

# Feature—*Brief on Environmental Rule of Law: In Need of Coherence in Contested Terrain*

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*This Issue Brief provides a succinct and critical analysis of “environmental rule of law” as an emerging concept. Following an outline of its origins, this article places environmental rule of law within the contested landscape of rule of law theory and practice. It concludes with several critical observations and comments, explaining that those promoting environmental rule of law as a guiding framework need to recognize broader rule of law debates and acknowledge challenges associated with relying on a rule of law paradigm for implementing the sustainable*

*development agenda. The focus throughout this article is primarily on the development and deployment of environmental rule of law at the international level. There exists a risk that environmental rule of law, like traditional “law and development” or rule of law programming, diverts valuable time, resources and institutions from the more difficult but less glamorous political and economic choices that actually sit at the centre of development policy-making and international development initiatives.*

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*Cette note d'information fournit une analyse succincte et critique de l'« état de droit environnemental » en tant que concept émergent. Après un aperçu de ses origines, cet article situe l'état de droit environnemental dans le contexte contesté de la théorie et de la pratique de l'état de droit. Il se termine par plusieurs observations critiques et commentaires, expliquant que les défenseurs de l'état de droit environnemental en tant que cadre directeur doivent reconnaître les débats plus larges sur l'état de droit et admettre les défis associés au fait de s'appuyer sur un paradigme de l'état de droit afin de*

*mettre en œuvre les objectifs du développement durable. Tout au long de cet article, l'accent est principalement mis sur le développement et le déploiement de l'état de droit environnemental au niveau international. Il existe un risque que l'état de droit environnemental, comme les programmes traditionnels de « droit et développement » ou d'état de droit, détourne du temps précieux, des ressources et des institutions des choix politiques et économiques plus difficiles et moins prestigieux, mais qui sont pourtant au centre des politiques de développement et des initiatives internationales de développement.*

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Titre en français : *Note d'information sur l'état de droit environnemental : besoin de cohérence dans un terrain miné*

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## 1. INTRODUCTION

Perhaps no two spheres of development suffer larger gaps between ambition and implementation than the rule of law and environmental law. For decades, scholars, practitioners, governments, and multilateral institutions have struggled to effectively implement law, policy, and programs in both areas. “Law and development”, of which rule of law is a significant part,<sup>1</sup> has been declared to be either in crisis or demise multiple times,<sup>2</sup> and remains a contested area with only modest demonstrated success.<sup>3</sup> Environmental law, meanwhile, boasts hundreds of treaties and agreements in the international realm alone,<sup>4</sup> but global environmental quality is deteriorating faster than ever before.<sup>5</sup> Neither area is a legitimate success story.

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<sup>1</sup> See David M Trubek, “The Political Economy of the Rule of Law: The Challenge of the New Developmental State” (2009) 1 Hague J on Rule of Law 28 (stating that rule of law “is a lineal descendent of the law and development ... movement of the 1960s” at 28).

<sup>2</sup> Brian Z Tamanaha, “The Lessons of Law-and-Development Studies” (1995) 89 Am J Intl L 470 at 471, 473 [Tamanaha, “Lessons”].

<sup>3</sup> David Kennedy, “Laws and Developments” in John Hatchard & Amanda Perry-Kessaris, eds, *Law and Development: Facing Complexity in the 21<sup>st</sup> Century* (London: Cavendish Publishing, 2003) 17.

<sup>4</sup> Gregory L Rose, *Gaps in the Implementation of Environmental Law at the National, Regional and Global Level* (Kuala Lumpur, Malaysia: UNEP, 2011) at 6. See also Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004) at 31–37.

<sup>5</sup> United Nations Environment Programme, *Global Environment Outlook, GEO 6: Healthy Planet, Healthy People* (Cambridge: Cambridge University Press, 2018) at 4, online (pdf): *UN Environment Document*

Out of this context has emerged a new concept: “environmental rule of law”. The concept has been gaining traction since its first articulation by the United Nations Environment Programme (UNEP) in 2013, having been the focus of several international meetings since,<sup>6</sup> culminating in the release of the “Environmental Rule of Law: First Global Report” by UNEP in January 2019 (“Global Report”).<sup>7</sup> Surprisingly, however, the coupling of environmental law and the rule of law into “environmental rule of law” has received minimal scholarly attention to date.<sup>8</sup>

This Issue Brief provides a succinct and critical analysis of “environmental rule of law” at this relatively early stage. The focus here is primarily on the development and deployment of the concept at the international level. Where did it come from? What does it mean? How does it relate to the broader rule of law debates? What does it offer the pursuit of sustainable development? The article begins with an outline of the origins of the concept, then places environmental rule of law within the contested landscape of rule of law theory and practice. It concludes with several critical observations and comments on constructive ways forward, explaining that those promoting environmental rule of law as a guiding concept or framework, especially in relation to efforts focused on the United Nations Development Programme’s 17 Sustainable Development Goals,<sup>9</sup> need to recognize broader rule of law debates and acknowledge challenges associated with relying on a rule of law paradigm for implementing the sustainable development agenda. This article also concludes by noting that it is too soon to say whether the environmental rule of law concept should be abandoned all together.

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*Repository* <[wedocs.unep.org/bitstream/handle/20.500.11822/27539/GEO6\\_2019.pdf](http://wedocs.unep.org/bitstream/handle/20.500.11822/27539/GEO6_2019.pdf)> [perma.cc/FG2R-MWLT].

- <sup>6</sup> See e.g. “II Inter-American Congress on the Environmental Rule of Law: Supreme Court of Chile, Justice Courts Palace, Santiago, Chile, September 4–6, 2017” (6 September 2017), online (video): *The Organization of American States* <[www.oas.org/en/sg/commonhome/environmental-rule-law.asp](http://www.oas.org/en/sg/commonhome/environmental-rule-law.asp)> [perma.cc/46V4-S9KX].
- <sup>7</sup> United Nations Environment Programme, “Environmental Rule of Law: First Global Report” (2019), online (pdf): *UN Environment Document Repository* <[wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental\\_rule\\_of\\_law.pdf](http://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf)> [perma.cc/D5FQ-96DX] [“Global Report”].
- <sup>8</sup> Indeed, a search for any peer-reviewed materials considering this concept using the terminology “environmental rule of law” returns very few results. However, significant consideration of something conceptually related was included in a collection of essays published in 2013. See Christina Voigt, ed, *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge, UK: Cambridge University Press, 2013). See also Elizabeth Barrett Ristroph, “The Role of Philippine Courts in Establishing the Environmental Rule of Law” (2012) 42 *Environmental L Reporter* 10866; Bruce Pardy, “Towards an Environmental Rule of Law” (2014) 17 *Asia Pac J Envtl L* 163. For use of “environmental rule of law” in a different manner and context, see A Dan Tarlock, “The Future of Environmental ‘Rule of Law’ Litigation” (2000) 17:2 *Pace Envtl L Rev* 237.
- <sup>9</sup> See United Nations, “About the Sustainable Development Goals” (last visited 24 July 2019), online: *UN* <[www.un.org/sustainabledevelopment/sustainable-development-goals/](http://www.un.org/sustainabledevelopment/sustainable-development-goals/)> [perma.cc/H6ZC-HTXH] [United Nations, “About the SDGs”].

## 2. EMERGENCE OF ENVIRONMENTAL RULE OF LAW

### 2.1. HISTORICAL CONTEXT AND INCEPTION

The concept of environmental rule of law was first articulated at the international level in 2013 by the UNEP Governing Council in *Advancing Justice, Governance and Law for Environmental Sustainability* (Decision 27/9).<sup>10</sup> This decision, flowing from the UNEP-organized World Congress on Justice, Governance and Law for Environmental Sustainability held in connection with the Rio+20 United Nations Conference on Sustainable Development,<sup>11</sup> was a recent development in a decades-long evolution of international environmental law and associated institutions. A full chronology is beyond the scope of this article, but several key developments are important for understanding the context that has led to the emergence of environmental rule of law. The focus here is primarily on United Nations-led efforts, particularly the series of United Nations conferences on the environment and development.

Events directly relevant to UNEP's recent environmental rule of law initiative started with the Stockholm Conference on the Human Environment in 1972, where states began systematically cooperating through the UN system to reconcile economic development and environmental protection.<sup>12</sup> The Stockholm conference set in motion initiatives on normative, institutional, programmatic, and financing fronts that drove the direction of the UN activities in this area for decades (including establishment of UNEP).<sup>13</sup> In the intervening years, hundreds of treaties and agreements pertaining to environmental issues (of varying legal force) have been put in place internationally,<sup>14</sup> along with a plethora of ministries, agencies, and institutions at the national and sub-national levels.<sup>15</sup>

The 1992 United Nations Conference on Environment and Development in Rio de Janeiro led to the *Rio Declaration on Environment and Development*, which set out twenty-seven principles to guide and inform cooperation on sustainable development, including international agreements.<sup>16</sup> It was also at the Rio Conference where two foundational

<sup>10</sup> *Advancing justice, governance and law for environmental sustainability*, GC Dec 27/9, UNEP/OC, 27th Sess, UN Doc UNEP/GC.27/17 (2013) 34, online (pdf): *UN Environment Document Repository* <wedocs.unep.org/bitstream/handle/20.500.11822/12221/Governing%20Council%20Decision%2027-2.pdf> [perma.cc/CF64-D3S9] [UNEP GC].

<sup>11</sup> See United Nations Environment Programme, "Advancing Justice, Governance and Law for Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorney Generals and Auditor Generals" (2012), online (pdf): *UN Environment Document Repository* <wedocs.unep.org/bitstream/handle/20.500.11822/9969/advancing\_justice\_governance\_law.pdf> [perma.cc/7LE7-B3EH] [UNEP, "Advancing Justice"].

<sup>12</sup> Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment*, 3rd ed (Oxford: Oxford University Press, 2009) at 48.

<sup>13</sup> *Ibid* at 48–50.

<sup>14</sup> Cordonier Segger & Khalfan, *supra* note 4 at 31–32. See also Rose, *supra* note 4 at 6.

<sup>15</sup> Rose, *supra* note 4 at 6–7.

<sup>16</sup> See *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, UN Doc A/CONF.151/26/Rev.1(Vol I), Annex I (1992) 3. These principles are widely regarded to be the comprehensive basis for international environmental law. The *Declaration* was preceded and informed by the World Commission on Environment and Development, which published the "Brundtland Report" and articulated the now much-used concept of "sustainable development". See

international environmental legal frameworks were put in place: the *United Nations Framework Convention on Climate Change (UNFCCC)*<sup>17</sup> and the *Convention on Biological Diversity*.<sup>18</sup> These two international environmental legal regimes continue to be primary drivers of environmental law and policy today, most recently animated through the *Paris Agreement* on climate change under the *UNFCCC*,<sup>19</sup> and domestic measures pledged pursuant to it.<sup>20</sup>

In 2002, ten years after Rio, another UN conference on environment and development convened in Johannesburg, South Africa. This “World Summit on Sustainable Development” adopted the *Johannesburg Declaration on Sustainable Development*<sup>21</sup> and *Plan of Implementation*;<sup>22</sup> however, the conference and its outputs are widely viewed as disappointing.<sup>23</sup> The *Declaration* affirmed existing statements from Stockholm and Rio but offered minimal new content.<sup>24</sup> With waning political will on the environmental agenda at the time,<sup>25</sup> the elusiveness of sustainable development (including basic definitional challenges)<sup>26</sup> and the span of the implementation gap were becoming quite clear.<sup>27</sup>

That view and associated circumstances had not changed measurably by the next world conference ten years later. In 2012, 20 years after the UN Conference on Environment and Development, Rio de Janeiro hosted the Rio+20 United Nations Conference on Sustainable Development (Rio+20).<sup>28</sup> The outcome document, *The Future We Want*,<sup>29</sup> has been criticized

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*Report of the World Commission on Environment and Development: Our Common Future*, UNGAOR, 42nd Sess, Supp No 25, UN Doc A/42/427 (1987) at ch 2, paras 1–3 [*Our Common Future*].

<sup>17</sup> 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>18</sup> 5 June 1992, 1760 UNTS 79, 31 ILM 818 (entered into force 29 December 1993).

<sup>19</sup> *Adoption of the Paris Agreement*, CP Dec 1/CP.21, 21st Sess, UN Doc FCCC/CP/2015/10/Add.1 (2016).

<sup>20</sup> *Ibid*, art 4.

<sup>21</sup> World Summit on Sustainable Development Res 1, 2002, UN Doc A/CONF.199/20, 1.

<sup>22</sup> *Plan of Implementation of the World Summit on Sustainable Development*, World Summit on Sustainable Development Res 2, 2002, UN Doc A/CONF.199/20, 6.

<sup>23</sup> Birnie, Boyle & Redgwell, *supra* note 12 at 53. See also Klaus Bosselmann, “Grounding the Rule of Law” in Voigt, *supra* note 8, 75 at 78.

<sup>24</sup> Pierre-Marie Dupuy & Jorge Vinuales, *International Environmental Law* (Cambridge, UK: Cambridge University Press, 2015) at 18–21.

<sup>25</sup> Birnie, Boyle & Redgwell, *supra* note 12 at 53. Emblematic of waning political will was President George W. Bush’s absence from the Johannesburg Summit (Julian Borger, “Bush Snubs Earth Summit”, *The Guardian* (16 August 2002), online: *The Guardian* <[www.theguardian.com/environment/2002/aug/17/worldsummit2002.internationalnews](http://www.theguardian.com/environment/2002/aug/17/worldsummit2002.internationalnews)> [perma.cc/FC26-P2L7]).

<sup>26</sup> Birnie, Boyle & Redgwell, *supra* note 12 at 55.

<sup>27</sup> *Ibid* at 53. See also Adlai Amor, “WRI Expresses Disappointment over Many WSSD Outcomes” (4 September 2002), online (blog): *Science Blog* <[www3.scienceblog.com/community/older/archives/K/0/pub0167.html](http://www3.scienceblog.com/community/older/archives/K/0/pub0167.html)> [perma.cc/Z78V-L9J9]. For a more comprehensive chronological overview of this evolution of international environmental law and sustainable development, see Dupuy & Vinuales, *supra* note 24 at 8–21.

<sup>28</sup> See “About the Rio+20 Conference” (last visited 24 July 2019), online: *Sustainable Development Goals Knowledge Platform* <[sustainabledevelopment.un.org/rio20/about](http://sustainabledevelopment.un.org/rio20/about)> [perma.cc/DB25-6KYN]. See also Dupuy & Vinuales, *supra* note 24 at 18–19.

<sup>29</sup> GA Res 66/288, UNGAOR, 66th Sess, Annex, UN Doc A/RES/66/288 (2012).

for simply “list[ing] voluntary measures that countries can accept or ignore.”<sup>30</sup> However, the event did sow the seeds for the emergence of the concept of environmental rule of law.

A key outcome from Rio+20 was creation of the new United Nations Environment Assembly (UNEA) to strengthen and upgrade UNEP as the leading global environmental authority that “sets the global environmental agenda.”<sup>31</sup> Rio+20 also featured the gathering of UNEP’s World Congress on Justice, Governance and Law for Environmental Sustainability, which included more than 200 of the world’s chief justices, attorneys general, and auditors general.<sup>32</sup> A significant amount of attention at that event focused on the view that desired outcomes related to the environment and sustainable development will remain unimplemented “without adherence to the *rule of law*, without open, just and dependable legal orders.”<sup>33</sup>

Prominence of rule of law in this context continued in 2013 with the UNEP Governing Council’s adoption of the abovementioned Decision 27/9 on *Advancing Justice, Governance and Law for Environmental Sustainability*.<sup>34</sup> This decision “is the first internationally negotiated document to establish the term ‘environmental rule of law.’”<sup>35</sup>

Specifically, part of the decision requested the UNEP Executive Director to:

*lead the United Nations system and support national Governments upon their request in the development and implementation of environmental rule of law with attention to all levels to mutually supporting governance features, including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution.*<sup>36</sup>

In response to this mandate, UNEP initiated a number of activities and programs. Several regional dialogues on environmental rule of law took place soon after Decision 27/9. The first was in the Asia-Pacific region in December 2013,<sup>37</sup> a second in the Latin American and

<sup>30</sup> Bosselmann, *supra* note 23 at 76.

<sup>31</sup> See “UN Environment Assembly and Governing Council” (last visited 24 July 2019), online: *UNEP* <[web.unep.org/environmentassembly/un-environment-assembly-and-governing-council](http://web.unep.org/environmentassembly/un-environment-assembly-and-governing-council)> [perma.cc/BGT7-2XPZ].

<sup>32</sup> International Institute for Sustainable Development, “A Summary Report of the World Congress on Justice, Governance and Law for Environmental Sustainability” (22 June 2012) 203:1 *UNEP World Congress Bulletin* 1 at 1, online (pdf): *IISD* <[www.iisd.ca/download/pdf/sd/ymbvol203num1e.pdf](http://www.iisd.ca/download/pdf/sd/ymbvol203num1e.pdf)> [perma.cc/K7BY-HXAJ].

<sup>33</sup> See UNEP, “Advancing Justice”, *supra* note 11 at 3 [emphasis added].

<sup>34</sup> UNEP GC, *supra* note 10.

<sup>35</sup> United Nations Environment Programme, “Issue Brief: Environmental Rule of Law: Critical to Sustainable Development” (2015) at 1, online (pdf): *UN Environment Document Repository* <[wedocs.unep.org/bitstream/handle/20.500.11822/10664/issue-brief-erol.pdf](http://wedocs.unep.org/bitstream/handle/20.500.11822/10664/issue-brief-erol.pdf)> [perma.cc/33LZ-EE8F] [UNEP, “Issue Brief”].

<sup>36</sup> UNEP GC, *supra* note 10 at 35 [emphasis added].

<sup>37</sup> See Shamshad Akhtar, “Rule of Law to Support the Post-2015 Development Agenda and Sustainable Development Goals” (Speech delivered at the Asia-Pacific Roundtable: Environmental Rule of Law for Sustainable Development in Support of the Post-2015 Development Agenda, Bangkok, 20 May 2015),

Caribbean region in March 2015,<sup>38</sup> and another in Africa later that year.<sup>39</sup> Additionally, in June 2014, as part of the first session of UNEA, the Global Symposium on Environmental Rule of Law was held to “discuss the ways and means by which the further development and implementation of environmental rule of law can help ensure just and sustainable development outcomes.”<sup>40</sup>

More recently, participants in the first World Environmental Law Conference, sponsored by the International Union for Conservation of Nature (IUCN), agreed on an outcome document called the “World Declaration on Environmental Rule of Law.”<sup>41</sup> This was followed by the release of the aforementioned “Global Report” on environmental rule of law in early 2019.<sup>42</sup>

These events and associated declarations and reports represent a significant and fast-developing body of work. And yet, for all this attention and focus, what does this concept actually mean? As discussed below, a review of these developments reveals a need for more clarity and coherence if environmental rule of law is to go beyond the coupling of popular terms. Articulations of the concept to date are neither clear nor coherent enough to constitute a useful guiding principle or framework for moving forward.

## 2.2. ELEMENTS OF ENVIRONMENTAL RULE OF LAW

At inception, the constituent elements of environmental rule of law were not entirely clear. Documents and materials generated since Decision 27/9 offered sketches of what the concept is and is not, but variance exists. The premise underpinning environmental rule of law appears to be that rule of law at national and international levels is essential for sustainable development and environmental protection.<sup>43</sup> In other words, it is viewed as a precondition for implementing the now decades old sustainable development agenda. This viewpoint is

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online: *UNESCAP* <[www.unescap.org/speeches/rule-law-support-post-2015-development-agenda-and-sustainable-development-goals](http://www.unescap.org/speeches/rule-law-support-post-2015-development-agenda-and-sustainable-development-goals)> [perma.cc/534N-ZN86].

<sup>38</sup> See Organization of American States, “Inter-American Congress on the Environmental Rule of Law” (last visited 22 July 2019), online: *OAS* <[www.oas.org/en/sedi/dsd/ELPG/aboutELPG/Events/IA\\_congress\\_2015.asp](http://www.oas.org/en/sedi/dsd/ELPG/aboutELPG/Events/IA_congress_2015.asp)> [perma.cc/4A7P-4KQY].

<sup>39</sup> See “1st Africa Colloquium on Environmental Rule of Law - Towards Strengthened Environmental Governance, Justice and Law” (2015), online (pdf): *UN Environment Document Repository* <[wedocs.unep.org/bitstream/handle/20.500.11822/14463/concept-note-programme-13-oct-2015.pdf](http://wedocs.unep.org/bitstream/handle/20.500.11822/14463/concept-note-programme-13-oct-2015.pdf)> [perma.cc/9V6A-X4R9].

<sup>40</sup> United Nations Environment Programme, Press Release, “First-Ever UN Environment Assembly (UNEA), Ground-Breaking Platform for Policy Leadership, Gets Underway” (23 June 2014), online: *UNEP* <[www.unenvironment.org/pt-br/node/6486](http://www.unenvironment.org/pt-br/node/6486)> [perma.cc/9EYL-Z2VP] [UNEP, “First-Ever”].

<sup>41</sup> IUCN World Commission on Environmental Law, “IUCN World Declaration on the Environmental Rule of Law” (2016), online (pdf): *IUCN* <[www.iucn.org/sites/dev/files/content/documents/english\\_world\\_declaration\\_on\\_the\\_environmental\\_rule\\_of\\_law\\_final.pdf](http://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf)> [perma.cc/2VD2-NMZU].

<sup>42</sup> *Supra* note 7.

<sup>43</sup> The latter being part of the former by most conceptualizations, although this touches on a fundamental challenge—defining sustainable development is notoriously difficult, and determining what it means in practice is more challenging yet. For a thorough discussion of this area, see Simon Dresner, *The Principles of Sustainability* (Sterling, Va: Earthscan, 2002).



discernable in several key documents, including Decision 27/9 itself. For example, the preamble states,

that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.<sup>44</sup>

Similarly, the decision “recognizes that the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations.”<sup>45</sup>

A similar premise is apparent in the summary document from the 2014 Global Symposium on Environmental Rule of Law. It claims that the rule of law is “critical to the achievement of sustainable development objectives and environmental goals, including the green economy,” and goes on to highlight that participants in the Symposium provided examples showing that “in the absence of environmental rule of law, key objectives of environmental governance could not be realized.”<sup>46</sup>

Materials from other regional forums exhibited a similar view, though in different words, that environmental rule of law is a precondition to sustainable development and environmental protection. The summary of proceedings from the Inter-American Congress on the Environmental Rule of Law in March 2015 noted: “The critical importance of the Environmental Rule of Law in the context of the soon to be adopted Sustainable Development Goals was emphasized as means to achieve more just and sustainable development outcomes and address the inequalities that persist in the Americas, despite the unique hemispheric natural wealth.”<sup>47</sup>

Perhaps the clearest articulation was found in the “Putrajaya Statement”, which came out of the Asia and Pacific International Colloquium on Environmental Rule of Law in December 2013, and outlined “[t]he constituent elements of environmental rule of law ... as adequate and implementable laws, access to justice and information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights.”<sup>48</sup>

<sup>44</sup> UNEP GC, *supra* note 10 at 34.

<sup>45</sup> *Ibid* at 35.

<sup>46</sup> UNEP, Environment Assembly, *Environmental Justice and Sustainable Development: A Global Symposium on Environmental Rule of Law*, UN Doc UNEP/EA.1/CRP.1, June 2014 at 1.

<sup>47</sup> Organization of American States, “Inter-American Congress on the Environmental Rule of Law: Summary of Proceedings and Key Messages” (2015) at 6, online (pdf): *OAS* <[www.oas.org/en/sedi/dsd/ELPG/aboutELPG/Events/summary\\_proceedings\\_jamaica\\_2015.pdf](http://www.oas.org/en/sedi/dsd/ELPG/aboutELPG/Events/summary_proceedings_jamaica_2015.pdf)> [perma.cc/ZA3Z-L5S9] [Organization of American States, “Summary”]. See also United Nations Environment Programme, “Environmental Rule of Law Critical to Achieving Inclusive, Sustainable Development in Africa, Concludes Regional Colloquium” (19 October 2015), online (blog): *Europa* <[europa.eu/capacity4dev/uneplblog/environmental-rule-law-critical-achieving-inclusive-sustainable-development-africa-concludes-re](http://europa.eu/capacity4dev/uneplblog/environmental-rule-law-critical-achieving-inclusive-sustainable-development-africa-concludes-re)> [perma.cc/GDR3-ANVG].

<sup>48</sup> Akhtar, *supra* note 37.

Taken together, notwithstanding different packaging, these proceedings and statements demonstrate a relatively cohesive, if superficial, underlying view—that environmental rule of law is a precondition to desirable environmental and sustainable development objectives at local and global levels. A review of the “Putrajaya Statement”,<sup>49</sup> the summary of proceedings from the Inter-American Congress on the Environmental Rule of Law,<sup>50</sup> the summary from the 2014 Global Symposium on Environmental Rule of Law,<sup>51</sup> the UNEP environmental rule of law “Issue Brief”,<sup>52</sup> Decision 29/7,<sup>53</sup> and the outcome document of the 2016 IUCN World Environmental Law Congress<sup>54</sup> produces a long list of activities and desires associated with environmental rule of law:

- Good governance
- Fair, clear and implementable laws
- Information disclosure
- Public participation
- Access to justice
- Timely, impartial and independent dispute resolution
- Fairness in the application of the law
- Separation of powers
- Environmental justice
- Accountability
- Transparency
- Liability for environmental damage
- Human rights
- Corruption reduction
- Criminal, civil and administrative enforcement
- Sustainable development
- Right to nature

None of these are small tasks; together, they present a daunting list of areas for environmental rule of law to address. Indeed, the 2016 “World Declaration on Environmental Rule of Law” included the sweeping statement that environmental rule of law should “serve as the legal foundation for promoting environmental ethics and achieving environmental justice,

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<sup>49</sup> See *ibid.*

<sup>50</sup> Organization of American States, “Summary”, *supra* note 47.

<sup>51</sup> See UNEP, “First-Ever”, *supra* note 40.

<sup>52</sup> UNEP, “Issue Brief”, *supra* note 35.

<sup>53</sup> UNEP GC, *supra* note 10.

<sup>54</sup> IUCN World Commission on Environmental Law, *supra* note 41.

global ecological integrity, and a sustainable future for all, including for future generations, at local, national, sub-national, regional, and international levels.”<sup>55</sup>

There are several ways that this collection of elements and objectives could be characterized as a way to better understand environmental rule of law as a concept. First, they could be viewed along an axis of substantive to procedural propositions. Public participation, for example, represents a purely procedural dimension, while liability for environmental damage is clearly substantive. Similarly, information disclosure is typically viewed as a procedural right, whereas environmental justice is firmly in substantive territory.

On a different but related axis, the elements represent views of environmental rule of law as both a means to an end and an end in itself. Corruption reduction and effective enforcement could be viewed as a means to achieve environmental protection, while laws that are “fair, clear and implementable” is an end.<sup>56</sup> Indeed, an August 2015 UNEP report on implementation of Decision 29/7 commented on the significance of environmental rule of law “as both a means *and* an end in the context of the post-2015 development agenda and the sustainable development goals.”<sup>57</sup>

Yet another way to interpret these elements is on an implementation to transformation spectrum. Where dimensions such as enforcement and accountability are oriented toward implementing *existing* environmental laws, the inclusion of environmental justice and liability suggest a more transformative agenda that requires paradigmatic changes in economic, if not political, systems. From the multifaceted concepts and aims associated with environmental rule of law since Rio+20 until now, one clear point seems obvious: it is a sub-field without consensus, comprised of varying views.

The 2019 “Global Report” on environmental rule of law, however, provides more—but far from complete—clarity on the concept. For better or worse, the report contains a number of similar but different definitions and descriptions, including the following:

- “Environmental rule of law ... describes when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet;”<sup>58</sup>
- “Environmental rule of law provides an essential platform underpinning the four pillars of sustainable development—economic, social, environmental, and peace. Without environmental rule of law, development cannot be sustainable. With environmental rule of law, well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged

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<sup>55</sup> *Ibid* at 2.

<sup>56</sup> See bulleted list, *above*.

<sup>57</sup> UNEP, *Report on the Implementation of the Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV) for the period 2010-2014: Implementation of Governing Council Decision 27/9*, UN Doc UNEP/Env.Law/MTV4/MR/1/2/Add.1, 2015 at para 9, online (pdf): <[web.unep.org/sites/default/files/delc/documents/montevideo/addendum-gc27-9.pdf](http://web.unep.org/sites/default/files/delc/documents/montevideo/addendum-gc27-9.pdf)> [perma.cc/E4US-T6XQ] [emphasis added].

<sup>58</sup> “Global Report”, *supra* note 7 at 1.

public lead to a culture of compliance that embraces environmental and social values;<sup>59</sup>

- “[E]nvironmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet. Environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations;”<sup>60</sup>
- “[E]nvironmental rule of law provides a framework for giving meaning to environmental laws already on the books and for helping to foster cultures of compliance with environmental law across nations;”<sup>61</sup> and,
- “[P]rocedural rights, such as access to justice, access to information, and access to effective legal remedies, are critical elements of environmental rule of law because they provide the means for achieving environmental goals and laws.”<sup>62</sup>

The report goes on to put forward seven “distinguishing characteristics” of environmental rule of law: “human health and welfare”, “multiple levels of governance”, “natural resource dynamics”, “fate of natural resources”, “public involvement”, “uncommon timescales”, and “significant uncertainty”.<sup>63</sup>

Unfortunately, the report is an instance of providing a large quantity of information without sufficient coherence. What is needed is quality analysis and a hard look at what environmental rule of law actually is (and is not), and what value it can offer in the contested terrains of environmental law, sustainable development, and rule of law. The discussion in the remainder of this article moves the conversation in that direction. To do so, the next section places environmental rule of law in the boarder landscape of rule of law theory and practice.

### 3. THE RULE OF LAW LANDSCAPE: DEFINITIONS, THEORY AND PRACTICE

Rule of law has a long and contested history.<sup>64</sup> Universal agreement on a definition of rule of law does not exist.<sup>65</sup> As the World Justice Project has cautioned, “[t]he rule of law is

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at 8.

<sup>61</sup> *Ibid* at 13.

<sup>62</sup> *Ibid* at 143.

<sup>63</sup> *Ibid* at 10–13. Perhaps as further indication of lacking coherence, there are noticeable and substantive differences between articulation of these elements in the text and in the abbreviated articulations in Figure 1.5 (*ibid* at 11).

<sup>64</sup> See Brian Z Tamanaha, “The History and Elements of the Rule of Law” [2012] Sing JLS 232. See also Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” (2002) 21:2 Law & Phil 137 [Tamanaha, “History”].

<sup>65</sup> Michael Neumann, *The Rule of Law: Politicizing Ethics* (Burlington, Va: Ashgate, 2002) at 3–24. See also Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Cheltenham, UK: Edward Elgar, 2014) at 33–56 [May, *Rule of Law*].

notoriously difficult to define and measure.<sup>66</sup> In this space, diverse views occupy a field that has been described as heated.<sup>67</sup> Perspectives generally span from those that focus on a basic set of elements upon which most would agree, to a wider collection of dimensions that attract less agreement. Literature on the subject spans hundreds of years, and has attracted contributions from seminal thinkers such as Max Weber,<sup>68</sup> Thomas Hobbes, and John Rawls.<sup>69</sup>

A long-standing way of interpreting different views of rule of law is to distinguish between a “thick” or “thin” definition.<sup>70</sup> Thin definitions, the primary version of which is usually attributed to Albert Venn Dicey,<sup>71</sup> can be summarized as a “law and order” view where no one is above the law and the “rulers” are subject to the same law and punishment as everyone else.<sup>72</sup> A succinct version of this conceptualization in the contemporary context was put forward by Brian Z. Tamanaha: “The rule of law means that government officials and citizens are bound by and abide by the law.”<sup>73</sup> This view, he explains, means that there is a system of laws that are generally understood and apply equally to everyone, with enforcement mechanisms or institutions.<sup>74</sup> No more, no less.

By contrast, thick definitions typically build on those thin elements by including reference to notions of democracy, justice, and human rights. These definitions, which some commentators have referred to as “moralized”,<sup>75</sup> tend to be part of a normative agenda rooted in moral views about what is good. Put another way, these definitions imply an affirmative social welfare duty on the part of governments accompanied by an instrumentalist view of the law as a means to achieve good things for society.<sup>76</sup> An example of a thick definition of rule of law is that articulated in a 2004 United Nations *Report of the Secretary General*:

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly

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<sup>66</sup> “World Justice Project Rule of Law Index 2015” (2015) at 10, online (pdf): *WJP* <worldjusticeproject.org/sites/default/files/roli\_2015\_0.pdf> [perma.cc/63TH-RWAN].

<sup>67</sup> Erik G Jensen, “The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses” in Erik G Jensen & Thomas C Heller, eds, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003) 336 at 338.

<sup>68</sup> See Christopher May, “Market Exchange and the Rule of Law: Confidence in Predictability” (2018) 10:2 Hague J on Rule of Law 365 at 371.

<sup>69</sup> For a comprehensive summary and commentary, see Neumann, *supra* note 65 at 3–14.

<sup>70</sup> See *ibid* at 3–24. See also May, *Rule of Law*, *supra* note 65 at 33–56. Regarding thin definitions in particular, see Tamanaha, “History”, *supra* note 64 at 233. Note that a synonym for thin in the literature is ‘formal’.

<sup>71</sup> As summarized and discussed in Neumann, *supra* note 65 at vii–viii.

<sup>72</sup> *Ibid* at 1–2.

<sup>73</sup> Tamanaha, “History”, *supra* note 64 at 233.

<sup>74</sup> *Ibid*.

<sup>75</sup> Bosselmann, *supra* note 23 at 79. Neumann, *supra* note 65 at 2–3.

<sup>76</sup> For a discussion of rule of law and instrumentalism, see Bruce Pardy, *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Kingston, ON: Fifth Forum Press, 2015) at 1–14. See also Brian Z Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law” (2007) 56:2 DePaul L Rev 469 [Tamanaha, “Instrumental View”].

promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>77</sup>

Contestation in the field is complex but the basic lines of debate are as follows. Some commentators argue that while rule of law is part of the broader political economy, the definition should be kept thin because this is necessary to maintain a sharp analytical distinction between rule of law and other desired ends such as democracy, human rights, health, and security.<sup>78</sup> This distinction is made based on a view that while attributes of thicker dimensions (e.g., democracy and human rights) are laudable, they are not essential to the basic elements of rule of law.

Those who subscribe to thick definitions, however, would assert that the “basic rule of law should have added to it qualifiers to ensure that not just *any* law should be followed,”<sup>79</sup> and that a “normative rule of law concept [can provide] a foundation for moral guidance.”<sup>80</sup> In citing thicker dimensions put forward by Lon Fuller, Joseph Raz, and John Rawls, Michael Neumann characterizes this moralized perspective as a view that thin definitions “should be improved on by expressing ... universal values.”<sup>81</sup>

Experience has shown that the leap from definitional debate and theory to practice is a challenging one in the rule of law space, particularly when a thicker definition is envisioned. As Erik G. Jensen explains, “the goals and expectations articulated in rule-of-law projects often diverge dramatically from their activities and accomplishments. Expectations tend to be bloated.”<sup>82</sup> He notes that success in rule of law initiatives is typically limited to ‘thin’-level rule of law in the form of improvements in procedures and efficiencies.<sup>83</sup>

For many commentators and practitioners, rule of law is seen as an essential precondition to economic growth due to a perceived<sup>84</sup> causal relationship between rule of law and economic development.<sup>85</sup> David Kennedy, however, takes the more critical view that rule of law ought not be seen as a development strategy in and of itself, and that viewing it in that way encourages

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<sup>77</sup> UNSC, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc S/2004/616, 2004 at para 6, online (pdf): *UN* <[www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2004/616](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616)> [perma.cc/AB8S-52EG].

<sup>78</sup> This is the rationale of Brian Z. Tamanaha, for example. See e.g. Tamanaha, “Lessons”, *supra* note 2; Tamanaha, “History”, *supra* note 64; Tamanaha, “Instrumental View”, *supra* note 76.

<sup>79</sup> Bosselmann, *supra* note 23 at 80 [emphasis in original].

<sup>80</sup> *Ibid.*

<sup>81</sup> Neumann, *supra* note 65 at 2.

<sup>82</sup> Jensen, *supra* note 67 at 339.

<sup>83</sup> *Ibid.*

<sup>84</sup> But perhaps not empirically substantiated. See *ibid* at 364–66.

<sup>85</sup> See Trubek, *supra* note 1 at 28. See generally Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge, UK: Cambridge University Press, 2006) 253. See also Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails*

an untenable belief that law could substitute for the necessary political and economic choices at the centre of development policy-making.<sup>86</sup> He emphasizes “how easily one loses sight of ... traditional issues of political and economic theory when the words ‘rule of law’ come into play.”<sup>87</sup> Tamanaha has expressed similar skepticism: “when a working rule of law system is in place, focusing on ‘the rule of law’ itself, as a political ideal or a theoretical construct or a set of quantitative indices, does not get us very far, and having this as the central focus might even serve as a distraction.”<sup>88</sup>

Despite such critical views questioning the usefulness of rule of law as a guiding concept or development strategy, rule of law rhetoric and programming continue to boom.<sup>89</sup> Similar to Kennedy’s above-cited point, Christopher May posits that the “lack of fixed meaning may actually make the term attractive,”<sup>90</sup> largely because “rule of law represents a set of institutions that can be depoliticized and presented as a technical response to shortcomings of society without the ideological baggage that would come with more explicit demands for democracy and liberalization.”<sup>91</sup>

It is unclear whether it was allure of this nature that inspired the emergence of environmental rule of law. Regardless, and for better or worse, environmental law and rule of law are now linked in a high-profile way at the international level. As this coupling matures, the institutions promoting it will have to reckon with the unavoidable contestations that are inherent in whatever rule of law is.

#### 4. ENVIRONMENTAL RULE OF LAW IN THE BROADER LANDSCAPE

Where does environmental rule of law place in this broader landscape? The short answer is that it is difficult to say, given its multiple personalities. However, deeper consideration is both warranted and possible. Notwithstanding varying articulations and conceptualizations cited above, it is reasonable for present analytical purposes to take as a focal point the articulation of environmental rule of law in the 2019 “Global Report”. It states that

environmental rule of law holds all entities equally accountable to publicly promulgated, independently adjudicated laws that are consistent with international norms and standards for sustaining the planet. Environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations.<sup>92</sup>

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*Everywhere Else* (New York: Basic Books, 2000) (suggesting that a formal property rights legal regime is an important condition precedent for economic development, and lack thereof is a significant barrier).

<sup>86</sup> *Supra* note 3 at 17.

<sup>87</sup> *Ibid* at 23.

<sup>88</sup> Tamanaha, “History”, *supra* note 64 at 247.

<sup>89</sup> May, *Rule of Law*, *supra* note 65 at xii–xiii. See also Thomas Carothers, “Rule of Law Temptations” in James J Heckman, Robert L Nelson & Lee Cabatingan, eds, *Global Perspectives on the Rule of Law* (New York: Routledge, 2010) 17.

<sup>90</sup> May, *Rule of Law*, *supra* note 65 at xiii.

<sup>91</sup> *Ibid* at xxviii.

<sup>92</sup> “Global Report”, *supra* note 7 at 8.

Interpretation of this definition is aided by referring back to the above-mentioned “Putrajaya Statement” in which the “constituent elements of environmental rule of law were outlined as adequate and implementable laws, access to justice and information, public participation, accountability, transparency, liability for environmental damage, fair and just enforcement, and human rights.”<sup>93</sup> In discussing “the dynamic relationship between rights and environmental rule of law,”<sup>94</sup> the “Global Report” states that “[b]oth substantive and procedural rights are important to realizing the environmental rule of law,”<sup>95</sup> and goes on to describe rights and environmental rule of law as “interdependent.”<sup>96</sup>

When viewed against the broader rule of law literature, environmental rule of law clearly lies at the ‘thick’ end of the rule of law definitional spectrum. This is particularly the case if one considers the multiple and varying articulations throughout the 2019 “Global Report”, as discussed above. Taking the various conceptualizations together, environmental rule includes ‘thin’ elements, such as enforcement and accountability, while also exhibiting significant ‘thick’ content, such as protecting human rights and “global ecological integrity”,<sup>97</sup> and liability for environmental damage. Noting these grand objectives, and recalling the above-stated long list of activities and ambitions associated with the concept,<sup>98</sup> the ‘thickness’ of environmental rule of law is observable in elements that show it to be more substantive than procedural, more ends than means (i.e., normative), and more transformational in scope than simply implementation oriented. Put another way, environmental rule of law could be viewed as a heavily ‘moralized’ version of rule of law premised on an instrumentalist view of the law.<sup>99</sup>

As such, environmental rule of law is vulnerable to the critiques associated with the thicker formulations of rule of law discussed above, though this time in the specific realm of environment and sustainable development. Environmental rule of law’s apparent core premise of rule of law as a precondition to sustainable development bears close resemblance to now mostly abandoned beliefs that see rule of law as an essential precondition to economic development.<sup>100</sup> It is exposed to founded concerns and notes of caution directed to the broader law and development project.<sup>101</sup> Applying the critical perspectives of Kennedy and Tamanaha, for example, environmental rule of law should not be seen as a sustainable development strategy in and of itself.<sup>102</sup> Rather, traditional issues of politics and economy and the associated difficult policy choices and trade-offs must still be considered head-on. In all of this, there is

<sup>93</sup> Akhtar, *supra* note 37.

<sup>94</sup> “Global Report”, *supra* note 7 at 138.

<sup>95</sup> *Ibid* at 142.

<sup>96</sup> *Ibid*.

<sup>97</sup> IUCN World Commission on Environmental Law, *supra* note 41 at 2.

<sup>98</sup> See Part 2.2, *above*.

<sup>99</sup> See Tamanaha, “Instrumental View”, *supra* note 76 (describing legal instrumentalism as a view of law as “a means to an end or an instrument for the social good” at 469).

<sup>100</sup> Trubek, *supra* note 1 (noting an assumption that rule of law is a precondition to economic development but that this assumption is in question). See also Santos, *supra* note 85 (also noting an assumption that rule of law is a precondition to economic development but that this assumption is in question).

<sup>101</sup> Recalling views of Kennedy and Tamanaha, *above*. Kennedy, *supra* note 3 at 23; Tamanaha, “Lessons”, *supra* note 2 at 483–86.

<sup>102</sup> Kennedy, *supra* note 3 at 23; Tamanaha, “Lessons”, *supra* note 2 at 483–86.



a risk that environmental rule of law may divert attention away from such important debates, policy choices, and resourcing decisions.

At a high level, assuming proponents of environmental rule of law want to avoid the concept from becoming a counter-productive distraction and want to see it add value in the sustainable development context, a fundamental threshold question needs to be considered: What is the overarching agenda to be pursued through environmental rule of law? Two primary conceptualizations are presented here to assist in thinking this through (but there are certainly more).

One option is to envision environmental rule of law as primarily focused on existing laws. In this conceptualization, the priority would be on effective implementation and enforcement of law and policy that is already in place. To adopt terminology from leading US environmental law scholar A. Dan Tarlock, this conceptualization is more or less premised on a “rule of law litigation strategy,” using courts and tribunals to perform their traditional function of enforcing, rather than creating, rules.<sup>103</sup> The focus under this conceptualization would be a “law and order” paradigm aimed at ensuring accountability, transparency, access to justice, and, in general, a system where government officials and citizens are bound by and abide by environmental laws. Implementation and enforcement of poaching or illegal forestry laws could be seen as examples of this.<sup>104</sup> In such a case, environmental rule of law would still sit at the thick end of the definitional spectrum, but as a relatively thin version. This personality of the environmental rule of law concept can be seen in a number of its articulations to date.<sup>105</sup> To side-step at least some of the contested rule of law terrain described above, and to more accurately communicate what is being proposed by UNEP, this conceptualization would be better put as ‘*rule of law for the environment*’, not environmental rule of law.<sup>106</sup>

By contrast, another option is to view environmental rule of law as chiefly concerned with a normative law reform agenda that leads to substantive transformational changes. Viewed in this light, the environmental rule of law framework is primarily geared to develop and implement a stronger sustainability agenda such as that set out in the 2012 “Earth Charter”<sup>107</sup> or that portrayed in parts of the report of the 1987 Brundtland Commission, which envisioned that “human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.”<sup>108</sup> While conceptualizations might vary depending on normative aims and nuances, this form of environmental rule of law would certainly place as a very thick version at the thick end of the spectrum. For enhanced clarity and, again, to avoid some of the

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<sup>103</sup> *Supra* note 8 at 241. See also Ristroph, *supra* note 8.

<sup>104</sup> See discussion of such in “Global Report”, *supra* note 7 at 14, 47, 134. See also International Development Law Organization, “Doing Justice to Sustainable Development: Integrating the Rule of Law into the Post-2015 Development Agenda” (2014) at 34–39, online (pdf): <[www.idlo.int/sites/default/files/pdfs/Doing%20Justice%20to%20Sustainable%20Development%20report.pdf](http://www.idlo.int/sites/default/files/pdfs/Doing%20Justice%20to%20Sustainable%20Development%20report.pdf)> [perma.cc/2YWP-T8ZZ] (including specific examples of such legal initiatives in Kenya, India and elsewhere).

<sup>105</sup> See Part 2.2, *above*.

<sup>106</sup> See International Development Law Organization, *supra* note 104 at 10–12, 34–39 (applying a conceptualization along the lines of the former—rule of law for the environment).

<sup>107</sup> “The Earth Charter” (last visited 24 July 2019), online: *Earth Charter Initiative* <[earthcharter.org/discover/the-earth-charter/](http://earthcharter.org/discover/the-earth-charter/)>.

<sup>108</sup> *Our Common Future*, *supra* note 16 at ch 12, para 80.

theoretical baggage associated with rule of law, this view would be better articulated as ‘*rule of environmental law*’ as opposed to environmental rule of law.<sup>109</sup>

Further to the point of whether environmental rule of law is an appropriate way to articulate the aims with which it appears to be associated, environmental rule of law will also have to contend with the question of why “environmental” issues should receive exalted status as a prefix of rule of law. While it is hard to argue that implementation of environmental laws and the global sustainability agenda are not worth pursuing, and that programs typically associated with rule of law initiatives may be helpful in achieving environmental goals, it is not clear that the sustainability and environmental law agenda warrants linking itself to the rule of law in a singular fashion. This is on one hand due to the rule of law concept being contested and rather devoid of actual meaning, but it is also due to the reality that the rule of law label could be easily adopted by any other set of normative aims. For example, if going down this track, why not establish “human rights rule of law”, or “commercial rule of law”, or “international trade rule of law”? Such proliferation in the practice of adding a prefix to rule of law would generate more tension and confusion in relation to rule of law than the significant amount that already exists, as discussed in Part 3 above. It also sets the stage for co-opting rule of law language for political agendas that are actually at odds with conventional notions of rule of law. This risk is illustrated clearly by a recent example from China, in which “socialist rule of law” was the basis for a number of reforms in the Fourth Plenum of the 18th Party Congress in October 2014.<sup>110</sup> This is a particularly odd coupling of terms for an authoritarian state (rule of law, of course, is typically considered a principle of democracy), demonstrating the risk of starting down the rule of law prefix path. This risk is, of course, heightened when the organization using the terminology is the United Nations, given the influence the United Nations has on international legal norms and discourse.

## 5. CONCLUSION

This Issue Brief has provided a succinct critical analysis of the emergent concept of environmental rule of law by tracing its roots, examining the variance across articulations to date, including those in the first global report on environmental rule of law released in early 2019,<sup>111</sup> and relating the concept to the long-contested landscape of rule of law theory and practice. Overall, this brief reveals that environmental rule of law is vulnerable to existing critiques of rule of law programming in the international development sphere, and suggests that the UN-led work on environmental rule of law to date is in need of further coherence.

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<sup>109</sup> Such a conceptualization may, for example, more closely align with the notion of “Wild Law”. See generally Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd ed (White River Junction, Vt: Chelsea Green Publishing, 2011) (Wild Law basically calls for changing humans’ legal systems to align with earth’s ecological limits and ecosystems, including assigning legal rights to the non-human natural world).

<sup>110</sup> See Hongwen Zhu & Michael A Peters, “Social Governance, Education and Socialist Rule of Law in China” (2019) 51:7 *Educational Philosophy & Theory* 670. See also Rebecca Liao, “China Strives Incoherently for the ‘Socialist Rule of Law’”, *Financial Times* (26 October 2014), online: *FT* <[www.ft.com/content/3f4ebd30-5b84-11e4-a674-00144feab7de](http://www.ft.com/content/3f4ebd30-5b84-11e4-a674-00144feab7de)> [perma.cc/2SSR-XN47].

<sup>111</sup> “Global Report”, *supra* note 7.

As the concept moves beyond a primarily UNEP-led conversation, clarity and focus will be of heightened importance. This is particularly the case in the present context where multilateral institutions, nation states, and sub-national governments are beginning their work to implement the United Nations Development Programme's 17 Sustainable Development Goals (SDGs)<sup>112</sup> and continuing their efforts to enact and implement environmental laws that reverse intensifying trends of environmental degradation.

Achieving the SDGs will require new legal instruments and effective implementation of existing ones, especially in relation to environmental law. To advance such work, and to advance associated environmental and sustainability legal initiatives, promoters of environmental rule of law ought to more openly heed critiques of using rule of law terminology, and ought to ensure that the environmental rule of law banner does not substitute for the more difficult but less glamorous political and economic choices that actually sit at the centre of development policy-making. Questions of how to move a country toward democracy or how to restructure a nation's economy for a sustainable future, for example, will not be answered by lofty environmental rule of law language or a few targeted environmental rule of law programs. Further, any continued work using the environmental rule of law terminology ought to prioritize generating more clarity with respect to different conceptualizations of rule of law generally, and implementation of environmental laws specifically. It also ought to acknowledge and clarify the existing tension between conceiving environmental rule of law as "rule of law for the environment" or "rule of environmental law".

Reflecting on developments to date, it is too soon to say whether the environmental rule of law concept should be abandoned altogether. However, similar to the state of affairs in rule of law theory and practice, environmental rule of law is in need of honest scrutiny that clarifies precisely what it is and how it adds value to implementing the global sustainability agenda and achieving better environmental outcomes.

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<sup>112</sup> See United Nations, "About the SDGs", *supra* note 9.