conduct ESIAs, it is pertinent to note that UN entities should act proactively to assist their Member States in fulfilling States' obligations under international treaties, including MEAs. This Chapter will carefully test the obligations of international organizations to conduct ESIAs from these three sources.

4.1 Unilateral obligations in international organizations' own ruling documents

[105] Virally 1992, p. 241

In reviewing the efforts of UN Secretary-General, UNEMG and UNCEB to enhance the visibility and vision of environmental and social sustainability across the UN entities under Chapter 2.1.2, it is evident that the determination and commitment of UN leadership and senior management is aligned with embedding these standards into the legal and normative framework of the UN entities. The integration ensures consistent application within the organization's governance, programming, and management.[106]

Given the leading role of the UN system and entities in shaping and supporting the legal agreements and normative principles at both the global level and in assisting Member States' domestic responsive actions, if UN is to be successful in this task, "they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs."[107] Hence in the published documents of managing environmental and social safeguards, the UN entities spare no effort to explicitly stress that their established rules and subsequent actions shall comply with the existing international treaties in the relevant areas, and they are dedicated to refrain or withdraw from any activity that may lead to violations of these conventional obligations.[108]

There are two layers regulating the compliance asserted by the UN agencies: with the unilaterally declared rules of the UN entities, which confirms the legal status of those documented declarations as rules of international organizations, and assigns the obligations to themselves; and therefrom with the multilateral environmental agreements, along with their

[106] UNEMG *Model Approach to Environmental and Social Standards*, p. 4, para. 6
[107] See in *Economic, Social and Cultural Rights and the International Monetary Fund* by François Gianviti, the former General Counsel of IMF, exploring how the *International Covenant on Economic, Social and Cultural Rights* exercises its legal effect on IMF, and points out that "[i]nternational organizations are also subject to the rule of law. Their members, their debtors and their creditors all expect them to carry out their activities at all times in conformity with the rules that apply to them. However, the international financial organizations, including the Fund, are helping their member countries in developing sound frameworks for governance and better legal and judicial systems, all of which highlights the rule of law as a central element of development. If the international organizations are to be successful in this task, they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs." The full document could be found under <https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> accessed 15 August 2023.
[108] See, for instance, para. 136 of FAO *Framework for Environmental and Social Management*: "FAO activities will not support the manufacture, trade, or use of chemicals or hazardous substances that are subject to international bans, restrictions or phase outs. Exceptions will only permitted for acceptable purposes as defined under international conventions or protocols"; and para. 110: "FAO programmes and projects will ensure sustainable management of living natural resources (terrestrial, freshwater and marine living resources) in accordance with Article 10 *Sustainable Use of Components of Biological Diversity* of the CBD"; also para. 112: "FAO programmes and projects will also not reduce genetic diversity within species and ensure that the risk of illegal trade in protected species does not increase as a result of the activities of the programme or project in accordance with the Convention on International Trade in Endangered Species in Wild Fauna and Flora (CITES)." Similar examples could also be found in the UNDP *Social and Environmental Standards*: "This Standard reflects the objectives of the Convention on Biological Diversity – including the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the use of genetic resources – and other international conventions and agreements", pp. 11-12, para 3, footnote 27.

counterparts of international legal person, i.e. States, who typically act as contracting parties to the conventions. Frequently, international organizations oblige themselves by principles and norms of international law without explicitly acknowledging an obligation to do so.[109] However, when international organizations intentionally create binding obligations for themselves through publicly declared unilateral acts,[110] it is generally recognized that such declarations pertain to their legal status, manifest the will of the organizations to be bound by the autonomously created obligations,[111] and necessitate legal actions consistent with the declaration.[112] One of the basic principles providing binding character and governing obligation performance assumed by such unilateral declarations, either made by international organizations or States, is good faith, as pointed out by the ICJ Judgement of the *Nuclear Tests Case*[113] and the ILC *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, for the concerned subject of international law – such as States – "are entitled to require that the obligations thus created be respected,"[114] and "take them into consideration and rely on them."[115] The fact that both the ICJ Judgement and the ILC Guiding Principles address unilateral declarations creating legal obligations for States does not preclude its relevance to those acts taken by international organizations, as "[t]here is no reason why this should not also apply to declarations made by other subjects of international law, such as international organizations."[116]

The *Framework for Environmental and Social Management* of the Food and Agriculture Organization of the United Nations (FAO) provides an example to establish binding obligation of the organization under international law through publicly declared unilateral acts, by announcing that the "FAO programmes and projects will adhere to the CBD and the Cartagena Protocol on Biosafety in the handling, transport, and use of living modified organisms resulting from modern biotechnology that may have adverse impacts on biodiversity and human health."[117] Such observance shall regulate the EIAs taken for FAO operations. Despite of the

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[109] Daugirdas 2016, p. 339
[110] For instance, see the WFP *Environmental and Social Sustainability Framework, Module 2: WFP Environmental and Social Standards*, p. 8: "This standard reflects commitments in WFP's Environmental Policy, obligations enshrined in the Rotterdam Convention, Montreal Protocol, Stockholm Convention, and International Code of Conduct on Pesticide Management…"
[111] Reinisch 2001, p. 136
[112] Dörr 2019, para.12
[113] Regarding unilateral acts made by States creating legal obligations, see the ICJ *Judgement of the Nuclear Tests Case (Australia v France)*, para. 43-46
[114] Ibid, para. 46.
[115] ICJ *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Principle 1, p. 370
[116] Dörr 2019, para.12
[117] FAO *Framework for Environmental and Social Management*, para. 110

various wordings of unilateral declarations adopted by the UN entities in their similar documents respectively,[118] the content of the obligations are defined as primary rules, and reflects the rules of responsibility incumbent on the international organizations a result of the primary rules. Technically, international law views these environmental and social safeguarding documents as "rules of the organization" binding the respective UN entities, as it belongs to "the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization", according to Article 2 (b) of the ILC *Draft articles on the responsibility of international organizations*.[119]

Herewith, the Draft Article 2 (b) reflects two key elements of "rules of the organization" when converging with the customary process: one is the objective element, which is the repeated behaviour of the international organization as subjects of international law; the other is the subjective element, which holds that such behaviour is dependent on legal obligations recognized by the organization. Specifically, the obligation of international organizations to adhere to the environmental and social safeguarding documents being "rules of the organization" as one source of their obligation to implement ESIAs is supported by the declared will and belief of the international organizations, along with their corresponding practices.[120]

The relationship between international environmental law and the rules of international organizations is crucial, starting with international organizations must ensure, as aforementioned, that their rules and regulations are consistent with the obligations under international environmental law. The rules of the international organizations therewith declare their commitments to the international environmental conventions, delineate the standards of their decision-making, governance and conducts, and ensure that their activities comply with the established international environmental requirements. Considering that adverse environmental impacts resulting from the actions of international organizations typically occur within the territory of a State or in areas beyond national jurisdiction, could it be legally inferred that any failure to fulfil the obligations mandated by the rules of the organization will constitute a breach of their obligation under international law, consequently leading to an internationally

[118] For instance, the *UNDP Social and Environmental Standards* provides on p. 52, footnote 125 that "UNDP projects ensure that pollution prevention and control technologies and practices are applied during the project life cycle, utilizing performance levels and measures specified in national law or in good international good practice." See also supra note 108

[119] Richard 2017, p. 326. Reference is also made to supra note 8.

[120] Treves 2006, para. 8

wrongful act and the accountability of the organization, as states by Article 4 (b) of the ILC *Draft articles on the responsibility of international organizations*?[121]

The ILC Draft Articles, while occasionally regarded as controversial in their support for regulating the activities of international organizations, have assembled a framework that can guide the understanding and practices of the international community with respect to responsibility of international organizations within the broader context of international law.[122] Article 10 provides that it will constitute a breach of an obligation under international law by an international organization "when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned." This paragraph, on the one hand, "includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization", which tends to involve "any international obligation that may arise from the rules of the organization"[123] and cover a comprehensive variety of the acts adopted by international organizations, including decisions, resolutions, instruments as agreements concluded by international organizations with third parties, and judicial or arbitral decisions binding to international organization.[124] On the other hand, "regardless of the origin or character of the obligation concerned" in the Draft Article 10 implies for apportioning responsibility and accountability to an international organization in the case that a breach of the international obligation exists, the specific nature of the wrongful act committed by international organizations – be it constitutes a violation of a treaty, customary international law, or unilateral commitments – is largely irrelevant, and the principle to trigger responsibility equally applies.[125]

Then what could be the origin or character of the obligations of international organizations, i.e. which sources of international law bind international organizations? International organizations are recognized to have international legal personality, which confers upon them the capacity to act independently from their Member States in the execution of their functions, and enables their actions to be attributed directly to the organization itself.[126] Scholars argued

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[121] Article 4 of the ILC *Draft articles on the responsibility of international organizations* reads: "Elements of an internationally wrongful act of an international organization – There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization."
[122] Klabbers 2022, p. 308
[123] ILC *Draft articles on the responsibility of international organizations, with commentaries*, p. 63, para. (4)
[124] ILC *Draft articles on the responsibility of international organizations, with commentaries*, p. 51, para. 16. On the elaboration on the definition of "rules of international organizations", see supra note 5.
[125] Klabbers 2022, p. 324
[126] Gaja 2003, p. 113, para. 27

that, international organizations are subject to international legal obligations to the same extent as sovereign States. The equivalence that international organizations are neither more nor less readily bound by international law means that, both international organizations and States must be subject to *jus cogens*, which are universally obligatory to all the subjects of international law. Furthermore, international organizations and States are regulated by the treaties with their explicit consent, except for certain limited exceptions which are uniformly applicable to both entities. And general international law applies to international organizations and States alike; however, for international organization, this is only as a default matter.[127]

International organizations, same as States, are exclusively subject to international law and their internal legal order,[128] while it is broadly acknowledged that the internal legal order of an international organization may encompass various regulations not solely established by the entity, which includes the peremptory norms, general principles of law and customary international law (except to the extent that their charters, as *lex specialis*, contract around it),[129] and those stipulations emanating from treaties to which the international organization is a contracting party. The *ICJ Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* proves the logical consequence that, "[i]nternational organizations are subject of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties." [130]

The ICJ Advisory Opinion clarifies that the international obligation of international organization may be established by the treaties founding the international organization or to which international treaties are parties, by customary international law, or by general principles applicable within the international legal order,[131] which conforms with Article 38 of the ICJ Statute stipulating the sources of international law.[132] Further, although it might appear redundant to clarify that the commitments originating from the founding treaties, binding

[127] Daugirdas 2016, p. 325
[128] Ibid, p. 359
[129] Ibid, p. 373. Regarding charters and internal rules of international organizations being *lex specialis* as far as concerning responsibility of the organization, and cannot be overridden by *lex generalis*, see ibid, p. 378
[130] ICJ *Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, para. 37
[131] ILC *Report on the work of the sixty-third session*, Chapter V. *Responsibility of International Organizations*, para. (2) of the commentary to Article 10, p. 63
[132] See *Statute of the International Court of Justice*, Article 38, para. 1: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

agreements where the functional scope of the international organization is tasked or mandated, and the rules of the organization are indeed international obligations, [133] the practical significance of adhering to these instruments makes it advisable to eliminate any uncertainty and ensure that violations of these commitments constitute breaches of the international obligations specified by the ILC *Draft articles on the responsibility of international organizations*,[134] considering the critical role that these rules play in the functioning of any organization.[135]

International organizations may employ diverse instruments and decision-making mechanisms to accomplish their mandates, varying from resolutions to decisions, recommendations, declarations, regulations, directives, standards, and guidelines. Additionally, certain organizations adopt managerial instruments, such as policy programmes for action or reporting and monitoring functions.[136] The ILC Draft Articles endorse that the obligations of an international organization arise from its own rules,[137] while the legal nature of rules of international organizations is not absolutely with no debate. One perspective asserts that the rules are part of international law because they derive from treaties or other instruments governed by international law, emphasizing that relations between an international organization, its member states, and its agents should be governed by international law including the organization's rules. Other authors, however, argue that the organization's internal system is separate from international law and resembles a state's internal law, which may lead the ILC Draft Articles not covering breaches of obligations under rules of international organizations.[138]

One of the illustrations could be that in comparison with the ICJ Advisory Opinion – that had recognized international organizations as subjects of international law, while not addressed whether rules of international organizations other than their constitutive instrument could also becoming binding to the entity[139] – it was not until the ICJ *Statements concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* that it was suggested that the obligations imposed by a resolution may be considered to supersede, or at least have the same legal status as those obligations established

[133] Gaja 2005, para. 22-23
[134] ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, p. 63
[135] Gaja 2005, para. 22
[136] Benzing 2007, para. 6
[137] See supra note 123
[138] Gaja 2005, para. 18-19
[139] See supra note 130

by an international treaty, which indicates that rules of international organizations, particularly those of the United Nations, are part of international law.[140]

The discussion around the legal nature of rules of international organization is also reflected in Commentary (5) of Article 10 in the *Draft articles on the responsibility of international organizations*. [141] The Commission acknowledged that the issue is to certain extent controversial, and that it remains an open question whether all the obligations arising from rules of international organization should be considered as under international law. Consequently, in Commentary (7), ILC explicitly clarified that Paragraph 2 of Article 10[142] "does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law (…)".[143] Since Paragraph 1 of Article 10 already establishes that a breach constitutes a breach, irrespective of the origin and nature of the obligation,[144] it implicitly follows that the obligation in question may also originate from the organization's rules, though the Commission itself subsequently dismissed in its commentary that violation of any organizational rule would inherently constitute a breach of an international obligation.[145]

To continue with this approach, the wording of Article 10 is sufficiently flexible to allow exceptions for those international organizations whose rules are no longer considered as contributing as part of international law. Rules of international organizations, be it regarded as under international law or not, may establish specific procedures for involving breaches of obligations, including to decide whether a breach has occurred.[146] While helpful as it is to confirm the regulation over the circumstances where international organizations breach their

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[140] See ICJ *Order for the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, p. 15, para. 39: "[W]hereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention." Here the *Resolution 748 (1992) of the Security Council* was adopted on 31 March 1992 to impose sanctions on Libya due to its failure to comply with previous demands related to the investigation of the Aerial Incidents at Lockerbie and over Chad and Niger, until Libya coming into complying with international demands to cease all forms of terrorist actions and cooperating fully with investigations into the mentioned terrorist attacks. Article 103 of the Charter, i.e. *UN Charter*, reads: "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*"

[141] ILC *Draft articles on the responsibility of international organizations, with commentaries*, 2011, p. 63, para. (5)

[142] Paragraph 2 of Article 10 of the *Draft articles on the responsibility of international organizations* reads as: "Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization."

[143] ILC *Draft articles on the responsibility of international organizations, with commentaries*, p. 64, para. (7)

[144] See supra note 123

[145] Ragazzi 2013, p. 241

[146] Gaja 2005, para. 22-23

obligations towards States or other international organizations, it is not addressed in the Draft Articles to control international organizations to exercise their public powers, and the accountability that would come along therewith. Consequently, many organizations have proactively established self-regulatory mechanisms to fill and vacuum and prevent external interventions that might compromise their autonomy.[147] A notable feature of the established rules for self-control of international organizations is their significant emphasis on customary practices, as we see in the case of UNEMG and UN Model Approach under Chapter 2.2. International organizations have to seek to balance the principles codified in the founding document of international organizations and formally ratified by members, with the need for organizational development,[148] as echoed by the ICJ Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations*, that "whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[149]

The position the scope of their international obligations has also been communicated by international organizations themselves to ILC: international organizations acknowledged their binding commitment to those parts of treaty law that constitute customary international law or general principles, and to future developments in customary international law.[150] The international organizations also highlighted the significance of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (VCLT-IO) in reflecting customary international law and shaping the practices and applicable laws of international organizations.[151]

Given the foregoing discussion, it is not the purpose of the thesis to render a definitive conclusion whether rules of international organization ought to be recognized as general international law and apply to all the entities governed by international law. However, it appears prudent to assert that, the environmental and social safeguard policies and management frameworks released by the UN entities, as quoted in Chapter Three, shall constitute proper

[147] Klabbers 2022, p. 338
[148] Gaja 2004, p. 8, para. 22
[149] ICJ *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, 1949, p. 180
[150] See Daugirdas 2016, p. 373.
[151] Reference is made to Article 11, Paragraph 2 of the VCLT-IO: "The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed." See the comments of international organizations and problems perceived by the IFIs on the VCLT-IO in the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Note by the Secretariat*, 1983

law for the international organizations that have promulgated them. The documents are not only announced as self-regulatory instruments for the respective UN entities, also reflect the international customary legal practice in the area of environmental governance and EIA commitments. Thus, the compliance therewith forms an international obligation for the UN entities.

Additionally, the acceptance of the principles of international environmental law made through being referred to in the documents of international organizations – such as the principle of sustainable development and the precautionary principle widely adopted and promoted through the declarations of UNEMG member organizations and the UN Model Approach[152] – could provide strong justifications to support the duty of the UN Agencies to adhere to the principles and comply with customary international law. Such line of reasoning is expected to be extended to other international organizations as well.[153] Compliance with the principles of international law integrated into the rules of an organization will hence strengthen the validity of the rules adopted by the organization.[154]

Following the horizon, it confirms that the recorded self-announcements in the released environmental and social safeguard documents of the UN entities have established the international obligation, and logically, the accountability of the UN agencies in case of an internationally wrongful act. It may still be contended that, in comparison to States, the duty of international organizations to fulfil their confirmed obligations is likely to be more restricted due to their rather limited functional mandates and available resources.[155] Nevertheless, the weight of maintaining a robust reputation for adherence to international law is generally more pronounced for international organizations than for States. International organizations are traditionally viewed as protectors of the international legal system rather than as potential violators thereof,[156] as they depend on their Member States for their operational continuity, and stand in constant need to be good members of the international community.[157] In this sense, the perception of an international organization's legitimacy and efficacy is intimately associated with its reputation as a loyal follower of its obligations under international law, which is critical

[152] Wolfrum 2010, para. 55. Also see, for instance, *Formation and Evidence of Customary International Law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat*
[153] Reinisch 2001, p. 136
[154] Klein 2019, para. 5
[155] Campbell et al. 2018, p. 551
[156] Daugirdas 2015, pp. 991-992
[157] Ibid 2015, p. 1010

for the international organization to secure cooperation and support from its Member States and from the wider international community.[158]

In the specific context of EIA, following its systematic process to identify, investigate, and evaluate the potential impacts of proposed actions on the environment aims to ensure that decision-makers appropriately consider the interests of those potentially affected, and supports dialogical processes that engage a broad spectrum of the public, rather than relying solely on one-way dissemination of information, may serve as a means of legitimation.[159] Moreover, in cases where national EIA regulations and international requirements diverge, the UN entities are obligated to reinforce their position and respect the more stringent standard.[160] Chapter 4.2 will further elaborate on the issue.

4.2 Obligation made to other international organizations as funding partners

Acts taken by one international organization can establish legal obligations for another.[161] In practice, one ley reason for the UN entities to develop their own environmental and social safeguarding policies and management frameworks, alongside responding to the normative directive from UNEMG and UNCEB, is to systematize and leverage the ad-hoc efforts of the organizations. The approach ensures to comply with the standard requirements for assessing the environmental and social impact and risks in their development cooperation, which is essential for seeking financing from the donor community and key funding partners, including multilateral development banks and funding mechanisms, such as the World Bank, GEF[162] and GCF.

Chapter Three outlines the pioneering role of the IFIs in establishing and guiding objectives to streamline, conduct, monitor, and evaluate ESIAs. In recent years, a vision has emerged to

[158] Ibid 2015, p. 991

[159] Craik 2019, p. 240. UNDP, for instance, requires to screen all the project activities (including those are not directly funded by UNDP, but by partner's in-kind contribution) to ensure that potential environmental and social impact and risks of those activities do not compromise to meet the standards set up by UNDP to avoid potential reputational risks. See UNDP *Guidance Note on UNDP Social and Environmental Standards for Social and Environmental Assessment and Management* 2022, p. 5

[160] UNEMG *Model Approach to Environmental and Social Standards*, p. 20

[161] Benzing 2007, para. 25

[162] See supra note 73. The Conferences of the Parties to the pertinent multilateral environmental agreements promulgate normative guiding documents to guarantee that their treaty implementation by third parties stay in line with the decisions made them. GEF is one such entity, having been designated by the Conferences of the Parties as an operational entity for the financial mechanisms established to provide new and supplementary grant and concessional funding to cover the agreed incremental costs needed for taking measures with the target to achieve global environmental benefits. GEF is recognized as the largest grant funding source committed to addressing the environmental concerns worldwide, and acts as a mechanism for international cooperation. See also Röben 2000, p. 387, 407

secure the long-term future of the planet, its people and its resources, ensuring social inclusion and promoting shared prosperity and sustainability,[163] which presents a gradual shift in interpreting the development mandates and policies of IFIs over the past decades to include political dimensions and environmental and social risks management in viewing poverty reduction and human rights protection as complementary, rather than distinct and unrelated goals for IFIs.[164] It is foreseeable that the expansion of the mandates and targets of IFIs will address the evolving and increasing needs of developing countries across a broader spectrum of economic, social and environmental development, and align with updates to the international development agenda in responding to the emerging global priorities and voices. The UN system and its entities, which share a similar mandate to advance global sustainable development goals, are actively seeking more funding opportunities to support their development programmes and projects in Member States. In pursuit of the objective, the UN agencies have been working closely with IFIs, longing for strengthening their partnerships,[165] through both establishing direct financing channels and indirectly via borrowing States.

A typical representation of the modality of direct financing would be those GEF-funded projects. The fund is replenished by its donor countries and made available through GEF as an international organization with legal personality, with the support of the GEF Agencies including global and regional development banks, and UN entities,[166] to developing countries. The indirect funding channels include those development programmes and projects implemented by an UN agency financially supported by part of a loan/grant from a multilateral development bank to a State. Paragraph 9 of the *General Conditions of Agreement, Definitions* of the *Standard Form of Agreement for Use by World Bank Borrowers - Delivery of Outputs by [UN entity] under Bank-Financed Projects* described the circumstance that “[t]he Government will make the payments (either directly or by authorizing the Bank to pay on the Government’s behalf) to the UN Partner account […]” In practice, relevant examples would be the agreements between funding agencies and international organizations – including the UN agencies approved as implementing partners or *de facto* subcontractors of the received

[163] World Bank *Environmental and Social Framework*, p. ix
[164] Campbell et al. 2018, pp. 543-544
[165] For instance, UNDP highlights the updates in its latest version of the *Social and Environmental Standards* to focus on the “[i]ncorporation of provisions to strengthen alignment with the 2018 Global Environment Facility (GEF) safeguards policy, UN Model Approach to Environmental and Social Standards, and World Bank Environmental and Social Framework.” See *UNDP’s Social and Environmental Standards (SES)*, p. 2
[166] See the list of GEF Agencies under <https://www.thegef.org/partners/gef-agencies> accessed 9 September 2023

funds – made in relation to and dependent on agreements with States, for instance, loan agreement with a State supported by a project.[167]

In either case of direct or indirect financing, the donor requirements will apply through the entire lifecycle of design, fund mobilization, monitoring, and reporting of all their funded projects, regardless of the scale, form, or modality of the financial instruments involved. For instance, the World Bank states its *Environmental and Social Framework and Standards* applying to "all projects supported by the Bank through Investment Project Financing. The Bank will only support projects that are consistent with, and within the boundaries of, the Bank's Articles of Agreement and are expected to meet the requirements of the ESSs in a manner and within a timeframe acceptable to the Bank."[168] Also, GEF indicates that its *Policy on Environmental and Social Safeguards* "applies to the Secretariat and all GEF Partner Agencies (hereafter "Agencies").[169] The Policy applies to all new GEF-financed projects and programs submitted on or after the date of effectiveness of July 1, 2019. For GEF-financed projects and programs under implementation, the Policy applies to all mid-term reviews and terminal evaluations submitted after one year of the date of effectiveness."[170]

Reflection on the historical development of the World Bank's protection standards reveals a normative development of enacting robust environmental and social rules closely mirroring the advancements of relevant international law.[171] Originated in anticipation of the 1972 United Nations Conference on the Human Environment, World Bank's policies expanded during the 1980s in response to the transnational environmental campaigns that exposed the detrimental impacts of its development projects on both environment and human.[172] Also in the context of international cooperation being spotlighted – as evidenced by the 1987 *Brundtland Report* and preparations for the 1992 UN Conference on Environment and Development – a comprehensive set of World Bank Safeguard policies were introduced in the late 1980s and early 1990s, marking a significant shift in the World Bank's role from a mere lender to a norm-

[167] Amerasinghe 2005, p. 388-389
[168] *World Bank Environmental and Social Framework and Standards*, p. 5, para. 7
[169] Regarding the GEF Agencies, see supra footnote 166. The implementing agencies' juridical personality allows them to allocate the GEF resources to given projects in a legally binding manner, see Röben 2000, p. 407.
[170] *GEF Policy on Environmental and Social Safeguards*, page 11, para. 4. Likewise, similar terms are confirmed in the IFAD *Social, Environmental and Climate Assessment Procedures*, that it should apply "to all investments in IFAD's programme of loans and grants, and all non-sovereign operations (NSOs) for which IFAD financing is sought. These procedures also apply to IFAD's technical assistance", para. 2, p. 7.
[171] Dann and Riegner 2019, p. 539
[172] Park 2020, p. 19

setting institution, and having substantially enhanced its influence within the global order and on borrowing States.[173]

In 1997, amid the Pangue Dam controversy in Chile, the International Finance Corporation (IFC) publicly committed to adhering to the environmental and social policies established by the World Bank Group henceforward.[174] The IFC subsequently developed specific policies that were either closely aligned with or directly derived from the World Bank's safeguard policies. In 2003, a review was undertaken by the IFC on its implementation of these safeguard policies, and a revised policy framework was adopted in April 2006 as a result, which has consolidated all the existing safeguard policies into a single "Policy on Social and Environmental Sustainability."[175] The version shall govern the project review and due diligence processes to all IFC-funded projects, including conducting EIA serving as the principal framework of the environmental and social policies for its function of assessing, monitoring and evaluation the necessity, categorization and depth of project oversight. The operational standards and measures were institutionalized and integrated into the loan agreements of borrowers, becoming the primary mechanism for project financing.[176]

Both the World Bank and IFC are UN specialized agencies.[177] Their environmental policies and procedures may therefore be regarded as part of the international environmental law,[178] especially considering that the guidance on the elements necessitated for constituting their environmental standards could be derived from customary international law,[179] and in some respects, even more specified than those prescribed by international environmental law.[180] Moreover, project-specific loan agreements between the World Bank and borrower States are typically governed by international law.[181] The practice has existed for a long time, and was

[173] Dann and Riegner 2019, p. 538, also see supra note 10
[174] Hunter 2008, p. 443
[175] Ibid, p. 444
[176] Park 2020, p. 19
[177] Ragazzi 2013, p. 236. Reference is made to the *Agreement between the United Nations and the International Bank for Reconstruction and Development*, 1947, Article I, paragraph 1: "This agreement, which is entered into by the United Nations pursuant to the provisions of Article 63 of its Charter, and by the International Bank for Reconstruction and Development (hereinafter called the Bank) pursuant to the provisions of Section 8 (a) of article V of its Articles of Agreement, is intended to define the terms on which the United Nations and the Bank shall be brought into relationship", and paragraph 2: "The Bank is a specialized agency established by agreement among its member Governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to function as, an independent international organization." Also see the *Agreement on relationship between the United Nations and the International Finance Corporation* for similar expressions.
[178] Di Leva 2010, p. 344, see also the relevant discussion under Chapter 4.1
[179] Head 1996, p. 232
[180] Richard 2017, p. 315
[181] Head 1996, p. 217

confirmed by Section 10.01 of the *General Conditions Applicable to Loan and Guarantee Agreements* of the Word Bank Group and Section 10.01 of the *General Conditions Applicable to Development Credit Agreements*.[182] The Sections use the negative phrasing "notwithstanding the law of any State or political subdivision thereof, to the contrary", and state that neither party can claim any provision is invalid or unenforceable due to the Articles of Agreement of the Bank, which clarifies the enforceability by asserting what cannot be used to challenge it, thereby effectively underscoring the supremacy of the terms in loan agreements over conflicting national laws or provisions.[183]

It has become a standard obligation for borrowers to "ensure that the Project is carried out in accordance with the Environmental and Social Standards, in a manner acceptable to the Bank."[184] When a government seeks a loan or grant from the World Bank, it must submit a funding application that complies with the procedural, environmental, and social requirements specified in the *World Bank Environmental and Social Framework and Standards*, which thereby acts as an ex-ante conditionality.[185] Subsequently during the project preparation phase, the concluded loan agreement will incorporate the environmental and social the World Bank's policy, delineating procedures that the World Bank and its borrowers must follow to ensure the assessment of potential environmental impacts of investment projects financed by the World Bank, as well as the measures to avoid or mitigate such impacts. The extent and scope of EIA may vary based on the potential impact, but its application is universal.[186] The World Bank provides no funds to any activities that will breach the borrower's obligations under applicable international law. As a result, a project's EIA must pinpoint the pertinent international

[182] Amerasinghe 2005, p. 387, footnote 6

[183] Section 10.01 of the Word Bank Group *General Conditions Applicable to Loan and Guarantee Agreements* reads as follows: "*Enforceability*. The rights and obligations of the Bank, the Borrower and the Guarantor under the Loan Agreement and the Guarantee Agreement shall be valid and enforceable in accordance with their terms notwithstanding the law of any State or political subdivision thereof, to the contrary. Neither the Bank nor the Borrower nor the Guarantor shall be entitled in any proceeding under this Article to assert any claim that any provision of these General Conditions or of the Loan Agreement or the Guarantee Agreement is invalid or unenforceable because of any provision of the Articles of Agreement of the Bank."

[184] See the example of the *Loan Agreement (Support to Small and Medium Enterprises for Economic Recovery Project) between Republic of Tunisia and International Bank for Reconstruction And Development*, Schedule 2, Section D. *Environmental and Social Standards*, under <https://documents1.worldbank.org/curated/en/099174002102341520/pdf/P17838008a46090d208f560689814d3d706.pdf?_gl=1*16cege4*_gcl_au*MTUwMjgyOTU3My4xNzIzNDU5ODkx> accessed 14 September 2024

[185] Dann and Riegner 2019, p. 542

[186] Di Leva 2010, p. 352

environmental treaty affected by the proposed project and assist to ensure the project's compliance with it during the implementation.[187]

From such perspective, the *Environmental and Social Standards* are not directly applicable to the borrowers, but outline the conditions that must be met before a loan agreement can be finalized. The standards become legally binding once they are incorporated into the loan agreements through an *Environmental and Social Commitment Plan* (ESC-Plan) formulated through negotiations between the World Bank's management and the government of the borrowing State. The ESC-Plans serve as the legal nexus to link the environmental and social regulations of the World Bank to the obligations of the borrowing States, and establish the legal foundation for the information and control rights, as well as rights to legal remedies of the World Bank. The ESC-Plans unify various types of plans into a single mandatory document for all projects, and serve as the technical or managerial components of the *World Bank Environmental and Social Framework*,[188] which is the result of a comprehensive legislative process and systematically addresses all relevant thematic areas and structural issues.[189]

The *World Bank Environmental and Social Framework* has achieved more successful substantive alignment with other international legal norms, and partially reintegrated with other international legal regimes. Its outcome was facilitated by the involvement and coordination with other international institutions during the consultation process at the drafting phase.[190] Clear and effective policies and measures are made on its governing law to prevent disputes through confirming legal obligations of the parties with higher certainty.[191] The compliance mechanism inherently embedded in the sustainable standards sometimes render them potentially more stringent than numerous treaties formed through intergovernmental negotiations. Furthermore, the standards can be extended through procurement contracts to cover the entire supply chain of a project. The method of enforcement is, in certain respects, more robust than that available under some multilateral environmental agreements and exemplifies the increasing utilization of private contracts to achieve public interest objectives. The environmental and social norms enshrined in underlying loan agreements or accompanying documentation should empower the financial institutions to seek remedies under these loan

[187] Ibid, p. 361, see the *World Bank Operational Manual 4.01 – Environmental Assessment*, para. 3, under: https://thedocs.worldbank.org/en/doc/f3077ee7a3590f4f4610ede4734496fc-0290012023/original/OP-4-01-Environmental-Assessment.pdf, accessed 21 August 2024
[188] Dann and Riegner 2019, p. 552
[189] Ibid, p. 550
[190] Ibid, p. 558
[191] Head 1996, p. 232

agreements for non-compliance with the stipulated environmental and social norms.[192] In case of non-compliance, the World Bank is entitled to refuse, withhold, or demand repayment of the loan.[193] Although this is infrequent, it presumes that financial institutions can use broader leverage necessary to ensure the enforcement of environmental conditions.[194]

UN entities are receiving more and more direct or indirect funds[195] from IFIs to fund their development programmes and projects. Reviewing the historical records of the UN and its leading interventions in mainstreaming environmental sustainability and social protection agendas within the international community, it is evident that donors, when opting between unrestricted voluntary contributions, restricted voluntary contributions, or mandatory contributions to finance UN-system activities, often assess their positioning and decisions vis-à-vis the governing coalition and policy priority of the specific UN entity as a criteria of their decision to a given scope of funding. When the internal regulations and policy priorities of an international organization align with the preference of the donor, even if the donor is part of the governing coalition, the provision of mandatory contributions to the international organization would pose the least control and risk to the donor, as it is hardly likely that the governing bodies would endorse agendas and programmes that the donor can disagree with, despite the fact that the contributions and policies are determined by the governing body of the international organization rather than by individual donors.[196]

In contrast, when a donor finds its preferences regarding the utilization of funds do not align with the governing coalition and policy priorities of the international organization – particularly if the disagreements pertain to the affordability of programme cost or bureaucratic inefficiencies rather than policy content – it is more likely that the donor will provide restricted voluntary contributions, to assure as much control on the financial size, scope and recipients

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192 Hunter 2008, pp. 471-472

193 Dann and Riegner 2019, p. 542

194 Hunter 2008, p. 472, quoted the World Bank's former General Counsel, Ibrahim Shihata: "Appropriate covenants in the legal documents do not of course ensure by themselves that the required action will be taken. For this reason, provisions are included in the General Conditions applicable to all loan agreements to give the Bank power to suspend disbursements if the borrower or the project executing agency defaults in carrying out agreed actions. This is a most potent remedy when project implementation is still ongoing. Problems that arise after the completion of the project and the full disbursement of loan proceeds to the borrower are more difficult to handle. However, the Bank may in such a case still enforce the borrower's commitments by declaring that the borrower has defaulted in performing its obligations under the loan agreement. This could lead, if acceptable actions is not taken by the borrower within the period indicated by the Bank, to the acceleration of maturity of the loan and the Bank's insistence on immediate repayment of the loan in full. This is obviously a seriously path which has been avoided in practice, although such defaults do affect the level and pace of future Bank operations in the country in question."

195 See supra note 166 and 167

196 Bayram and Graham 2016, p. 422-423

of their contributions as possible, and leave their provided funds pooled with other donors' contribution and distributed according to ruling and programming priorities set by the international organization.[197]

In such manner, it is naturally in the interest of donors to use their funding methods as a complementary lever to influence the decisions and actions of international organizations, steering them towards the donors' preferences and exerting control over relevant organizational agenda setting and operations where possible. In promoting environmental and social impact safeguarding, rather than treating it as an affirmative prerequisite subject to constant monitoring and evaluation throughout the lifecycle of individual UN-led programmes and projects – or even as a development objective for certain projects to achieve – mainstreaming it as a cross-organizational commitment to identify, avoid and/or mitigate any potential adverse impacts of relevant interventions could prove to be more cost-efficient for the donors who prioritize environmental and social safeguarding. This approach would also enhance the reputation and accountability of both the international organization and the donors within the context of multilateral legitimacy, collective decision making and burden sharing.[198]

With the trend of environmental and social risk screening and impact assessment becoming standard practice and process for development programmes and projects funded by development financing mechanisms, the requirements imposed on the funded parties have been scrutinized and clarified to avoid fragmented investment in the time, energy, and resources in the scope of individual development programme and project, without synergy, reflection and experience sharing. The reform, starting at the activity level, with the established donor rules and requirements for environmental and social risk assessment and management benchmarked against international best practices, mandates due diligence for all projects receiving financing in any form, including subprojects funded from the sources of financial institutions, co-financed by other institutions, and those contracted to deliver project activities.[199]

[197] Ibid

[198] Ibid

[199] It is specifically outlined by the World Bank, for instance, as Borrower's responsibility to manage those contractors who are selected to provide service or goods in given development programmes and projects, monitor their environmental and social risk and impact performance, and ensure that the implementation is in a manner consistent with the World Bank's Environmental and Social Standards: "Contractors retained by or acting on behalf of the Borrower or its implementing agency are considered to be under the direct control of the Borrower. To manage the contractors effectively, the Borrower is required to conduct risk assessment on environmental and social risks associated with those contracts; vet contractors to ensure that they are legitimate and reliable and have required knowledge and skills to deliver on their contract; incorporate relevant Environmental and Social Commitment Plan elements into tender documents; require contractors to have equivalent arrangements with their subcontractors; and monitor their compliance with contractual commitments." See World Bank Group Open

The case-by-case approach of inspecting all funded development programmes and projects may enhance the donor's credibility regarding the environmental and social impact performance of their investment portfolio. However, it may not yield the same perception for the funded party when reviewing its implementation portfolio supported by diverse donor groups. In the absence of a systematic and accountable environmental and social impact and risk managing framework at the entity level, the burden and benefits of introducing such a safeguard plan can be managed only by programme and project separately. Consequently, the implementing partners – i.e. the UN entities within the scope of this thesis – would be under pressure to formalize the environmental and social rules and regulations across the programme and management functions of the organization,[200] and use the fulfilment of the conditions to complement the accreditation and reaccreditation processes established by donors for the implementing entities.[201]

The harmonization of the donor requirements on environmental and social safeguards with those of the implementing UN entities will eventually converge at each party's strategic and institutional levels. Both are mandated to respond to MEAs, UN sustainable development agendas, and international customary law in the thematic areas. The rules declared by the UN entities, along with their links to other operational strategies and governance, call for a common approach to the assessment and management of environmental and social risks and impacts. The approach facilitates cooperation with the donor community in beneficiary States, aiming to harmonize requirements, avoid duplication, and support efficient use of resources.[202] In certain instances, the alignment will extend to non-accredited institutions with which the implementing UN entities jointly deliver activities. It is encouraged for the accredited entities and these other institutions to explore and reach agreements to co-employ the assessment and management of the environmental and social risks and impacts, consistent with the principles

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Learning Course – *Introduction to the World Bank Environmental and Social Framework*, Module 2, "Assessment and Management of Environmental and Social Risks and Impacts", p. 21.

[200] See supra note 45

[201] See GCF *Revised Environmental and Social Policy* 2021, p. 4, para 3.2 (b). The point is also implied in the *Standard Form of Agreement for Use by World Bank Borrowers - Delivery of Outputs by [UN entity] under Bank-Financed Projects*, para. 17: "*Environmental Management*: The UN Partner shall, while delivering the Outputs, act in accordance with the UN Partner's regulations, rules, policies and procedures to ensure that all activities under this Agreement are, to the extent possible, implemented in an environmentally responsible and sustainable manner." Also see the *Minimum Standards for Policies, Procedures, Systems and Capabilities* of GEF Agency Partners in GEF *Policy on Environmental and Social Safeguards*, pp. 12-13, as well as *Monitoring Agency Compliance with GEF Policies on Environmental and Social Safeguards, Gender, and Fiduciary Standards: Implementation Modalities* under <https://www.thegef.org/sites/default/files/documents/Monitoring_Agency_Compliance_Policy_0.pdf> accessed 16 August 2023.

[202] World Bank Group Open Learning Course – *Introduction to the World Bank Environmental and Social Framework*, Module 4, *Environmental and Social Standards at a glance*, p. 3.

and requirements that provide the same level of environmental and social protection, if not the highest level provided by the standards of the donor communities.

The UN entities and financial institutions incorporate references to the standards of other institutions, harmonizing with the efforts to align with the international law pertaining to the sustainable development goals.[203] Separate horizontal networks exist between targeted financial institution or group of institutions, as well as group of national and international organizations. Core groups in each of the major donor countries (i.e. G7) as well as in several key borrowing countries were invited to the reform campaign of multilateral development banks, such as the World Bank, the Asian Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development. The coordinated efforts engaged for systemic changes and long-term cooperation in monitoring and reforming the targeted financial institutions and international organizations are based on the permanent networks of a core group of national and international organizations to secure their substantial access to the institutions, as well as to information, media, and key decision makers.[204] Therewith the process of legalization continues among the donors, UN entities, and beneficiary or borrower States through selecting the appropriate legal form to negotiate interests and reach compromise. The adoption of an aligned environmental and social safeguard and management framework by all the stakeholders is driven by a functionalist rationale: it is fundamentally about achieving their development goals in an effective manner.[205]

Once the environmental and social safeguard policies and management frameworks are synchronised between the financial institutions and UN entities, the harmonization of the legal structure requires the corresponding system of the involved States to be benchmarked. Should the system of the financial institution be employed by a project, any discrepancies between the objectives and operational principles outlined in its rules and those of the borrower's system must be addressed through conditions stipulated in the loan agreement.[206] Supplementary national standards or requirements concerning environmental and social safeguards and sustainability could replace or merge with the conditions set by the funding institute, as long as they are proven to align with and are of equal or more stringent than the existing ones.[207] National legislatures, especially in developing countries, have taken the inspiration from the World Bank benchmarks to shape their own legal frameworks and incorporating their practical

[203] Hunter 2008, p. 438
[204] Ibid, p. 452
[205] Dann and Riegner 2019, p. 559
[206] Di Leva 2010, p. 361
[207] GCF *Revised Environmental and Social Policy* 2021, pp. 4-5, para 6-7

experiences. A notable instance is the widespread adoption of EIA.[208] The precondition of utilizing domestic environmental and social systems necessitates that its result-based requirements must align substantially with those set forth by the *World Bank Environmental and Social Standards*. Prior verification by the World Bank is mandated to ensure that an equivalent system and level of outcomes is achievable. Even if national systems are deemed materially consistent, it is crucial to continuously monitor this consistency throughout the project lifecycle, bolster the national systems to prevent the risks, ensure effective law enforcement and compliance with the rule of law principles, and establish additional collaborative measures with the borrower to enhance their capabilities, where necessary.[209]

The discussion so far has examined the rationales and methods by which the UN entities fulfil and communicate their duty to uphold environmental and social sustainability to their main stakeholders, including donor partners. Subsequent analysis will include the other critical party involved, namely States, with a view to scrutinizing international organizations' adherence to their obligations towards those entities.

4.3 Commitments to Member States: support to State obligation on ESIA

Among the fundamental roles and purposes of the UN is to assist its Member States in fulfilling their obligations arising from international treaties. The UN Charter, in its Preamble, confirms the objectives including: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[210] The fact that the UN possessing international legal personality, as affirmed by the ICJ, confirms the nature of the organization, "which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations."[211] The function of the UN entities to enable their Member States to meet their obligations under international law is further supported by a combination of legal documents, resolutions, and principles, including the relevant UNGA Resolutions, mandates, decisions and

[208] Dann and Riegner 2019, p. 546

[209] Ibid, p. 552-554, who also provides, ibid, the exposition of the reformed *World Bank Environmental and Social Framework* in relation to the established national environmental and social regulations: the increased utilization of the country system aligns with the principle of national ownership, and enables the World Bank to tailor environmental and social project management to the varying capacities and requirements of the borrowing State. The approach allows the efficient components of the national legal and administrative frameworks to substitute the corresponding elements of the *World Bank Environmental and Social Standards*. Additionally, it empowers the World Bank with the leverage to elevate standards with national law broadly, rather than merely fostering high standards in isolated projects.

[210] *United Nations Charter*, Preamble

[211] ICJ *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, 1949, p. 179

standard basic service agreements bilaterally signed between the UN entities and their Member States respectively, as well as Conference of the Parties (COP) Decisions of MEAs addressing the role of international organizations in supporting Member States' obligations under the convention and related agreements.[212] Additionally, the function is also supported by the official environmental and social safeguards/management framework released by the UN entities, which are pertinent to the scope of the thesis.[213]

In the context, the support provided by the UN entities to Member States in conducting ESIA is inherently aligned with the UN's commitment to support Member States. The execution of ESIA is a critical component among all the requisite measures and actions undertaken by the UN entities to prevent activities that may expose the involved State to the risk of breaching its obligations under pertinent international conventions and customary international law concerning environment protection, human rights, social development, etc.[214] Circumstances may necessitate the UN entities to lean forward and proactively lead the ESIA processes if an affected State lacks adequate technical expertise, financial resources, or human capital required to meet related legal obligations. The pivotal role played by the UN system in supporting the negotiation of MEAs, allocating and disseminating advanced knowledge and technologies, as well as fostering international environmental cooperation and partnership underscores its capacities to extend the resources and benefits to less developed States in the area, and contributes to conducting ESIAs across various countries.

The recent trend among the UN entities adopting environmental and social standards for their development programming and projects may present concerns, or sometimes challenges in ensuring coherent implementation at country levels. To mitigate disparate interpretations, it is essential for the UN entities to coordinate and consolidate their efforts towards better

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[212] See for instance, the *UNDP Standard Basic Framework Agreement/Standard Basic Assistance Agreement* bilaterally signed with individual Member States outlining the scope and approach of UNDP's assistance to Member States in implementing their development projects; as well as the UNEP Decisions adopted by the Governing Council/Global Ministerial Environment Forum at its first universal session, available under https://wedocs.unep.org/bitstream/handle/20.500.11822/12221/Governing%20Council%20Decision%2027-2.pdf?sequence=1&isAllowed=y accessed 14 August 2023.

[213] See, for instance, in the *UNDP Social and Environmental Standards*, that "UNDP seeks to support governments to adhere to their human rights obligations and empower individuals and groups, particularly the most marginalized, to realize their rights and to ensure that they fully participate throughout UNDP's programming cycle", p. 7, para. 16

[214] UNEMG *Model Approach to Environmental and Social Standards*, p. 9, para 17. See the examples in the *UNDP Social and Environmental Standards*: "UNDP refrains from providing support for activities that may contribute to violations of a State's human rights obligations and the core international human rights treaties, and seeks to support the protection and fulfilment of human rights. UNDP programmes and projects are required to be informed by human rights analysis, including from the UN human rights mechanisms (the relevant human rights treaty bodies, the Universal Periodic Review process and Special Procedures)", p. 6, para 13, footnote 17

alignment.[215] The support from the UN system and entities could be further solidified through offering technical expertise, scientific knowledge transfer, and capacity building initiatives, therewith fostering an enabling environment for States to enhance compliance with their international obligations. Moreover, the UN entities can assist States with reporting their efforts required by certain MEAs for monitoring progress on fulfilling agreed-upon obligations. The conduct and outcomes of such reporting could also inform both the processes and conclusions of ESIAs.[216]

On the one hand, behind the ESIA technical arrangements lies the international legal order based on fundamental values, inviolable and binding all subjects of international law, including international organizations, because the duty to respect the legal order represents the values of the international community.[217] On the other hand, ESIAs can be conceptually regarded in a highly instrumental manner under the international legal order, serving as planning tools designed to inform decision-makers about the environmental implications and social consequences of the proposed activities. The obligations associated with ESIAs are therewith perceived as technical and procedural requirements targeting to generate the necessary information. The ESIA obligation sometimes is procedural, and operates on the premise that fully informed decision-makers will make choices based on the results of ESIA and in alignment with the environmental and social targets. This perspective, often termed the comprehensive rationality model, is rooted in administrative decision-making frameworks that emphasize the collection and analysis of extensive relevant information by managing professionals to guide their discretion. The underlying assumption is that optimal decisions can be achieved with adequate information and expertise.[218]

Based on the assumption, the formation of epistemic communities, i.e. groups of technical experts with shared goals and expertise around the system of MEAs, is widely acknowledged to play a significantly positive role and provide crucial elements to the effectiveness of the regimes. Similarly, the emergence of the expert groups also facilitates the development and implementation of the environmental and social standards of the IFIs.[219] The conception of

[215] Ibid, p. 3, para. 5
[216] See, for instance, as an operational entity of the financial mechanism of UNFCCC, GEF is providing support to the States with the Convention obligations on their national communications, submission timetable and Biennial Update Reports to assess their mitigation potential. More details under <https://www.thegef.org/sites/default/files/documents/GEF-6%20Support%20to%20Enabling%20Activities%20and%20Convention%20Obligations.pdf> accessed 14 August 2023
[217] Klabbers 2022, p. 331-332
[218] Craik 2019, p. 240
[219] Hunter 2008, p. 462

these mechanisms is supported by civil society organizations and academia, who have identified the necessity to involve more public participation and consultation, as a response to the immunity of international organizations and as a means to ensure that those most affected by the organizations' activities have a way to safeguard their procedural and substantive rights and interests under the policies.[220]

Contemporary international law is increasingly invoked to address the matters that transcend traditional bilateral disputes, rather represent shared concerns and interests of a multitude of stakeholders at different levels, calling for collaborative engagement to formulate collective solutions.[221] The legitimately effective processes of decision-making and enforcement would result in coherent legal orders. Consequently, the more substantial the areas concern, the more pressure would be placed on non-parties, as joining the agreements would give them more influence in their further development.[222] The conceptualization of common concerns in the context of international environmental law enforce resources to be managed through and beyond the institutional framework of agreements representing the interests of the international community, rather than individual stakeholders,[223] as MEAs focus on producing the public good of a clean and safe environment, and seek to enrol universal participation, solidarity and influence to address the nature and reality of current environmental issues, such as biodiversity loss and climate change.

Therewith, the notion and conceptual approach of "boundary" and solely preventing "transboundary harm" may be considered outdated and challenging, when the environmental concerns involve complex ecological systems "beyond jurisdiction", which triggers reasoned consultation for reconciling competing interests to replace the formal and deterministic method of defining boundaries for unfettered State autonomy.[224] In light of the complexities, a significant recent development was the consensus adoption of the *Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*[225] on 19 June 2023. Article 28 mandates that the contracting Parties are obligated to conduct environmental impact

220 Ibid, p. 473-474
221 Brunnée 2002, p. 2
222 Röben 2000, p. 441
223 Ibid, p. 438. See also the relevant discussion around the obligation *erga omnes partes* and *jus necessarium* in the Separate Opinion of Judge Cancado Trindade to the ICJ *Judgement of Whaling in the Antarctic, Australia v. Japan: New Zealand intervening* of 31 March 2014
224 Craik 2019, p. 258
225 Regarding the distinction between "jurisdiction" and "control", and the shift of emphasis from "jurisdiction" to "control" in exercising obligation under the context of international environmental law, see ILC *Third report on the protection of the atmosphere*, pp. 346, para. 32-33

assessments to "ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control that take place in areas beyond national jurisdiction are assessed … before they are authorized." The commitment is further complemented by the duty to prevent significant adverse harm and the obligation to notify, report, and exchange information during the procedural stages of screening, scoping, impact assessment, and evaluation.[226]

Interestingly, Article 27 (f), linked with another pillar – Capacity Building – of the BBNJ Agreement, calls for strengthening the capacity of the Parties, particularly that of "developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries" in preparing, conducting, and evaluating EIAs and Strategic Environmental Assessments (SEAs)[227] to support the overarching objectives of the BBNJ Agreement. The initiative aims to establish a coherent and effective system of ocean governance on the high seas, aligning with the modern conservation principles and approaches developed under international environmental law.[228] It also intersects with the domain and measures existing under the international environmental law and customary international law, which can provide guidance to international organizations, including the UN entities and IFIs.

The universal obligation to conduct environmental assessment for the activities that could have substantial and detrimental effects on the marine environment is deeply entrenched in both treaty obligations and customary international law.[229] However, its implementation in areas beyond national jurisdiction remained fragmented across various sectors and regions.[230] Many instruments and decisions concerning ABNJ merely address the general obligations to conduct EIAs, rather than providing specific implementation provisions or supporting institutional infrastructure.[231] Thus, it is necessary to interpret the general BBNJ and UNCLOS requirements to conduct EIAs and their monitoring in conjunction with the more detailed

[226] See the *BBNJ Agreement* Article 30 and Article 31
[227] See the *BBNJ Agreement* Article 39. SEAs encompass a comprehensive, long-term approach to environmental protection, addressing entire sectors or extensive geographical regions, whereas EIAs are typically confined to specific sites and are temporally limited – see Wysocki and Vadrot 2020, p. 7
[228] Warner 2018, p. 33
[229] See the relevant discussion under Chapter 2.1.1
[230] Warner 2018, p. 41
[231] Ibid, p. 39

guidelines and procedural provisions established in the system of international environmental legal instruments, such as the CBD and its biodiversity-inclusive EIA guidelines.[232]

Complexity arises from the variable, sometime inconsistent standards of compliance among States with EIA obligations under multilateral environmental treaties.[233] Significant efforts have been directed towards formulating a standardized definition for EIAs and SEAs, potentially referencing various existing international legal frameworks and standards. However, consensus on the criteria that require an EIA for a particular activity, potential exemptions, the incorporation of cumulative impacts, the entities responsible for funding and conducting EIAs, and the expected outcomes of such assessments. An international body may be empowered with the authority to restrict activities when the EIA process indicates that an activity is likely to have significant adverse effects on the marine environment. Whereas EIAs and SEAs are also argued to not impose undue burdens on developing States, emphasizing the importance of capacity-building initiatives to support the EIA process and its validation.[234]

The prevailing system acknowledges that the reality that non-compliance with environmental regulations frequently stems from insufficient capacity.[235] The requirements for capacity building in EIA within ABNJ are particularly pronounced in contexts where established practices are underdeveloped, methodologies are nascent, and diverse assessment traditions may converge within the same region.[236] Meanwhile, the determination of what constitutes a reasonable level of impact assessment is inherently dynamic and subject to change over time. Practices, standards, or regulations that are deemed appropriate may become obsolete as advancements occur. Consequently, to uphold the principles of due diligence, it is essential to continuously monitor and integrate the latest advancements in technology and scientific research,[237] which is precisely what the development programmes and projects of the UN entities are designed to achieve.

UN entities can play a pivotal role in enhancing the capabilities of developing countries to manage and conserve marine biodiversity, and conduct effective EIAs using the requisite methodologies and tools. Technical support, training initiative, infrastructure development, monitoring and reporting etc. for EIA capacity building are essential elements scoped in the UN development programmes and projects. Moreover, an illustrative example from donor

[232] Ibid, p. 42
[233] Ibid, p. 43
[234] Wright 2018, p. 59
[235] Röben 2000, p. 418
[236] Warner 2018, p. 49
[237] *Yearbook of the International Law Commission 2001*, p. 154

partners could be the *GEF Initial Guidelines for Enabling Activities and Ratification Support Projects for the Agreement under the BBNJ Agreement*, in which GEF confirms to be part of the Financial Mechanism of the BBNJ Agreement, and releases initial guidelines in January 2024 "for enabling activities and ratification support projects to promote early entry into force and implementation readiness for the BBNJ Agreement."[238] GEF and its Agencies[239] are committed to providing national-level support for the implementation of State obligations under the BBNJ Agreement, including conducting EIAs in accordance with the processes established by the Agreement, and monitoring and reviewing impacts of authorized activities.[240] In parallel, GEF supports at the global and regional level to develop coordination platforms, capacity building and training modules, methodological guides, rosters of technical and legal expertise, knowledge management and awareness-raising tools, portfolio analysis, and implementation strategies, etc.[241]

The evolving landscape presents exciting opportunities and challenges expected to rise in the domain.

[238] *GEF Initial Guidelines for Enabling Activities and Ratification Support Projects for the Agreement under the BBNJ Agreement*, p. ii
[239] See supra footnote 166
[240] *GEF Initial Guidelines for Enabling Activities and Ratification Support Projects for the Agreement under the BBNJ Agreement*, p. 6
[241] Ibid, p. 7

Chapter Five Conclusion

The thesis examines the historical development of EIA since the 1970s at the international level under various multilateral environmental agreements, customary international law, and other non-binding international legal instruments. It elaborates on the actions taken by the UN system and entities, showcasing among other international organizations, to respond to the progressive development of ESIA and develop their own requirements and approaches to incorporate EIA processes into their policies and governance, programming and projects, and facilities and operations for safeguarding environmental and social sustainability.

The normative and operational evolution is closely aligned with the "no harm" rule, the precautionary approach, and the vision of sustainable development as featured in international environmental law. During the process of formulating and executing environmental and social safeguard strategies, a wide range of binding and non-binding international legal instruments has been explicitly recognized, adopted, and applied by the UN entities and IFIs to provide essential governance and guidance on the substantive scope and structural requirements of ESIAs, which has resulted in technical, procedural and operational commonalities in the frameworks designed by the international organizations.

To ensure the compliance and effectiveness of the ESIAs implemented by the UN agencies, a key issue is to define the scope of the rules that legally govern them, so that in the event of a breach of obligation, responsibility can be attributed to the organization. As there are relatively scarce formal procedures for adjudicating and enforcing international obligations of international organization, international organizations often tend to honour commitments that they voluntarily recognize as legally binding.[242] The UN entities self-impose unilateral obligations to adhere to relevant requirements in MEAs and customary international law when conducting ESIAs, which shall constitute proper law for the international organizations. Donor requirements to meet its environmental and social standards incorporated into funding agreements for UN development programmes and projects become another source of obligation for the international organizations. Over time, this may proceed with the formalization of a systematic environmental and social impact and risk management framework across the programme and management functions of the organization. Ultimately, the harmonization of the environmental and social safeguard policies and management frameworks of the UN entities and the donor community enables them to better support their Member States in

242 Daugirdas 2016, p. 372

fulfilling State obligations regarding ESIA in the international legal order, including through providing technical support and capacity building, to respond to and preserve the common interests and solidarity of the international community.

The thesis intentionally refrains from engaging in examing single ESIAs conducted by UN entities within their specific contexts, cases, and outcomes. Instead, it focuses on the overarching framework – the progressive development and legal foundations – that underpins the substantive and structural obligations associated with ESIAs. The perspective adopted carefully reflects and aligns with the key characteristics of the duty to conduct ESIAs. For each development programmes or project implemented by the UN entities, the scrutiny triggered by threshold requirement assessments remains the common practice, which should facilitate the consequent effective actions and fulfil the duty of due diligence.

The practical challenge, however, lies in determining the extent to which objectivity and tangible technical considerations can prevail over subjective and inferential judgments. Debates surrounding the adequacy, accuracy, and predictability of ESIA tend centre around procedural specificity, where considerable uncertainty persists, especially when dealing with unfamiliar contexts and broader environmental and social protection objectives.[243] The conduct and methodology of ESIAs have long been subject to criticism due to their inherent ambiguity regarding specific steps and content. It is questioned whether the commitment to conducting ESIAs is merely a matter of due diligence. Should from the perspectives of the UN entities and IFIs, conducting ESIA primarily serve as a means to achieve procedural justice within their mandated work, rather than an end in itself, during certain processes ESIAs may be regarded as not seamlessly aligning with the subject matter of a development programme or project.

Furthermore, divergent standards within an ESIA may present significant challenges. For instance, how should public interests and stakeholder claims be weighed, balanced, and deliberately tackled, while simultaneously adhering to the overall requirements from States, donors, the international community, and inter-organizational rules and governance? Addressing these questions remains a considerable challenge for international organizations, who thus must continue to advance alongside the progressive development and codification of international environmental law concerning climate change, biodiversity protection, and sustainable development. This topic could also be interesting for future relevant research.

[243] Craik 2008, p. 88

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Abstract

The thesis reviews the progressive development of Environmental Impact Assessments (EIA) since the 1970s at the international level under various Multilateral Environmental Agreements (MEAs), customary international law, and other non-binding international legal instruments. It highlights the “no harm” rule, the precautionary approach, and the vision of sustainable development as featured in international environmental law, and reflects the strategies and actions adopted by UN agencies and International Financial Institutions (IFIs) among other international organizations in establishing and implementing their own environmental and social safeguard policy and management framework for their development programmes and projects. The developed governance and guidance documents are essential on outlining the substantive scope and structural requirements of Environmental and Social Impact Assessments (ESIAs) by the international organizations, and prove to share technical, procedural, and operational commonalities between each other.

The legal foundation obligating the UN entities and prominent IFIs to conduct ESIAs relies on defining the scope of the rules that are binding to the organizations to ensure compliance and effectiveness of the implemented ESIAs. International organizations often honor the commitments they voluntarily recognize as applicable to them.

Three sources of obligation for international organizations to undertake ESIAs are explored: the self-imposed unilateral obligations that adhere to the pertinent requirements in MEAs and customary international law when conducting ESIAs will constitute proper law for the international organizations. Another source of obligation for the international organisations is donor requirements to comply with its environmental and social standards, which are integrated into funding agreements for UN development programmes and projects. Over time, a comprehensive environmental and social impact and risk management framework may eventually be formalised and implemented throughout the organization’s programme and management functions. In the end, the harmonization of the environmental and social standards and ESIA approach between the UN entities and the donor community will enable them to better support their Member States in meeting State obligations regarding ESIA under the international legal order, for which, technical support and capacity building to respond to and preserve the common interests and solidarity of the international community can be offered.

Zusammenfassung

Die Dissertation untersucht die fortschreitende Entwicklung von Umweltverträglichkeitsprüfungen (UVP) seit den 1970er Jahren auf internationaler Ebene im Rahmen verschiedener multilateraler Umweltabkommen (MEA), des Gewohnheitsrechts und anderer nicht bindender internationaler Rechtsinstrumente. Sie hebt die "Nicht-Schädigungs"-Regel, den Vorsorgeansatz und die Vision einer nachhaltigen Entwicklung hervor, wie sie im internationalen Umweltrecht verankert sind, und spiegelt die Strategien und Maßnahmen wider, die von UN-Agenturen und Internationalen Finanzinstitutionen (IFI) unter anderem internationalen Organisationen bei der Einrichtung und Umsetzung ihrer eigenen Umwelt- und Sozialschutzpolitik sowie Managementrahmen für ihre Entwicklungsprogramme und -projekte übernommen wurden. Die entwickelten Governance- und Leitdokumente sind wesentlich für die Festlegung des inhaltlichen Geltungsbereichs und der strukturellen Anforderungen an Umwelt- und Sozialverträglichkeitsprüfungen (ESIA) durch internationale Organisationen und belegen technische, verfahrenstechnische und operative Gemeinsamkeiten untereinander.

Die rechtliche Grundlage, welche UN-Einheiten und prominente IFIs zur Durchführung von ESIAs verpflichtet, beruht auf der Definition des Geltungsbereichs der Regeln, die für die Organisationen bindend sind, um Compliance und Wirksamkeit der implementierten ESIAs zu gewährleisten. Internationale Organisationen halten sich oft an Verpflichtungen, die sie freiwillig als für sich zutreffend anerkennen.

Drei Quellen der Verpflichtung für internationale Organisationen zur Durchführung von ESIAs werden untersucht: Die selbst auferlegten einseitigen Verpflichtungen, die den einschlägigen Anforderungen in MEAs und dem Gewohnheitsrecht bei der Durchführung von ESIAs entsprechen, werden zum ordnungsgemäßen Recht für internationale Organisationen. Eine weitere Quelle der Verpflichtung für internationale Organisationen sind die Anforderungen der Geldgeber, die Umwelt- und Sozialstandards einzuhalten, die in Finanzierungsvereinbarungen für UN-Entwicklungsprogramme und -projekte integriert sind. Im Laufe der Zeit kann ein umfassender Rahmen für Umwelt- und Sozialverträglichkeitsprüfungen und Risikomanagement formalisiert und in den Programm- und Managementfunktionen der Organisation implementiert werden. Letztendlich ermöglicht die Harmonisierung der Umwelt- und Sozialstandards sowie des ESIA-Ansatzes zwischen den UN-Einheiten und der Gebergemeinschaft, dass sie ihre Mitgliedstaaten besser bei der Erfüllung der staatlichen Verpflichtungen in Bezug auf ESIA im internationalen Rechtsrahmen unterstützen können,

indem sie technische Unterstützung und Kapazitätsaufbau anbieten, um die gemeinsamen Interessen und die Solidarität der internationalen Gemeinschaft zu wahren.