IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE QUESTION ON THE RESPONSIBILITY OF STATES UNDER INTERNATIONAL LAW TO PROTECT FOREST AS A RESPONSE TO CLIMATE CHANGE FOR THE BENEFIT OF THE PRESENT AND FUTURE GENERATIONS

REQUEST FOR ADVISORY OPINION

MEMORIAL FILED ON BEHALF OF NEW ZEALAND

World Commission on Environmental Law (WCEL) Moot Court

2nd World Environmental Law Congress 2020

Table of Contents

---

1 Introduction

The world's population is projected to increase to 10 billion people by 2050.[1] There is a corresponding global concern over food and water security. During this time significant ecosystems will be depleted or destroyed due to economic pressure to utilise the land for agricultural production. The ecosystems that operate in forests contribute to biological diversity and climate change security.[2] Since 2000, globally, over six million hectares of forest are lost a year.[3] In the last 50 years alone, around 17 percent of the Amazon rainforest has been destroyed.[4]

[1] Robert Deacon, "Deforestation and the Rule of Law in a Cross-Section of Countries," *Land Economics* 70, no. 4 (1994): 414–30.
[2] Deacon, id.
[3] Catherine Klein, "New Leadership Needed: The Convention on Biological Diversity," *Emory International Law Review* 32, no. 1 (2016).
[4] Christina Nunez, "Climate 101: Deforestation," National Geographic, 2019, https://www.nationalgeographic.com/environment/global-warming/deforestation/.

It is the overwhelming consensus of the entire scientific community that climate change is occurring,[5] is strongly influenced by human activities, and will prove catastrophic if apathy is allowed to reign as the dominant sensibility among us.[6] This is certainly not a new idea either. Scientists have been hypothesising about the effects of excess carbon dioxide on Earth's climate as far back as 1972.[7] It is undisputed that forests play a key role both as a cradle for life within its ecosystems and in maintaining a stable climate for the rest of us. This needs to be recognised in law and protected, even if only as matters of interpretation and principle, wherever relevant.

1.1 About Aotearoa New Zealand

Aotearoa New Zealand is an island nation located at a southern edge of the Pacific Ocean. It is a relatively young and sparsely populated state. The 1840 Treaty of Waitangi between the English Queen and the indigenous Māori provided the terms of English settlement and subsequent government. In 2020, as a result of mostly-European settlement over the last 200 years, Maori make up approximately 15 percent of the population of about 5 million.[8] Those five million people are spread over a land area of approximately the size of the United Kingdom.

New Zealand is a party to most international environmental agreements and prides itself on being a strong protector of the environment.[9] For example, it is a party to the CBD, UNFCCC, Kyoto Protocol and the Paris Agreement. It has a range of domestic environmental laws dealing with different subjects; the largest and most comprehensive statute creating an integrated management regime for most uses of land, air and water is the Resource Management Act 1991.[10] Separate legislation governs national parks, protected species, forestry, and most resource extraction.

New Zealand is also a party to most international human rights agreements and similarly prides itself on being a strong defender of human rights. Key domestic human rights laws include the NZ Bill of Rights Act and the Human Rights Act; both are ordinary statutes and the Bill of Rights contains solely civil and political rights; neither contains environmental rights.[11] New Zealand strongly supports indigenous rights domestically and internationally, and works to uphold those in the UN Declaration

[5] J. Cook, et al, *'Consensus on consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming'*, in *'Environmental Research Letters Vol. 11'*, 2016.
[6] AAAS, *'Statement on Climate Change from 18 Scientific Associations'*, 2009.
[7] J.S. Sawyer, *'Man-made Carbon Dioxide and the "Greenhouse" Effect'*, 1972.
[8] *See, e.g.*, Statistics New Zealand on population numbers and ethnicity: <www.stats.govt.nz>.
[9] Its pride may not reflect its domestic results in practice. See, e.g., *OECD* (2017). For example, New Zealand has been ranked 18th/179 in the world for its proportional environmental impact (where 1 is the greatest environmental impact proportional to total resource availability—i.e., New Zealand is one of the worst 20 countries of the world). CJA Bradshaw, X Giam, & NS Sodhi, *Evaluating the Relative Environmental Impact of Countries*, 5(5) PLoS ONE e10440 (2010), https://doi.org/10.1371/journal.pone.0010440
[10] Available at https://www.legislation.govt.nz.
[11] See http://www.legislation.govt.nz/ for copies of these statutes.

on the Rights of Indigenous Peoples. Some key recent developments in environmental protection have arisen as a result of resolution of indigenous rights claims, most notably those according legal personality to nature, including to a forest.[12]

New Zealand relies on trade with other nations as a significant source of national income and, as a small player on the world stage, works hard to help maintain the integrity of international legal system and dispute resolution mechanisms. New Zealand is repeatedly ranked as one of the least corrupt nations in the world.[13]

2 International Environmental Law Sources[*]

International law stems from three main sources; treaties, customs, and general principles.[14] Treaties are those instruments which states have voluntarily bound themselves to through negotiation with other states. They are governed by the Vienna Convention on the Law of Treaties (VCLT). The VCLT confirms treaties must be in written form, they are governed by international law and can be embodied in a single instrument or multiple related instruments. Treaties can be considered synonymous with convention, agreement, charter etc for the purpose of this submission.

The second source is customs. Provided certain elements are satisfied, the conduct of states alone, absent from any treaties or conventions, can itself be considered customary international law. The two key elements required for customary international law to exist are *opinio juris* and practice, as stated by the relevant case law alongside the ICJ.[15]

The third source is the general principles of international law.[16] General principles of international law commonly include both principles of the international legal system and domestic legal principles. The case for the principle of environmental protection in international law is discussed in greater depth below.

[12] See, eg, Te Urewera Act 2014, available at http://www.legislation.govt.nz/.
[13] *See, e.g.*, Transparency International, *Corruption Perceptions Index 2019*, https://www.transparency.org.nz/corruption-perceptions-index (last visited Mar. 16, 2020) (ranking New Zealand first equal with Denmark).
[*] (i) This section was drafted by Jacob Anderson.
[14] *Statute of the International Court of Justice*, article 38(1).
[15] *Nicaragua v USA*, 1986, p. 97, para. 183; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985, p. 29, para. 27; *North Sea Continental Shelf*, 1969, para. 77; Above n 5, art. 38(1)(b).
[16] Above n 5, art. 38(1)(c).

2.1 Fundamental Principle of Environmental Protection in International Law[*]

Principles of international law can be extracted in several ways, including, as noted above, through domestic legal systems. Environmental protection is phrased differently across different states. Therefore, it is helpful to draw from diverse examples of rights, principles, treaties, and regulatory regimes to argue for an international principle that prevents and protects from environmental degradation. The fundamental claim here is that the environment is a prerequisite for the continuation of the legal system (international or domestic).[17] The former Vice-President of the International Court of Justice, Weeramantry in the *Gabčíkovo-Nagymaros Project* characterised a principle of environmental sustainability as pre-constitutional. Instead, it is part of our "human heritage".[18] Justice Weeramantry stated that "damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments".[19] Here Justice Weeramantry is acknowledging the undermining principle of a viable environment to the other more concrete sources of international law such as the treaties and declarations discussed below.

Collins addresses that in Canada and other common law jurisdictions, the rule of the law is the foundation of society; to an extent, this is true of any legal system even if the 'rule of law' looks very different. Collins' principal argument is that "ecological sustainability is the bedrock on which [the rule of law] stands".[20] In the International Court of Justice case *Dunube Dam,* while the majority fell short of recognising sustainable development as a norm of customary international law, they did recognise it as a concept of international law.[21] In 2002 a Joint Expert Seminar between the United Nations Commission on Human Rights and United Nations Environment Programme stated that "the link between human rights and environmental protection should be affirmed as an essential tool…".[22] The growing recognition of a right to a secure, healthy and ecologically sound environment [should be supported] either as a constitutionally guaranteed right or as *a guiding principle of national and international law*".[23] 60% of States have a constitutional right that protects the environment.[24] Although there are differences in descriptions and definitions making it hard to recognise a cohesive customary international legal norm, the additional 350+ multilateral and 1000+ bilateral treaties focused on environmental protection are evidence of a domestic and international environmental principle.[25] Two

[*] (ii) This section was drafted by Jasmine Cox.
[17] Lynda Collins "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Pipelines Puzzle?" (2019) 70 UNBLJ 30.
[18] Collins, above, a 40.
[19] Susan Glazebrook "Human Rights and the Environment" (2009) VUWLR at 10.
[20] Above n 2, at 30.
[21] Glazebrook, above n 19, at 9.
[22] Glazebrook, above, at 7-8.
[23] Glazebrook, above, at 7-8. Emphasis added.
[24] Glazebrook, above, at 11.
[25] Glazebrook, above, at 13.

examples, the Convention on Biodiversity and the Kyoto Protocol are addressed below. Both exemplify the existence of and adherence to an international law principle of environmental protection pertaining to the issue of forest protection and climate change.

Justice of the UK Supreme Court Lord Lloyd-Jones recognised that "general principles of national law may in certain instances be reflected in treaties".[26] Treaties including Stockholm, Rio, Johannesburg and Hague Declarations have been the primary environmental protections in international environmental law. The argument here is that they reflect a legal principle that transcends domestic legal systems and permeates international law. This principle can also be found underlying human rights recognised in international law, such as the right to life, even if environmental rights are not directly and widely accepted on their own.[27] The UN report argues that there needs to be something more fundamental than just legislatures choosing to implement or ratify and adhere to regulations and statutes because "too often, implementation and enforcement of environmental laws and regulations fall far short of what is required to address environmental challenges".[28] Similarly, to the Environmental Rule of Law, which the UN report investigates and supports, a fundamental environmental principle of international law would have wider benefits such as encouraging equitable access to information and economic markets.[29]

A fundamental environmental principle of international law has more benefits than securing life on earth for humans. However, even with such a limited focus, it is important to recognise that our natural world is an essential prerequisite to the continuation of all domestic and international legal systems on this earth.[30] It can, therefore, be seen as a core principle of justice in international law. A principle of environmental protection in international law, which draws from domestic laws, principles and international treaties may help to interpret other international laws, including treaties and rules such as those that determine what counts as harm to a state.

New Zealand respectfully submits that this Court declare:

- **that the environment is a prerequisite for the continuation of any legal system, international or domestic;**
- **that a right to a secure, healthy and ecologically sound environment is a guiding principle of international law; (often referred to as a principle of environmental *quality*);**

[26] David Lloyd-Jones, Justice of the Supreme Court "General Principles of Law in International Law and Common Law" (Conseil D'Etat, Paris, 16 February 2018).
[27] UNEP (2019) *Environmental Rule of Law: First Global Report*.
[28] UNEP, at viii.
[29] UNEP, at 18.
[30] Collins, above n 17, at 37.

- that there exists an international law principle of environmental *protection,* and that it protects the existence of forests within domestic countries.

*2.2 Treaties and Conventions: The Convention on Biological Diversity 1992**

There are many international conventions containing provisions that seek to regulate their signatory's domestic activities with regards to forests; however, there is no single international convention or treaty which comprehensively encompasses forest issues as its main subject.[31] However, New Zealand submits that these conventions demonstrate the development of and widespread adherence to a fundamental principle of environmental quality and protection in international law.

Other submissions to this Court have addressed climate obligations such as under the United Nations Framework Convention on Climate Change (UNFCCC) and the subsequent Kyoto Protocol and Paris Agreement, so New Zealand will not address these. New Zealand will address the Convention on Biological Diversity (CBD) and discuss how it **contributes to the recognition and implementation of a fundamental principle of environmental protection**.

A focus on biodiversity is key as it forms the base for life on earth and for ecosystem services for humans and other species. Ecosystems are the natural habitats, communities and processes that species are dependent on in their surrounding environment. Over time, these species have uniquely adapted to the temperature, humidity, soil and nutrition for survival.[32] It is this combination of interactions and processes that make the earth habitable.[33] Deforestation has significant implications for climate change, agriculture, medicine and culture.

The Biodiversity Convention

The Convention on Biological Diversity is a legally binding international treaty that entered into force on 29 December 1993. The objectives of the treaty outlined in Article 1 are: the conservation of biological diversity; sustainable use and; the fair and equitable sharing of benefits associated with genetic resources.[34] These are met with binding commitments outlined in Articles 6 to 20. The central purpose of the Convention, sustainable development, is complementary to other international environmental law instruments such as the Convention on Climate Change. The Convention recognises that the conservation of biological diversity is a common concern across states. However, it also

* (iii) This section drafted by Caitlyn Clark.
[31] B. Ruis, *'No Forest Convention but Ten Tree Treaties'*, 2001.
[32] Alexandre Kiss and Dinah Shelton, *International Environment Law* (Leiden: Martinue Nijhoff Publishers, 2007).
[33] "Convention on Biological Diversity," ABS Focal Point, n.d., https://www.absfocalpoint.nl/en/absfocalpoint/internationalinstruments/Convention-on-Biological-Diversity.htm.
[34] Art 1

recognises that nations have sovereign rights over their own biological resources and notes the priorities of economic and social development to combat poverty.[35] This suggests that meeting social and economic goals on the use of natural resources will progress sustainable development and in turn support conservation.[36]

Relevant articles of the Biodiversity Convention

Article 6 outlines general measures for conservation and sustainable use. The Convention requires parties to develop national strategies, plans or programmes for the conservation and sustainable use of biodiversity or adapt existing plans or programmes for this purpose. Parties must integrate sustainable use of biodiversity into these plans, programmes, policies, and national decision-making.[37] States have an obligation to make or review environmental management plans surrounding the commercial use of forests and any further procedures of biodiversity management. Developing a national biodiversity planning process assists in identifying the causes and impacts of deforestation and further opportunities for conservation.

Article 7 concerns the identification and monitoring of biodiversity. Unlike other international agreements, the Convention does not have an internationally agreed list of species or habitats subject to conservation. Annexe I indicate types of species and ecosystems that Parties might consider. Parties are required to monitor the local important components of biodiversity and identify activities likely to have adverse effects.[38] States have an obligation to identify components of biodiversity important for the conservation and sustainable use of forests and to identify activities likely to affect these areas. Annexe I describe ecosystems and habitats that contain high diversity, large numbers of threatened species or are of cultural, social and economic importance to be conserved. Forests can be demonstrated to have a wealth of biological diversity and be the basis of cultural, social, and economic significance. Therefore, it is likely states have an obligation to protect the habitats that exist within a forest ecosystem.[39]

Article 8 addresses conservation of biodiversity in-situ. The Convention addresses *in-situ* and *ex-situ* conservation with particular significance given to *in-situ* conservation. This is "conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in

[35] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 1
[36] The Convention on Biological Diversity, December 1993), Preamble
[37] The Convention on Biological Diversity, Art 6
[38] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 7
[39] The Convention on Biological Diversity, December 1993), Annex I.

their natural surroundings."[40] The convention notes that while *ex-situ* measures may be important, *in-situ* conservation is the most fundamental requirement. A party's biodiversity planning process must consider protected areas, the regulation and management of resources and activities, rehabilitation, restoration, alien species, living modified organisms and traditional knowledge and practice of indigenous peoples. This acknowledges the significance of indigenous cultures who practise traditional lifestyles, their knowledge and cultural connection to the land. If indigenous cultures are dependent on the forest's natural resources, have a connection to them or live within these protected areas then parties are obliged to encourage their state's sustainable use of the natural environment.[41]

To protect forests, parties should establish a system of protected areas or areas where specific measures are required for conservation. This can be done by developing strict guidelines for an area and establishing systems of management to enhance protection. This may require the management of all developments near protected areas. This would require parties to identify activities such as commercial logging that may be detrimental if done near protected areas. Furthermore, parties may have to rehabilitate and restore degraded forests and any threatened species in secondary forests.[42]

Article 10 defines sustainable use as: "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."[43] To protect forests parties must integrate conservation and sustainable use into national decision-making to avoid adverse impacts on biological diversity to protect and encourage the customary uses of local populations. Parties should encourage cooperation between the public and private sectors to develop methods for sustainable use.[44]

Articles 11-14 contain measures to promote conservation and sustainable use. The Convention requires parties to promote understanding of the importance of biodiversity conservation and endorse measures to implement the purpose of the Convention.[45] To protect forests, parties must establish scientific and technical training to develop methods of sustainable use.[46] An Environmental Impact Assessment (EIA) procedure should be introduced through legislation to manage projects with potential impacts on

[40] Preamble.
[41] The Convention on Biological Diversity, December 1993), Art 8.
[42] December 1993), Art 8.
[43] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 10
[44] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 10
[45] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 11
[46] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 12

biodiversity.[47] This must define when the EIA is triggered, the procedural requirements and the assessment criteria to determine whether the project is unsustainable.[48]

Parties are required to consult with other states when their activities may adversely affect the biodiversity of other states or areas beyond national jurisdiction. Therefore, natural environments that expand over the area of more than one state need to be considered holistically by the region involved.[49] For example, the convention would in theory require parties such as Brazil, Peru, Colombia, Ecuador, Bolivia, Venezuela, Guyana, Suriname and French Guiana to consult over uses of the Amazon rainforest.

Implications of these Obligations

The implementation of the Convention involves a Clearing House Mechanism (CHM), Subsidiary Body on Scientific Technical and Technological Advice (SBSTTA), a Working Group on Biosafety (BSWG) and the Global Environment Facility (GEF) created by the decision-making body, the Conference of the Parties (COP).[50]

The only four member states of the United Nations not a party to the Convention are Andorra, South Sudan, the United States of America, and the Vatican. All the other 193 countries are parties and accept a binding obligation to conserve biodiversity.[51] If a state fails to uphold the precautionary principle it breaches its obligations under the Convention. If there is a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties must seek negotiation or mediation. If this fails, parties must accept arbitration or the dispute can be submitted to the International Court of Justice. [52] This is strong evidence of the operation of a fundamental principle of environmental protection within international law. It may be drawn from or imagined as the root of the precautionary principle.

Article 3 of the Convention describes the basis for assessing responsibility. This conditions that states have "the right to exploit their own resources pursuant to their own environmental policies, and the

[47] The Convention on Biological Diversity,
December 1993), Art 14
[48] December 1993), Art 14
[49] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 14
[50] William Snape, "Joining the Convention on Biological Diversity," *Sustainable DEvelopment Law & Policy* 10, no. 3 (2010).
[51] Catherine Tinker, "Responsibility for Biological Diversity Conservation Under International Law," *Transnational Law* 28, no. 4 (1995): 777–822.
[52] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 27

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] Sovereignty over resources is balanced by the requirement that each state accepts its responsibility not to harm the territory beyond its own national jurisdiction.[54] While this offers a basis for responsibility, it is problematic. Recognition of an environmental principle in international law may help to remedy this inconsistency, placing a burden on states to maintain environmental quality within their own state.

The EIA for managing potentially harmful projects is introduced, defined, and legislated by the government of each party. Therefore, states determine their own technical thresholds and make ultimate decisions on whether projects are sustainable.[55] In theory, so long as a state produces a plan that suggests conservation and sustainable use of biological diversity, the state has fulfilled its obligations. Articles 6-14 are further weakened by "as far as possible and as appropriate".[56] This makes it difficult to assess a parties compliance with its obligations under the Convention and to manage the parameters, substantive adequacy and consistency of national plans.[57] Parties may utilise their own resources, even where this has potentially harmful consequences. There is a limited course of liability in the Convention for harmful behaviour that does not directly impact another state.

While states are obliged to protect the natural environment, this must be balanced against the sovereign rights of states.[58] Rather than viewing the environment as fundamental the focus is on state autonomy in the name of development. The Convention adopts a weak sustainability approach here; which is the integration of social, economic, and environmental spheres without overriding ecological limits.[59] A stronger adaptation of biological diversity conservation would override limits on development. This is an environmental approach that would pose equal importance on environmental sustainability, social justice and economic prosperity.[60] It can be derived from a fundamental environmental principle which underpins written international law. The actions needed to protect the health of the planet for future generations conflicts with the immediate need for developments, for example to alleviate poverty.[61]

---

[53] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 3.
[54] Tinker, "Responsibility for Biological Diversity Conservation Under International Law."
[55] The Convention on Biological Diversity, *1760 UNTS 69*, (signed 5 June 1992, entered into force 29 December 1993), Art 14
[56] Lakshman Guruswamy, "The Convention on Biological Diversity: Exposing the Flawed Foundations," *Environmental Conservation*, 1999, 79–82.
[57] Anna Lawrence, *Taking Stock of Nature: Participatory Biodiversity Assessment for Policy Planning and Practice* (Cambridge University Press, 2010).
[58] Guruswamy, "The Convention on Biological Diversity: Exposing the Flawed Foundations."
[59] Klaus Bosselmann, "The Principle of Sustainability: Transforming Law and Governance," *Journal of Environmental Law* 22, no. 3 (2010): 23–24.
[60] Bosselmann, id.
[61] Edith Weiss, "In Fairness To Future Generations and Sustainable Development," *American University International Law Review* 8, no. 1 (1992): 19–26.

While poverty contributes to the degradation of the natural world, a stronger evaluation mechanism needs to exist to ensure that the rights of future generations are also adequately protected.

Political incentives encourage people in power to focus on short-term issues to deliver tangible results within their elected term. Private sectors are driven by the market to focus on short-term economic gain. However, our responsibilities to future generations require a strong environmental approach to sustainability that is conducive to long-term benefits.[62] The Convention imposes a legally binding obligation on contracting parties to protect and manage the natural environment in their jurisdiction. These obligations are demonstrated throughout articles 6-14 on what states must do to manage and protect the natural environment. These obligations have been weakened by states' arguments of a sovereign right to exploit their own resources, as such arguments have taken a restrictive view of what is covered by a prohibition to not harm the environment in jurisdictions outside of their own state boundaries. This is further weakened in practice as states design and implement actions they view to be appropriate. The Convention of Biological diversity lacks legal certainty and clarity to facilitate strong legislative and regulatory measures. While the convention does provide a strong base for management and guidance of parties to protect biological diversity in practice it is not sustainable for the context of deforestation. Greenhouse gases move throughout the atmosphere. When a state significantly degrades its forests, it causes atmospheric change globally that contributes to climate change. It is no longer realistic to imagine that behaviours create impacts only within the boundaries of their legal territory. To truly comply with the aims of the Convention, states will have to forego short-term financial opportunities to secure long-term environmental benefits for future generations.[63]

A recognised principle of international law would begin to force accountability across state boundaries as more remedies and procedural rights become available through principle rather tahn written and ratified articles. Although the argument for state sovereignty is strong - the existence of a principle of environmental protection across domestic and international legal instruments, decisions and custom is becoming more evident. There is an interest in stronger legal accountability of contracting parties to protect ecological diversity and the benefits of biodiversity. This must be done to secure the longevity of the earth and the health and prosperity of future generations.

We respectfully request the Court to declare that transboundary harm includes the wider damage caused by deforestation to the basis of natural life on earth, including the effect of deforestation on climate change. These provisions can be strengthened by such interpretations, which is within the jurisdiction of the Court to interpret and thus declare.

[62] Weiss, id.
[63] Tinker, "Responsibility for Biological Diversity Conservation Under International Law."

Further we submit that recognition of a fundamental principle of environmental protection would aid in transboundary harm disputes.

3. Trade law obligations*

I. Introduction to trade law

States, making up the major unit of the international system, have rights and obligations arising out of international law. With increasing awareness of how humans are impacting the environment, there have been correspondingly increasing efforts to identify and create state obligations to protect that environment. Despite this, there have also been ongoing difficulties in reaching the consensus necessary to create effective instruments of international environmental law. One such area this has been prevalent is in regards to protecting forests that reside within states' domestic jurisdictions. Due to the significance forests have in trade, in ecosystems and in relation to climate change, an enquiry into states' obligations to protect forests is as broad and complex as it is relevant to today's international challenges.

This submission will, therefore, explore the issue of forests in international law by examining state obligations in the international trade of forest products. It begins by briefly exploring the significance of forests in the environment, environmental crises and trade. Secondly, considering the implications of this on international law, it looks at the challenges raised when attempting to protect forests, such as when it competes with principles such as state sovereignty. Thirdly, the essay will look to the sources of international law that give rise to state obligations in order to understand the origins of any state responsibilities to protect the environment. It will then move to analyse the relevant existing instruments that create state obligations in international trade, including key treaties and WTO law. International trade is a useful perspective as trade is a key part of the current international system and reflects states' vital interests. These interests, when in contention with environmental protection, may take priority, due to the political and economic benefits provided by revenue, employment and relations with other states.

In doing so, it is possible to consider the gaps that exist in this area of international environmental law and this may therefore provide some insight into how these should be addressed in the future. In particular, it is possible to conclude that weighing the benefits of conservation against economic benefit such as in international trade, poses a serious detriment to the conservation and protection of forests.

* (iv) This section was drafted by Sophie Ross.

II. CHALLENGES THAT FORESTS POSE FOR INTERNATIONAL LAW

Although it is often challenging for states to reach consensus and create binding obligations, inevitably arising out of the huge variety of perspectives and interests between different states, it is possible to identify some specific factors that create difficulties for forest protection. This submission will consider three of these: the primary focus is on the paradoxical relationship of state sovereignty and environmental protection; also acknowledged is the complexity of forest ecosystems, and the numerous actors that are involved in forest exploitation.

A. FORESTS ECOSYSTEMS AND SUSTAINABLE MANAGEMENT

Firstly, it is important to note that forests include a huge variety of species and are involved in a number of natural processes, all making it difficult to reconcile in international instruments through the traditional anthropocentric and compartmentalised approach taken in law and environmental protection. The state system is, therefore, fundamentally at odds with the environmental order, as ecosystems do not follow state territorial boundaries.[64] The health of forests relates to the health of the ecosystems they are a part of and therefore is also related to natural processes such as that of water, soil and climate. Because of this, it is not enough for states to identify specific species that they endeavour to sustainably manage to continue to exploit these species resources. For example, under CITES it is difficult to cover all vulnerable species, in particular, as states have struggled to add species to existing appendices.

The idea of sustainable forest management creates something of a fallacy in this sense, as with other areas of sustainable development. States may feel they have met their obligations by regulating the forestry of a handful of species. While this may seek to ensure the resource is available for exploitation in the future, this may lead to degradation of the qualitative aspects of forest ecosystems. For example, in the case of tropical forests, ensuring the sustainable management of the valuable timber species does not consider the wellbeing of the other species that exist naturally in ecosystems with those species. This is relevant to the discussion of instruments such as the ITTA agreement discussed below.

Even where a sustainable development approach may be in place, natural resources like tropical timber products, are often required at the very start of the global supply chain and are therefore crucial for the integrity the international trade system.[65] Therefore, with an increasing global population and demand for trade and forest products, they will continue to be exploited making it difficult to shift to greater

[64] Jacquiline Peel, Phillipe Sands, with Adriana Fabra and Ruth MacKenzie "Principles of International Environmental Law" (3rd edition Cambridge University press, Cambridge UK, 2012) at 12.
[65] Fiona Smith. "Natural Resources and Global Value Chains: What Role for the WTO?" 11, no. 2 (June 2015), 249.

focus on ecosystems. This means that it will be extremely difficult for tropical forests to be exploited in a truly sustainable way and remain a neutral contributor of carbon under current practice.

B. DIFFERENT ACTORS

This is further complicated by the variety of different actors with interests in forests and forest products. International environmental law broadly is made by states as well as international governmental organisations and can be influenced by non-governmental organisations, private sector actors and other non-state actors.[66] Forest conservation is divided between several different institutions such as the Food and Agriculture Organization, UNCTAD and the Inter-governmental Forum on Forests, all of which are located in different countries with their own mandates, making coordination very difficult.[67]

In international trade, different business and industry groups are involved throughout the process of forest exploitation from forestry to production, export and investment.[68] Because international law is frequently vague to accommodate differing states interests, this provides room for investors and multinational corporations to lobby their interpretations of the relevant international environmental law instruments when seeking to exploit forest resources.[69] They also often undertake activity in states with more relaxed environmental regulation to reduce costs and maximise exploitable resources.[70] It may be difficult for a government to justify measures that counter this, or there may be a lack of political will or corruption which inhibits a state's ability to do so. Particularly where states may be concerned about strict standards reducing their economic competitiveness where other states may not have adopted similar approaches.[71] This illustrates the difficulty states have when attempting to impartially weigh different group interests, where those with economic interests may be the most vocal and influential.

C. STATE SOVEREIGNTY AND TRADE

State sovereignty provides the greatest challenge in any exercise that attempts to enforce obligations on states within their domestic jurisdictions.[72] The principle of state sovereignty is among the most fundamental rules of international law. Set out in the Article 2(1) UN Charter, it is well established that

[66] Elen Hay "Advanced Introduction to International Environmental Law" (Edward Eglar, Cheltenham UK, Northampton MA, USA, 2016) at 1.
[67] Patricia Birnie, Alan Boyle, Catherine Redgewell "International Law and the Environment" (3rd Edition, OUP, Oxford 2009) at 695.
[68] Feja Lesniewska Forests: Learning lessons from our interventions In Research Handbook on International Law and Natural Resources, (Edward Elgar Publishing, 2016) at 155.
[69] Lesniewska, above, at 160.
[70] Lesniewska, above, at 160.
[71] Peel, Sands, above n 64, at 7.
[72] Pierre-Marie Dupoy, Jorge E Viñuales "International Environmental Law" (2nd edition, Cambridge University Press, Cambridge, 2018) at 6.

states have equal sovereignty, that provides for supreme authority within its territory, immunity from other states' jurisdictions and freedom from intervention on domestic affairs.[73]

The idea of state sovereignty over natural resources is also well established.[74] Following World War II and the era of rapid decolonisation, emerging states sought to assert their sovereignty over resources within their domestic jurisdiction.[75] State sovereignty creates a challenge for international environmental law, as states are wary of agreeing to limits to this sovereignty, the principle has somewhat defined environmental regulation over natural resources. This was expressed in UNGA Resolution 1803 (XVII)[76]

> "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the state concerned."

States may consent to limits on their state sovereignty but this should always be considered in the context of international law such as customary international law principles. What has been agreed ensures what states view to be an acceptable level of sovereignty maintained.[77] As discussed in the following section, there is a great deal of soft law rather than legally binding obligations that also allows states to safeguard their sovereignty.

As with other areas of sustainable development, forests raise tension between developing and developed states. Historical loss of their forests has seen developed states pursue efforts to ensure the remaining forests of developing states are protected for their contribution to climate and ecological cycles.[78] Many tropical forests reside in developing states making this issue highly relevant to their interests as they will seek to maintain trade in these products. These states may particularly be reluctant to do what they perceive as sacrificing sovereignty over 'their own' natural resources.

New Zealand respectfully requests the Court encourage states to accept that the management and protection of natural resources is a matter of interest for the international community. Therefore, states should be willing to accept limitations to their sovereignty over natural resource use, where it provides for better and coordinated protection of these crucial ecosystems. This is the only

[73] UN Charter, Article 2(1).
[74] Virginie Barral National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development (Research Handbook on International Law and Natural Resources, Edward Elgar Publishing, 2016) at 3.
[75] Smith, above n 65, at 254.
[76] UN General Assembly resolution 1803 (XVII), Permanent Sovereignty over Natural Resources, 1962.
[77] Barral, above n 74, at 14.
[78] Peel, Sands, above n 64, at 495.

interpretation that accords with a fundamental environmental principle of quality and protection for the sustainability of our natural world.

III. SOURCES OF INTERNATIONAL LAW

When considering states obligations under international law, one must look to the sources of international law. The sources of international environmental law are that of general international law.[79] However, these sources interact with environmental law's unique challenges to create state obligations differently than other areas, such as the law on the use of force.[80] This submission will primarily consider; treaties, customary international law and soft law, with a brief word on some key judicial decisions.

A. TREATIES

A huge amount of international environmental law is found in treaties, which is a reflection of the complexity and range of environmental issues.[81] Treaties are important for international environmental law as they can create new rights and obligations, they may also reflect or solidify customary norms.[82] They provide for ongoing evolution of environmental law with the possibility of building on instruments and developing additional protocols, such as REDD+ developed by the parties to UNFCCC.

However, it is also possible to be concerned with the overlap and fragmentation of environmental protection among treaties.[83] They are subject to interpretation and must be interpreted in light of other international law rules and principles.[84] These factors may interact to weaken the effectiveness of treaties, for example, in protecting tropical forests. Additionally, the text that is agreed in treaties often reflects the lowest common denominator of state interests. This means that where it does create legally binding obligations, they may not create strong statements of these obligations or implementation and enforcement processes. As discussed above, these will often be designed to provide the state with a sense of security around their state sovereignty.

In the case of forests, a lack of consensus has prevented the creation of a convention specific to their protection. As discussed more extensively in the submissions of our learned colleagues before this

[79] Patricia Birnie, Alan Boyle, Catherine Redgewell "International Law and the Environment" (3rd Edition, OUP, Oxford 2009) at 958.
[80] Birnie, above, at 958.
[81] Birnie, above, at 944.
[82] Birnie, above, at 945.
[83] Birnie, above, 947.
[84] Birnie, above, at 947.

Court, forests are included in or relevant to a number of treaties, including the 1992 Convention on Biological Diversity, the 1992 Convention on Climate Change (UNFCCC) and the UN Convention to Combat Desertification (UNCC).[85] However, they have been negotiated alongside a great deal of other issues and therefore have not had their needs fully considered and provided for, making them subject to any gaps and weaknesses of the treaties as well as missing out on the clarity of obligation created by a devoted convention. Therefore, fragmentation and a lack of clear and enforceable state obligations concerning forests have been ongoing challenges in this area.

B. CUSTOMARY INTERNATIONAL LAW

International environmental law attempts to protect the environment by addressing and regulating the effect of human activity on the planet. Therefore, there is a huge range of relevant considerations, because environmental impact is felt from the multitude of activity undertaken by humans.[86] Because international environmental law as we understand it today is a relatively recent development, there is debate around its principles and what can be said to be customary international law.[87]

As previously discussed, state sovereignty over natural resources is key. However, this is also caveated by the state responsibility not to allow transboundary damage as a result of activity within a state's jurisdiction.[88] Also relevant are the principle of cooperation that underpins the UN system in the maintenance of peace and security. Arguably the precautionary principle, although this has been incorporated differently and inconsistently across states.[89] The principle of sustainable development is also debated as being sufficiently prevalent to be a principle of customary international law.[90]

Even where principles such as the precautionary principle may not be undeniably customary international law, they still guide treaty interpretation, to state practice and contribute to the moulding of more concrete rules of law in the future.[91]

It may be necessary in the future for states to read environmental obligations further into principles of international law as well as creating and solidifying more customary international law through practice and the continued pursuit of both hard and soft law instruments. These developments should create international obligations that consider and provide for how they will interact within other sectors of international law such as trade if they hope to be effective and resilient in the future.

[85] See also, The Ramsar Convention on Wetlands; World Heritage Convention; Vienna Convention for the Protection of the Ozone Layer (Vienna Convention); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention no. 169).
[86] Hay, above n 66, at 1.
[87] Dupoy, above n 72, at 39.
[88] *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905.
[89] Adelman, above, at 200.
[90] Adelman, above, at 952.
[91] Adelman, above, at 952.

C. SOFT LAW

Soft law describes instruments relevant to international law that are not themselves legally binding.[92] They are useful where states may be wary of agreeing to compromise their sovereignty, of creating new rights or duties, or are unconvinced there is sufficient scientific evidence to support an issue or the economic costs are uncertain. Here, they may be unable to agree on a legally binding agreement, but a soft law instrument may be seen as an important step in addressing an issue.[93]

Examples of this include the Forest Principles developed at UNCED 1992, along with a general commitment in Agenda 21 to further consider the need for international agreements to promote international cooperation for forests.[94] Since then there have been efforts to progress the issue, with groups like the UN Forum on Forests (UNFF) attempting to promote internationally agreed action plans at the state and global levels.[95] In 2007, the UNFF adopted the Non-Legally Binding Instrument on All Types of Forests, which was subsequently adopted by the General Assembly.[96] It had the purpose of strengthening political commitment to the sustainable management of forests and to contribute to the achievement of agreement on development goals. Other relevant soft law instruments include the 1972 Stockholm Declaration and the 1992 Rio Declaration.

However, as is highlighted below, forests are vulnerable to being thought of primarily as a commodity for trade. It is consequently necessary to recognise the potential weakness of soft law in when looking through the lens of international trade law in particular. In this context, a combination of existing binding obligations, along with state interests to pursue trade will likely mean trade is prioritised over soft law guidelines.

D. JUDICIAL DECISIONS

States are bound by judiciary decisions from the ICJ and other bodies they have consented to having jurisdiction, such as the WTO disputes tribunal. Relevant decisions to this discussion are cases concerning state sovereignty and extra-territorial harm. International law provides states sovereignty over their territory; however, it also provides that they must not allow activity on their territory to harm other states. This has been upheld in key cases such as the *Trail Smelter* decision and the *Corfu Channel* case.[97] Although this has traditionally been thought of in terms of direct forms of harm, this reasoning

[92] Dupoy, above n 72, at 40.
[93] Birnie, above n 79, at 956.
[94] Peel, Sands, above n 64, at 495.
[95] Peel, Sands, above, at 498.
[96] Non Legally binding Instrument on all types of forests, GA Res 62/98 2007.
[97] *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905; *Corfu Channel Case (United Kingdom v. Albania)*; Assessment of Compensation, 15 XII 49, International Court of Justice (ICJ), 15 December 1949,

should be extended in the face of climate change and environmental crisis. This would appreciate the view that it is illogical for states to both exploit their forests and recognise an obligation not to damage the environment of other states.[98] When considering the effects of deforestation and degradation on soil, habitat and biodiversity, which are not limited by state borders.[99] The judiciary will likely need encouragement from state practice and international agreements to apply this reasoning, as there is not currently sufficient international law to create this state responsibility where harm is not able to be clearly attributed to a state's activity.

IV. RELEVANT INTERNATIONAL TRADE LAW

A. INTERNATIONAL TROPICAL TIMBER AGREEMENT (ITTA)

The 1983 International Tropical Timber Agreement (ITTA) was created as a result of concerns for tropical forests due to developed countries consumption leading to deforestation.[100] The ITTA 1983 created The International Tropical Timber Organization (ITTO), an intergovernmental organisation with the purpose to promote the sustainable use and trade of tropical forest resources.[101] It was succeeded by the ITTA 1994, which in turn was succeeded by the ITTA 2006.[102] Its members make up 95% of tropical timber trade, which are divided into producers and consumers both of whom are provided equal voice within the ITTO.[103] With the succeeding agreements, the scope of the agreement has broadened to better encourage sustainable forest management and to provide space for discussion on all aspects of timber trade relevant to the agreement.[104] The ITTO has established quotas and regulations for both importing and exporting nations and was subsequently negotiated to allow for climate change mitigation and illegal logging.[105] It funds country-driven projects and looks into aspects of trade that may have been unresolved elsewhere in trade or environmental protection.[106] One particular initiative of the ITTO was the Year 2000 Objective, which sought to ensure by 2000 that all international trade of timber products was sourced from sustainably managed forests.[107] The assessment that followed in 2000 recognised that significant progress had been made by member states in creating the necessary

[98] Adelman, above, at 201.
[99] Adelman, above, at 201.
[100] Lesniewska, above, at 158.
[101] Emmanuel Meka, Steven Johnson, Putting Sustainability into Practice (38 Environmental Policy and Law; Amsterdam 2008) at 261.
[102] Meka, above, at 262.
[103] Christopher Rose International Tropical Timber Agreement (14 Environmental Conservation 1987) at 79.
[104] Meka, above n 101, at 262.
[105] Meka, above n 101, at 262.
[106] Meka, above n 101, at 266.
[107] Peel, Sands, above n 64, at 496.

policies in line with this goal, however, there was still concern around the implementation and enforcement of these policies.[108]

As a treaty, the ITTA creates binding obligations on states to act in good faith and comply with the treaty provisions, however, this creates obligations in relation to trade as well as sustainable forest management. Of the instruments discussed, the ITTA is perhaps that which environmentalists are most optimistic about.[109] However, it is still largely a tool to facilitate trade, and as particularly emphasised when considering the WTO law, it is possible to see trade as a priority that inevitably comes at the expense of conservation of species and ecosystems such as that of tropical forests.[110] For instance, the preamble of the 2006 ITTA included statements on both a state's right to exploit their resources and to not cause damage to the environment of other states.[111] Article 1 Objectives, refers first to the expansion and diversification of international trade in tropical timber, qualifying this as being from sustainably managed and legally harvested forests.[112] As will also be discussed in the context of CITES, it does not concern itself with the health of ecosystems but seeks to ensure the tropical timber species, in particular, are able to continue to be exploited in the future. Therefore, states are not required to protect their tropical forests any further than for the sustainable management of the resources for human use continuing into the future.

B. CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora Threatened with Extinction (CITES) is a general species convention concerned with the regulation of trade for animal and plants species identified in its appendices.[113] The primary purpose of which is to prevent these species from falling victim to over exploitation as a result of international trade, including a number of plant and specifically tropical forest species.[114] For example, bigleaf mahogany (Swietenia marcophylla) from Central and South America and afromosia (Pericopsis elata) from Africa are included in Appendix II and are valuable in timber trade.[115] The preamble recognises the irreplaceable nature of species and the need to protect them for future generations.[116] CITES lists species on three

[108] Peel, Sands, above n 64, at 496.
[109] Meka, above n 101, at 263.
[110] Birnie, above n 79, at 694.
[111] 2006 International Tropical Timber Agreement
[112] ITTA, Article 1.
[113] Eikermann, above, at 64.
[114] Peel, Sands, above n 64, at 472.
[115] Eikermann, above, at 68.
[116] Convention on International Trade in Endangered Species of Wild Fauna and Flora Threatened with Extinction (CITES), preamble.

Appendices, the level of protection given to a species correlates with the appendix it is included in. Species included are subject to permit systems managed by member states and scientific authorities.[117]

As a multilateral treaty, CITES imposes obligations on states to comply with the convention. Where a state violates its obligations, CITES can apply sanctions and prevent a state from trading legally in a listed species.[118] However, in reality, states are rarely sanctioned and the effectiveness of this threat is limited by politicisation and the voluntary nature of the agreement.[119]

Arguably, a challenge for forestry protection in CITES is the compartmentalisation of different species, where tropical forests are comprised of hundreds of species. Being complex and interdependent ecosystems, it is important to ensure the overall health of the forest rather than inconsistent protection of different species throughout. Similarly, it takes a negative list approach, meaning that all species not expressly provided for in the appendices remain unregulated by this instrument. This has been particularly concerning where new species have struggled to be added to the lists.[120]

CITES is also still fundamentally an instrument for trade, reflected in the fact that GATT Secretariat was consulted in its development. This, combined with the negative list structure, means that it is an instrument that attempts to walk the tightrope of sustained exploitation of natural resources as opposed to actively pursuing sustainable ecosystems.

New Zealand requests that the Court declare the need for international agreements such as CITES to move away from the compartmentalised negative list approach. Instead, an ecosystem based approach that recognises the interconnected nature of forests is needed. The negative list approach should also be examined to ensure greater protection for species where there has not been sufficient investigation into how their exploitation will effect that species and the ecosystem they are a part of. Such an interpretation is required and justified by a fundamental principle of international law to environmental quality and protection for the species that comprise our natural world.

C. WTO LAW

The World Trade Organisation (WTO) is the key body in charge of international trade, after being negotiated in the aftermath of World War II with the main objective of promoting international trade

[117] Peel, Sands, above n 64, at 472.
[118] Rachel Fobar "Convention on International Trade in Endangered Species" National Geographic, 2019 <https://www.nationalgeographic.com/animals/reference/convention-on-international-trade-in-endangered-species/>
[119] Fobar, above.
[120] Eikermann, above, at 69.

liberalisation.[121] This purpose means it is more detached from environmental law and conservation than the ITTA and CITES.[122] The underlying and permeating objectives of liberalising trade and removing barriers, requires balancing environmental objectives against trade to work with sustainability principles for to further trade.[123] Under the WTO system, members are free to decide whether they harvest resources such as tropical forest products, however, obligations are imposed on states where they choose to do so.[124] Therefore, states are not required under WTO to exploit tropical forests, but where they harvest timber or other forest products, they must be aware of WTO obligations such as making resources available in trade with other WTO members. Where it imposes obligations on states, they will be taken very seriously and may come at the expense of conservation efforts.

This tension can be illustrated in WTO disputes and arbitration, such as in the *Shrimp-Turtle* case.[125] The *Shrimp-Turtle* case dealt with an import prohibition put in place by the US on shrimp and shrimp products caught through fishing techniques that had adverse effects on sea turtles.[126] The US argued this was justified as an exception to general trade rules under Article XX of the GATT. It was accepted that the US measure was provisionally justified under Article XX(g), which allows for the consideration of exhaustible natural resources as an exception to key principles of the GATT and WTO in terms of trade liberalism. This can be seen in a positive light, suggesting that WTO law may provide some space for environmental considerations. Particularly as in its findings, the Appellate Body accepted that living species were exhaustible natural resources and therefore affirming that this was limited to, for example, oil or minerals in the context of the WTO.[127] However, in saying that, the US was found to have violated the chapeau of Article XX as the ban was still found to constitute an unjustifiable discrimination in violation of the US state obligations.[128] This was because the US import ban was inflexible in requiring WTO members to utilise essentially the regulatory program adopted by the US in protecting sea turtles. This went against the need within the WTO to balance the rights of members to invoke exceptions, with the rights of other members to have their rights and obligations under the GATT respected.[129]

Although this case did not deal directly with tropical forests, it shows the potential incompatibility with the WTO and the level of conservation needed to protect natural resources and counter the environmental challenges facing the world today. The *Shrimp-Turtle* case was seen in some ways as a positive result for environmental protection in that the US was seen to have prima facie been justified

[121] Kati Kulovesi International Trade: Natural Resources and the World Trade Organization (Research Handbook on International Law and Natural Resources, Edward Elgar Publishing, 2016) at 47.
[122] Eikermann, above, at 64.
[123] Kulovesi, above n 121, at 48.
[124] Kulovesi, above, at 49
[125] WTO "Shrimp-Turtle" <https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm>
[126] Kulovesi, above n 121, at 56.
[127] *United States — Import prohibition of certain shrimp and shrimp products* WT/DS58/RW
[128] Kuvolesi, above n 121, at 57.
[129] Kuvolesi, above, at 57.

under Article XX, having failed the second test under the chapeau. However, in subsequent cases such as the China-Raw Materials and China-Rare Earths disputes, WTO dispute settlement has taken narrower views to the environmental efforts application to trade law. Indicating the *Shrimp-Turtle* case may not have been a progressive step towards greater environmental consideration in the WTO.

In the specific context of tropical forests, it is possible to see similar frustrations in the EU's attempts to regulate the illegal timber trade. The EU has pursued timber regulation agreements which states enter into on a voluntary basis. States are not required under international law to participate in protecting domestic forests by participating in the EU initiatives, however where they do participate, they would be obliged to act in a way consistent with their obligations under the agreement. These have not yet found to be incompatible with WTO law, however the process of negotiating each with each state in order to avoid violating WTO obligations has been a costly and time-consuming exercise for the EU. Hence, even where the WTO does not directly condone trade efforts in conservation, they may create significant obstacles to initiatives.

New Zealand respectfully requests the Court to recognise that the international context has shifted significantly since the development of the WTO and the current international trade framework. Further from this, we request the Court to declare that it is no longer possible for the states to continue to produce and consume products, including those originating from forests, at the current rate. This is an interpretation that is justified and required by a fundamental principle to protect the natural world upon which the international trading system depends.

V. CONCLUSION on trade law obligations

Looking at obligations under international trade is a useful exercise as it highlights occasions where environmental protection is second hand to trade and economic growth. A prioritisation that is no longer justifiable in the light of the available science and present environmental crises. International trade recognises state sovereignty over natural resources, while also attempting to facilitate trade and reduce barriers to trade wherever possible. Although these cases may not have referred directly to tropical forests, the reasoning may be applicable in analogous cases involving forest species.

Under current international law, there are obligations to comply with treaty obligations to contribute to sustainable forest management, such as CITES and ITTA, however, under international trade law, there are also obligations to prioritise trade liberalisation and not to create unnecessary barriers to trade. In this way, it is possible to argue that CITES and ITTA still facilitate an incomplete form of forest protection. One that still aims to facilitate trade and does not holistically protect ecosystems that forests

are a part of. The fundamental perspective arising out of disputes so far is that a state's right to pursue conservation is not a right to detrimentally affect trade or to control markets.[130]

International trade fails in its interactions with environmental protection where it neglects to appreciate the interdependence of environmental protection, ecosystems and human wellbeing. This is hugely significant when moving forward in international environmental law because states and international organisations must not only consider obligations created under conventions, treaties or declarations directly relating to environmental law but must consider how they will respond to environmental crises within other facets of their international relations, such as trade, that may be in conflict or take priority. As a result, this submission provides a supporting argument for stepping away from the traditional anthropocentric approach to international environmental law, in favour of a more ecosystem-based perspective.

We respectfully request the Court to recognise the need for ecosystem-based climate action and conservation to be a priority in international law. Namely, that there should be a greater focus in international trade on the need for protection of the ecosystems that natural resources such as forests are a part of.

Where there is any doubt or ambiguity in international trade law, we request the Court declares that the interpretation that more greatly facilitates this.

We wish to encourage states to accept limitations on or developments of international trade law to accommodate this, with the appreciation that the priorities that underpin current international trade are unsustainable and incompatible with effective climate action, and with the fundamental principle that states need to protect the natural world and a stable climate in order to protect the existence of our current world order.

4. Alternatives

4.1 Legal personhood[*]

A way for countries to honour a fundamental principle to protect forests as a basis for life on earth, as well as a way to better uphold human rights, is to accord forests legal personality at the national level. This can better recognise people's legal responsibilities over nature to protect and essentially be a

[130] Smith, above n 65, at 250.

[*] (v) This section was drafted by Alana Peek and Eloise Pointon.

guardian over it. This recognition of a forest in its own right can then also enable states to change ownership issues and consequences, by providing that the forest can own itself. These tools can thus both implement our responsibilities under fundamental legal principles of quality and protection, while also reflecting alternative world views of our relationship with nature, such as those held by traditional community-based and indigenous peoples.

Legal personality of nature as a way to better protect nature was brought up in the United States of America in 1972 by Christopher Stone.[131] The idea is to treat nature as a subject of rights and give people a guardianship role in protecting the rights of nature. Stone's ideas on using this approach to nature have been implemented throughout the United States, often in City council decisions.[132] The actual implementations of Stone's ideas have been to give nature rights instead of to give nature legal personality, but the effect is similar.[133]

The Colombian Supreme Court has used a legal personality approach with regards to the Amazon rainforest which gives more protection to the forest while also promoting the rights of its 84 indigenous tribes (though the English version of the case does not mention the indigenous aspect).[134]

The recent decision of the Colombian Supreme Court gave the Amazon rainforest legal personality and treats the forest as a subject of rights which is therefore entitled to be protected, conserved, maintained and restored.[135] The state of Colombia is now responsible for the rights of the Amazon rainforest and its territorial agencies are to counteract deforestation.[136] The Court based its decision on both fundamental responsibilities of states of environmental protection, and human rights laws, including those protecting indigenous values and rights.

The reasons for Colombia deciding to give the Amazon rainforest legal personality are expressed in more general human rights terms as to the risks to human health and wellbeing if deforestation continues as it has previously been.[137] The main concerns mentioned include adverse changes to water sources and water supply, land degradation, carbon dioxide emissions and adverse changes to ecosystems all of

[131] Christopher Stone "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 Southern California Law Review 450.
[132] City of Santa Monica, Santa Monica Municipal Code, Ch 4.75 ('Sustainability Rights Ordinance'), 4.75.040(b). Available at www.harmonywithnatureun.org ; City of Pittsburg, The Pittsburgh Code, Title Six, Art. 1, Ch. 618.3(b); available at www.harmonywithnatureun.org/content/documents/203Ordinance-Pittsburgh--.pdf.
[133] Catherine Iorns Magallanes "From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers" 2019 *ResponsAbility: Law and Governance for Living Well with the Earth (*Routledge, London), at 216-239.
[134] *Future Generations v Ministry of the Environment and others* [2018] 11001 22 03 000 2018 00319 00.
[135] At 45 (of English transcript available at https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf)
[136] At 45.
[137] *Future Generations v Ministry of the Environment and others* [2018] 11001 22 03 000 2018 00319 00.

which are looked at from the perspective of how these consequences of deforestation will affect current and future generations with regards to life, health and wellbeing.[138] The court was concerned about peoples' rights to environmental welfare of the rainforest and the global impact deforestation would have and that the previous actions that the Colombian government has taken to combat deforestation have not been enough.[139] The court calls out the negligence of officials in charge of maintaining Colombia's national parks and sets out responsibilities on people (mainly ministers) to protect the Amazon and to form a plan to combat deforestation. Unfortunately, the judgement does not impose a plan itself to combat deforestation and protection of the Amazon but it does put significant pressure on the Colombian government to actively protect the rainforest by forming a plan of action to mitigate and combat deforestation.[140]

Beyond the human rights aspects, the judgment goes further and the Court considers itself guided by hard and soft international law "which constitute a global economic order".[141] The court was not simply guided by its own national law but principles of international law as well as other International Conventions. The Court's decision was not an isolated one, but rather reflects international changes too. This decision ultimately came out of the Atrato River decision that held the Atrato river to have legal personhood. That case was unique in that, unlike other examples of legal personhood, the court focused on "grand narratives" rather than the common law.[142] This departure from an internal, national legal focus to a more outward focus shows "a point of confluence for the international arguments that see rivers as the focal intersections of rights of Nature and human rights, as inevitably flowing in the same direction".

New Zealand has given legal personality to both rivers and forests in order to promote indigenous rights of Māori Iwi, to protect the natural resources from exploitation and to give people responsibilities in relation to the forests and rivers.[143] The Te Urewera forest was given legal personality in 2014 through negotiations between the crown and Tūhoe, who are the Iwi with claim to the forest. Te Urewera was previously owned by the New Zealand government but title now vests in Te Urewera itself after the passing of the Te Urewera Act and management of the forest is done by a new entity formed to act on behalf of the forest.[144] Giving legal personality to Te Urewera reflects the cultural importance of this forest to Tūhoe and Māori culture and that the New Zealand government recognises the cultural

[138] At 34.
[139] At 34.
[140] At 45.
[141] At 22.
[142] Clark, Cristy, et al. "Can You Hear the Rivers Sing: Legal Personhood, Ontology, and the Nitty-Gritty of Governance." Ecology LQ 45 (2018): 805.
[143] Te Awa Tupua Act 2017 (Whanganui river); Te Urewera Act 2014 (Te Urewera forest)
[144] Māori Law Review "Tūhoe-Crown settlement – Te Urewera Act 2014" (October 2014) Available at: https://maorilawreview.co.nz/2014/10/tuhoe-crown-settlement-te-urewera-act-2014/.

importance. Giving legal personality to forests and rivers was brought about in New Zealand due to disputes between Māori Iwi and the crown over these resources and ownership. Giving nature the right to own itself was considered as a good middle ground to allow the environment to be adequately protected, while not giving up ownership rights to people. It implemented core concepts of responsibility for nature for its own sake, not just for the benefit of humans.

Some other countries have given legal personality to rivers which means that this practice is being accepted around the world, though practice will need to be seen in many more countries before it could be seen as part of international law.[145] The Ganges River and the Yamuna River in India were declared to be legal persons in 2017.[146] The Ganges is heavily polluted and heavily engineered so it is in desperate need of legal protection in order to improve the quality of the river for the species that live in it as well as for human health and wellbeing.[147] Ecuador is another country that has given legal rights to nature in order to protect the environment and to honour indigenous rights to nature.[148] The Vilcabamba River was given rights in 2011 by the Provincial Court of Loja in Ecuador based on the rights of the river itself.[149] In 2019 all rivers in Bangladesh were given legal rights by the Bangladesh Supreme Court, this means that if anyone commits harm against any river, they can face the consequences of the law.[150] This does create some issues for those who live off the river as well as jurisdictional issues as Rivers can flow between states so damage could occur in a state without protection like Bangladesh has. This was not an isolated decision but a direct response and reaction to legal personhood being embraced around the world elsewhere, this thus shows an emerging custom, rather than an individual decision based on domestic law.

Application to International Law

This view of the rights of nature has recently been included in the Convention of Biodiversity Framework "zero draft" which is up for adoption in 2021. The inclusion of such a concept shows that it is becoming more normalised and mainstream and less niche.[151] Giving legal personhood is a key way to give nature right and to implement human responsibility for it.

---

[145] Catherine Iorns Magallanes "From Rights to Responsibilities using Legal Personhood and Guardianship for Rivers" 2019 *ResponsAbility: Law and Governance for Living Well with the Earth (*Routledge, London), at 216-239.
[146] At 216-239.
[147] At 220-222.
[148] Joel Colón-Ríos "Notes on the Theory and Practice of the Rights of Nature: The Case of the Vilcabamba River" in Martin and others (eds) In Search of Environmental Justice (Edward Elgar, Cheltenham, 2015) 120.
[149] Natalia Greene "The first Successful Case of the Rights of Nature Implementation in Ecuador" (2011) GARN. Available at https://therightsofnature.org/first-ron-case-ecuador/.
[150] Signa Samuel "Bangladesh gave all it's rivers legal rights" (Aug 18th 2019) available at www.vox.com.
[151]Earth Law Centre "Protect the environment/rights of nature" (September 2nd 2020) at www.earthlawcenter.org.

The principle of giving legal personality to nature can easily extend to forests because it has done so before in New Zealand and Colombia.[152] As this can extend to forests and trees; then, maybe if enough countries practice this action, giving nature legal personality in order to protect and preserve it (humans being responsible for nature) it could eventually become customary international law or perhaps an international principle. This would mean that countries will be expected to consider giving the natural world legal personality when making decisions concerning nature.

The creation of custom is quite a simple process in theory, multiple countries actions must be in line with that custom, acting under the belief that they must act in accordance with the custom. To establish customary international law there must be actual state practice showing that the custom is accepted and being applied.[153] State practice is generally looked at on the basis of duration, consistency, repetition and generality.[154] This does not mean that all of these elements are required to show state practice as it will depend on the nature and origin of the practice as to the weight given to each factor.[155] Customs can be created quickly so duration may say little about state practice. Continuity and repetition require some uniform practice especially from states whose interests would be particularly impacted by the creation of the custom, though this does not mean complete conformity.[156]

Once state practice is shown to exist, *opinio juris* must then be established.[157] *Opinio Juris* is the "mental element" that countries are acting in line with the custom because they believe they must do so. States believe they are legally obligated to conform to the state practice, and once they have acted in accordance with the practice and the belief of the obligatory nature of the practice, it becomes custom.[158]

New Zealand now has national precedent that where a dispute arises as to ownership and use of the natural world it can be resolved by giving nature legal personhood as shown in the Te Urewera treaty negotiation settlement agreement and the Whanganui river Treaty settlement.[159]

There are enough countries following this conception to establish that there is an emerging international custom that could exist and one day be binding over countries that have recognised the custom. For the practice of giving forests legal personality to truly become custom, countries must believe that giving legal personality to the natural world and its resources is something they are obligated to do at an international level. Currently there is no established international customary law to give legal

[152] Te Urewera Act 2014 in New Zealand; Colombia SC case
[153] Malcolm Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 76.
[154] At 76.
[155] At 84.
[156] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (merits)* [1986] ICJ Rep 14, 76 ILR 348, at para [186].
[157] Malcolm Shaw, above n 153, at 84.
[158] At 84.
[159] Te Urewera Act 2014; Te Awa Tupua Act 2017.

personality to forests or the environment, it is strictly individual countries choosing to resolve disputes over the environment by giving the environment legal personality. The practice of giving legal personality to the natural world is slowly growing and becoming more prominent but the *opinio juris* element is still somewhat lacking as countries are showing no evidence of conforming to this practice because they consider that they are legally obligated to act in international law. However the states that have given legal personality to aspects of nature have been considering the actions of other states who have done so, and justifying their adoption of the same tools, by reference to these other practices. Thus, while states are not yet feeling bound by this emerging custom, they are acknowledging that it is a viable and possible option.

When it becomes international customary law to give legal personality to nature, then countries that have not given legal personality to the natural world could consider the custom in their national law when decision making and decide whether or not to follow in accordance with it. If enough countries choose to act in accordance with this legal personality approach to nature and it were to become an international principle or customary international law then all countries would have to consider the rights of nature and human responsibility to nature when making decisions that would concern the natural world. Deforestation would be a much larger legal issue because, if a forest owns itself and has a regulatory body maintaining and representing it, then the cutting down of much of the forest would breach a lot of legal rights and responsibilities owed to the forest.

The concept of giving legal personality or legal rights to nature may seem far-fetched in relation to countries' obligations to protect their forests but it may be an emerging solution to the lack of international protection and rights. Legal personality can ensure that forests are maintained, not exploited and unable to be owned which would reinforce the importance of forests and strengthen recognition of indigenous rights. Forests having legal personality makes it much harder for companies and corporations to take advantage of forest areas and deforest for profit because it puts responsibilities on people regarding the forests.

While countries argue that they do not have many international obligations to protect their forests, many do have obligations to their indigenous populations which is strongly connected to protecting the environment. For countries to truly respect the rights of indigenous peoples, they must begin to view nature differently and consider how laws in their country could better incorporate indigenous views about nature. The state of forests might seem quite grim at the moment but there are ways in which forestry protections are improving especially when considering forest protection from an indigenous perspective. A very significant development in the law has been the decisions in states such as New Zealand, Colombia, India, The USA and Ecuador in giving legal rights and legal personality to nature including to forests. This approach encapsulates respect for indigenous world views on relationships

between people and nature while adding significant protections to nature and to forests. The next thing that countries need to do who have given legal rights or personality to nature is to uphold those rights and ensure that human responsibilities to nature are being observed.

New Zealand respectfully requests the Court to consider the utility of legal personhood for nature as a tool to uphold the fundamental responsibility humans have to protect nature.

We respectfully request the Court to recognise the fundamental importance of upholding indigenous and tribal community rights, including to traditional territories and equal respect of their religions; this entails upholding their cosmologies and spiritual or religious views that nature is an ancestor and thus needs to be recognised as a person in law.

We respectfully request the court to declare legal personhood through the rights of nature to be an emerging custom of International Law.

4.1 Earth Jurisprudence[*]

In light of the laws around forestry directly affecting the environment, earth jurisprudence can be used as a lense through which to read the laws relating to forests. Earth jurisprudence revolves around there being an intrinsic relationship between humans and the environment. Without acknowledging this and moving forward in harmony, we will perish.160 Earth jurisprudence is traced back to a critical legal repose to the situation the earth is in. It challenges the 'harmful and anthropocentric worldview' and considers it to be naive.161 Anthropocentrism considers humans as the most important thing in the universe, while ecocentrism is nature focused. A new legal system is needed which enhances the Human-Earth relationship rather than the earth being solely a resource to be exploited. One of the key fundamentals to earth jurisprudence is 'mutual enhancement'. In the context of forests, this would mean allowing people to benefit from the forests, but not without the mutual respect, investment and preservation of forests. The western theory that ownership is paramount is considered outdated.162 This view can be summarised as favouring ecocentrism over anthropocentrism.

Western perceptions typically adopt a human centric view of the earth, the earth as a means to an end. One significant alternative perception places cultural and spiritual value on biodiversity. This suggests

[*] (vi) This section drafted by Eloise Pointon & Caitlyn Clark.
[160] Australian Earth Laws Alliance, ' Earth Jurisprudence', Australian Earth Laws Alliance, www.earthlaws.org.au/what-is-earth-jurisprudence/earth-jurisprudence, (accessed 16 February 2020).
[161] Peter Burdon, *Earth Jurisprudence*, (Oxon: Routledge, 2015), 81.
[162] Ibid, 11.

the land is owned by no one individual and that the natural world holds an intrinsic value and should be protected in its own right. We are simply co-existing with nature as part of the ecosystem. Preservation of biodiversity preserves cultures who feel a strong connection to the earth as well as their practices and associated beliefs.[163]

Earth jurisprudence, although not near custom like legal personhood, is emerging to become increasingly acknowledged. As noted with the new draft for the Convention of Biodiversity it may soon be acknowledged in a Treaty, this would give it strength at international law. Earth jurisprudence is the next step beyond legal personhood and is not actually that far removed, considering it takes into account indenous views and conceptions of nature that are already being considered in other Conventions like UNDRIP.

New Zealand respectfully requests the Court to consider the argument for protection of forests from the perspective of Earth jurisprudence, and requests the Court to consider whether Earth jurisprudence would add any weight to the above arguments that human responsibility to protect our natural world is a fundamental legal principle of international environmental law.

5. Conclusion

Summarising New Zealand's requests to this Court:

1. Fundamental principles:

New Zealand respectfully submits that this Court declare:

- that the environment is a prerequisite to the continuation of any legal system, international or domestic;

- that a right to a secure, healthy and ecologically sound environment is a guiding principle of international law; (often referred to as a principle of environmental *quality*);

- that there exists an international law principle of environmental *protection*, and that it protects the existence of forests within domestic countries.

[163] Klein.

We respectfully request the Court to declare that transboundary harm includes the wider damage caused by deforestation to the basis of natural life on earth, including the effect of deforestation on climate change. These provisions can be strengthened by such interpretations, which is within the jurisdiction of the Court to interpret and thus declare.

2. Trade Law:

New Zealand respectfully requests the Court to recognise that the international context has shifted significantly since the development of the WTO and the current international trade framework. Further from this, we request the Court to declare that it is no longer possible for the states to continue to produce and consume products, including those originating from forests, at the current rate. This is an interpretation that is justified and required by a fundamental principle to protect the natural world upon which the international trading system depends.

We respectfully request the Court to recognise the need for ecosystem-based climate action and conservation to be a priority in international law. Namely, that there should be a greater focus in international trade on the need for protection of the ecosystems that natural resources such as forests are a part of.

Where there is any doubt or ambiguity in international trade law, we request the Court declares that the interpretation that more greatly facilitates this.

New Zealand requests that the Court declare the need for international agreements such as CITES to move away from the compartmentalised negative list approach. Instead, an ecosystem based approach that recognises the interconnected nature of forests is needed. The negative list approach should also be examined to ensure greater protection for species where there has not been sufficient investigation into how their exploitation will effect that species and the ecosystem they are a part of. Such an interpretation is required and justified by a fundamental principle of international law to environmental quality and protection for the species that comprise our natural world.

We wish to encourage states to accept limitations on or developments of international trade law to accommodate this, with the appreciation that the priorities that underpin current international trade are unsustainable and incompatible with effective climate action, and with the fundamental principle that states need to protect the natural world and a stable climate in order to protect the existence of our current world order.

3. Alternatives:

We respectfully request the Court to recognise the fundamental importance of upholding indigenous and tribal community rights, including to traditional territories and equal respect of their religions; this entails upholding their cosmologies and spiritual or religious views that nature is an ancestor and thus needs to be recognised as a person in law**.**

New Zealand respectfully requests the Court to consider the utility of legal personhood for nature as a tool to uphold the fundamental responsibility humans have to protect nature.

We respectfully request the court to declare legal personhood through the rights of nature to be an emerging custom of International Law.

New Zealand respectfully requests the Court to consider the argument for protection of forests from the perspective of Earth jurisprudence, and requests the Court to consider whether Earth jurisprudence would add any weight to the above arguments that human responsibility to protect our natural world is a fundamental legal principle of international environmental law.

****