Reimagining Environmental Law Principles

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This article interrogates the key environmental law principles from the proposed Global Pact 2017 in the context of current provisions in the Resource Management Act 1991 (RMA) and the indicative drafting for the purpose, principles, and definitions for the proposed Natural and Built Environments Act (NBA) that has been recommended by the Resource Management Review Panel to replace the RMA. The article provides an update on the current status of the Global Pact and the likely way forward at Stockholm+50 in June 2022. Finally, the article presents some conclusions on the potential way forward for domestic New Zealand law.

1. INTRODUCTION

The referral by the Minister for the Environment of the exposure draft of the Natural and Built Environments Bill (NBA) to the Environment Select Committee for inquiry as part of the comprehensive review of the New Zealand resource management system in June 2021 provides an opportunity to reimagine which legal principles should guide environmental decision-making in New Zealand.

This article will therefore interrogate the latest attempt by the Global Pact for Environment 2017 (Global Pact) to codify, consolidate, and crystallise international environmental law principles in the context of domestic New Zealand law. The genesis of international environmental law principles and commentary from the most highly qualified publicists regarding the normative effect of the principles will be examined in part 2 of this article. Part 3 will then

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interrogate the key principles from the Global Pact in the context of current provisions in the Resource Management Act 1991 (RMA) and the indicative drafting for the purpose, principles, and definitions for the proposed NBA that has been recommended by the Resource Management Review Panel (Review Panel) to replace the RMA.[1] Part 4 will provide an update on the current status of the Global Pact and the likely way forward. Finally, part 5 will present some conclusions on the potential way forward for domestic New Zealand law.

2. LOCATING THE PRINCIPLES

2.1 Genesis of International Environmental Law Principles

Peter Sand noted that the Stockholm Conference on the Human Environment 1972 marked the beginning of the modern era of international environmental law.[2] This seminal event has influenced the gradual development of fundamental environmental law principles. For example, the Stockholm Declaration 1972 defined the principles regarding prevention, cooperation, intergenerational equity, the enactment of effective environmental legislation, and liability for environmental harm.[3] These principles were confirmed by the Rio Declaration 1992 that in turn defined the principles regarding common but differentiated responsibilities (CBDR), precaution, polluter pays, environmental impact assessment (EIA), notification of emergencies, and notification and consultation in cases of risk.[4] Other international declarations have also been influential in developing environmental law principles — for example, the World Charter for Nature 1982 and the United Nations (UN) Sustainable Development Goals 2015 (SDGs).

Civil society has also been active in providing further impetus for the development of international environmental law principles through texts such as the Earth Charter 1980, the International Law Association's New Delhi Declaration on the Principles of International Environmental Law relating to Sustainable Development 2002, the Oslo Principles on Global Obligations for

1 Report of the Resource Management Review Panel *New Directions for Resource Management in New Zealand* (Resource Management Review Panel, Wellington, June 2020) at 23; Environment Committee *Inquiry on the Natural and Built Environments Bill: Parliamentary Paper* (1 November 2021) at 58.

2 Peter H Sand "The Evolution of International Environmental Law" in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007) 29 at 33.

3 Stockholm Declaration, principles 2, 3, 7, 9, 11, 12, 13, 14, 27.

4 Rio Declaration, principles 7, 15, 16, 17, 18, 19.

Climate Change 2015, the draft International Union for the Conservation of Nature (IUCN) International Covenant on the Environment and Development 2015, the IUCN World Declaration on the Environmental Rule of Law 2016, and the Principles on Climate Change Obligations of Enterprises 2018.

The legal effect of the international environmental law principles defined by the Stockholm Declaration and the Rio Declaration and enhanced by the texts drafted by civil society (noted above) have been essayed by the most highly qualified publicists.

For example, Alan Boyle and Catherine Redgwell developed an integrated framework of 17 international environmental law principles drawn from the principles (found primarily in the Rio Declaration) organised under four general headings — namely, sustainable development,[5] global environmental responsibility,[6] prevention of pollution and environmental harm,[7] and conservation and sustainable use of natural resources.[8] Philippe Sands and Jacqueline Peel, on the other hand, articulated a shorter list of seven international environmental principles — namely, sovereignty over natural resources and the duty not to cause harm to the environment of other States or areas beyond national jurisdiction, preventative action, sustainable development, the precautionary approach, polluter pays, and CBDR.[9]

Ulrich Beyerlin and Thilo Marauhn also enumerated a shorter list of five international principles — namely, no harm, precautionary action, polluter pays, CBDR, and sustainable development.[10] While Pierre-Marie Dupuy and Jorge Vinuales described a much broader list of international environmental law principles and concepts (similar to Boyle and Redgwell) grouped under two broad headings.[11] First, under the heading of prevention, they listed a series of substantive principles and procedural principles.[12] Second, under the heading of

5 Rio Declaration, principles 3, 4, 8, 10, 16, 17, regarding: intergenerational equity, sustainable development and integration, sustainable patterns of production and consumption, public participation, polluter pays, environmental impact assessment [EIA].

6 Rio Declaration, principles 7 and 15, regarding: CBDR and precaution.

7 Rio Declaration, principles 2, 6, 7, 10, 11, 15, 17, 18, 19, regarding: transboundary environmental harm, prevention, due diligence, precaution, transboundary cooperation in cases of environmental risk, EIA.

8 Alan Boyle, Patricia Birnie and Catherine Redgwell *International Law & The Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 115–205.

9 Philippe Sands and Jacqueline Peel *Principles of International Environmental Law* (4th ed, Cambridge University Press, Cambridge, 2018) at 201–248.

10 Ulrich Beyerlin and Thilo Marauhn *International Environmental Law* (Hart Publishing, Oxford, 2011) at 39–83; Rio Declaration, principles 1, 2, 7, 15, 16, 17.

11 Pierre-Marie Dupuy and Jorge E Vinuales *International Environmental Law* (2nd ed, Cambridge University Press, Cambridge, 2018) at 62–99.

12 These included the following substantive principles: no harm, prevention, and

balance, they listed a series of principles and concepts.[13] Other academics have also identified emerging international environmental principles — for example, environmental displacement as a result of climate change impacts.[14]

Comparatively, environmental law principles are also located in domestic law. For example, the Environment Bill 2020 currently before the United Kingdom (UK) Parliament proposes that a suite of five environmental principles should be enacted into law — namely, the integration principle, the prevention principle, the precautionary principle, and the polluter pays principle that have their origins in the Stockholm Declaration and the Rio Declaration, together with the principle that environmental damage should be rectified at source derived from European environmental policy and now embodied in art 191 of the Treaty on the Functioning of the European Union 2009 (TFEU).[15] The statute (when enacted) will require decision-makers across government to have "due regard" to the suite of five environmental principles when evaluating the options for strategic policy decisions.[16] While in New Zealand, Ceri Warnock and Nicola Wheen noted that sustainable development,[17] the precautionary principle,[18] the polluter pays principle,[19] indigenous rights,[20] and procedural rights[21] are given effect to via domestic legislation.[22]

The UN Secretary-General (UNSG) in the report "Gaps in international law and environment-related instruments: towards a global pact for the environment" also identified a series of eight international environmental law principles

precaution; and the following procedural principles: cooperation and notification and consultation, prior informed consent, and environmental impact assessment.

13 These included the following principles: polluter pays, common but differentiated responsibilities [CBDR], participation, and intergenerational equity; and the following concepts: sustainable development, common areas, common heritage of mankind, and the common concern of humankind.

14 Walter Kalin and Jane McAdam "Environmental Displacement" in Y Aguila and JE Vinuales (eds) *A Global Pact for the Environment: Legal Foundations* (C-EENRG, Cambridge, 2019) 159.

15 Environment Bill 2019-21, HL Bill 53 (as amended on Report), s 18(5).

16 Section 20(1).

17 Rio Declaration, principle 4; Environment Act 1986, Long Title; Conservation Act 1987, s 2; Resource Management Act 1991 [RMA], s 5; Fisheries Act 1986, ss 2, 8, 14; Hazardous Substances and New Organisms Act 1986, ss 5, 6.

18 Rio Declaration, principle 15; RMA, s 32; Hazardous Substances and New Organisms Act 1986, s 7; Fisheries Act 1986, s 10; Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 34.

19 Rio Declaration, principle16; Conservation Act 1987, s 45; Marine Reserves Act 1971, s 183; Biosecurity Act 1993, s 65; Fisheries Act 1986, ss 261, 262, 263; Climate Change Response Act 2002, s 60.

20 Rio Declaration, principle 22; RMA, ss 6(e), 7(a), 8.

21 Rio Declaration, principle 10; Official Information Act 1982; RMA, ss 32, 95A, 100, 120, sch 1.

22 Ceri Warnock and Nicola Wheen *Brookers Environmental Legislation Handbook 2014* (Thomson Reuters, Wellington, 2014) at 6–13.

derived from the Rio Declaration — namely, prevention, precaution, polluter pays, environmental democracy, cooperation, the right to a clean and healthy environment, and CBDR,[23] together with the principles of non-regression and progression derived from the Universal Declaration on Human Rights 1948 and the Paris Agreement 2015.[24]

What emerges from this analysis is a reasonable degree of consensus around the general applicability of the principles derived from the Rio Declaration (considered by Ellen Hey to be the most definitive statement of international environmental law principles to date)[25] regarding prevention, intergenerational equity, sustainable development and integration, CBDR, public participation, precaution, polluter pays, EIA, notification and assistance in case of emergency, and notification and consultation on activities with transboundary impacts.[26] There are, however, some conceptual differences in the approaches adopted by these publicists. For example, Boyle and Redgwell do not distinguish between normative and emerging principles, while Beyerlin and Marauhn focus exclusively on key concepts that have normative quality and status. Additionally, the writings of Beyerlin and Marauhn and Dupuy and Vinuales are influenced by the legal philosophy articulated by Ronald Dworkin that distinguishes between legal rules and legal principles.[27] But Beyerlin and Marauhn noted that the distinction between policies and principles is poorly defined in practice.[28] While Dupuy and Vinuales observed that principles are normative statements, but distinguished between concepts, principles, and rules (that are all normative) as a scale moving from generality to particularity (from the abstract to the specific).[29]

2.2 Environmental Law Principles and Reform of the Resource Management System

The Environmental Defence Society (EDS) led the initial stages of the debate about reform of the resource management system through a series of working papers published in 2018–2019. Working Paper 1, "Reform of the Resource

23 United Nations Secretary-General "Gaps in international law and environment-related instruments: towards a global pact for the environment" (A73/419, 3 December 2018); Rio Declaration, principles 2, 15, 16, 10, 7, 9, 12, 27, 1, 3, 4, 7.

24 United Nations Secretary-General, above n 23; Universal Declaration on Human Rights, art 30; Paris Agreement, art 4.

25 Ellen Hey *Advanced Introduction to International Environmental Law* (Edward Elgar Publishing, Cheltenham, 2018) at 53.

26 Rio Declaration, principles 2, 3, 4, 7, 10, 15, 16, 17, 18, 19.

27 Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, Massachusetts, 1977).

28 Beyerlin and Marauhn, above n 10, at 37–38.

29 Dupuy and Vinuales, above n 11, at 58–62.

Management System: The Next Generation", identified a list of 12 relevant environmental law principles. In particular, the working paper observed:[30]

> Principles are an essential part of the resource management system because they give substance to our worldviews and influence the more specific restrictions and directions in our legislation and institutions. They operate in the crucial normative middle ground between ethics (the basic ways in which we see the world) and the rules (the binding restrictions or directions we must adhere to). *They do not have to appear expressly in legislation in order to have influence; they can be important considerations in designing a system even if that system does not make express reference to them.* (emphasis added)

In addition to principles derived from the Rio Declaration, the 12 principles listed by EDS include: subsidiarity, public-interest use, conservation (based on the public trust doctrine), and efficiency. The principle of public-interest use is based on the premise that the resource management system should "value … incentivise or mandate, some resource uses that are in the public interest" or determine preferred outcomes from a policy perspective;[31] while the principle of efficiency is focused on system efficiency, procedural rights (eg environmental information and public participation), and metrics that are capable of taking incommensurable values properly into account.[32] The working paper also noted:[33]

> … Unfortunately, it is hard to observe any meta-principle to manage the relationship between the principles themselves, which can frequently come into conflict with each other. The challenge for system reform is therefore not just which principles to adopt, but also how strict they should be and how they should interact with each other in a coherent way.

However, this observation is not consistent with the conceptual nature of sustainable development as a mechanism for achieving balance between the application of competing environmental law principles, or the clear relationships of interdependence between principles noted (in particular) by Dupuy and Vinuales and Hey,[34] or how sustainable development (noted in part 3 below) permeates the range of principles articulated in the Rio Declaration.

30 Environmental Defence Society [EDS] "Reform of the Resource Management System: The Next Generation" (Working Paper 1, 2018) <www.eds.org.nz> at 56.
31 At 52.
32 At 56.
33 At 56.
34 Dupuy and Vinuales, above n 11, at 62; Hey, above n 25, at 58–70.

Environment law principles therefore provide direction to guide decision-making. Like principles used in other areas of, for example, the principles of legality, reasonableness, and procedural fairness used in judicial review — environmental law principles ensure that decision-making occurs within the confines of reasonably permissible options. They provide high-level directions regarding how conflicts between development and resource use on the one hand and protecting the environment on the other hand should be resolved. In this way, environmental principles should form a key component in pt 2 of the NBA.

Beyond that, EDS also noted the important role played by the RMA as an implementing mechanism for New Zealand's international obligations under a range of multilateral environmental agreements (MEAs) regarding biodiversity, coastal marine and ocean spaces, waste, and climate change.[35] In particular, the working paper observed:[36]

> New Zealand's obligations under international environmental law are therefore of considerable importance to resource management law reform. Any new law will need to be written in a way that gives effect to such obligations, or at the very least is consistent with them.

The report of the Review Panel arrived at a similar conclusion and recommended that the implementation principles in (what is now) s 18 of the NBA exposure draft should include an obligation imposed on all persons performing functions under the NBA to "do so in a way that … *complements* other relevant legislation and *international obligations*" (emphasis added).[37] This critical obligation is a significant omission from the implementation principles currently listed in s 18 of the NBA exposure draft.

3. THE GLOBAL PACT FOR THE ENVIRONMENT

The Global Pact responds to the dynamics of contemporary international environmental law by building on the global "governance" frameworks in the SDGs that set out a range of objectives that are designed to be met by 2030 and the "momentum" in the Paris Agreement to reduce greenhouse gas emissions,[38] and the increasing "consecration of environmental principles in national

35 EDS "Reform of the Resource Management System: The Next Generation" (Working Paper 2, 2018) <www.eds.org> Appendix 4.

36 At 108.

37 Report of the Resource Management Review Panel, above n 1, at 485.

38 Le club des jurists *Toward a Global Pact for the Environment — White Paper* (September 2017) at 17–18.

constitutions" that provide a foundation for apex courts (eg New Zealand Supreme Court) to "appropriate" international environmental law principles and apply them in the context of domestic jurisdictions.[39] Generally, the project has produced a "consensual document" based on existing international declarations and treaties and texts produced by civil society — for example, the work of the IUCN.[40] The credentials of the 100 experts responsible for drafting the Global Pact are impressive and based on their standing as the most highly qualified publicists currently active in the field of environmental law.[41] In particular, the Global Pact is designed to address "the normative proliferation of multilateral environmental agreements" and the ad hoc nature of international environment law and lack of coherence (and fragmentation) within the overall regime resulting from the explosion of treaty-making activity in the wake of the Stockholm Conference.[42] The resulting text consolidates existing international environmental law principles and restates them in the format of a binding legal instrument that is justiciable and capable of having direct effect before international and domestic courts.[43] The key principles are interrogated next in the context of domestic New Zealand law.

3.1 Sustainable Development

Article 3 of the Global Pact provides for integration and sustainable development:

> Parties shall integrate the requirements of environmental protection into the planning and implementation of their policies and national and international activities, especially in order to promote the fight against climate change, the protection of the oceans and the maintenance of biodiversity.
>
> They shall pursue sustainable development. To this end, they shall ensure the promotion of public support policies, patterns of production and consumption both sustainable and respectful of the environment.

Generally, the Rio Declaration is the primary "reference point for the legal characterisation of sustainable development where it appears" in (inter alia) principles 2, 3, 4, 10, 11, 15 and 17,[44] that provide for prevention,

39 At 19–22.
40 At 22–26.
41 At 54–65.
42 At 26–29.
43 At 32–33.
44 Virginie Barral and Pierre-Marie Dupuy "Sustainable Development and Inte-

intergenerational equity, public participation, effective environmental legislation, precaution, and environmental impact assessment (EIA).

In particular, art 3 codifies the provisions found in principles 4 and 8 of the Rio Declaration that provide for sustainable development through integration and sustainable patterns of production and consumption and demographic policies. The White Paper explaining the architecture of the Global Pact (White Paper) noted:[45]

> Article 3 of the Pact is dedicated to the principles of integration and sustainable development. The necessity to achieve sustainable development has been the keystone of international governance, since the Rio Summit of 1992 up to the 17 sustainable development goals adopted in 2015. The global pact for the environment concretizes the SDG in law. The integration principle is the legal vehicle to integrate the SDG to every public policy, including development policy, as well as into production and consumption patterns.

Beyond that, Virginie Barral and Pierre-Marie Dupuy found that it remained an open question as to whether sustainable development should be classified as a concept or as a principle. They noted that:[46]

> Whether sustainable development falls into one category or another is not without significance. The core distinction between rules, principles and concepts lies in their degree of abstraction and generality, rather than in their capacity to express legal values and to inform conduct.

Barral and Dupuy also noted:[47]

> Whilst there is little disagreement that sustainable development operates as an objective to be achieved through the integration of economic, environmental and social concerns, what the process of integration of these concerns entails is still the subject of debate. Some argue that the principle of integration lays down primarily procedural duties, the obligation to take account of these concerns in the process of decision-making, without necessarily having an impact on the outcome. However, arguably, a purely formal process of integration whereby environmental considerations are simply "taken into account" within the development decision-making process with no actual

gration" in Y Aguila and JE Vinuales (eds) *A Global Pact for the Environment: Legal Foundations* (C-EENRG, Cambridge, 2019) 44 at 47.

45 Le club des jurists, above n 38, at 40.

46 Barral and Dupuy, above n 44, at 48.

47 At 49.

> impact on the decision outcome may well fall short of being considered a sufficient effort in striving to achieve sustainable development.

The statutory purpose of the RMA set out in s 5(1) "is to promote the sustainable management of natural and physical resources". The purpose is deliberately narrower than international definitions of sustainable development (eg Rio Declaration, principle 5 regarding the eradication of poverty). For example, the "Report of the Review Group on the Resource Management Bill" which preceded the enactment of the RMA stated:[48]

> Apart from the constraints on government policy, the review group considers that the concept of "sustainable management" is appropriate for adoption as the general purpose of the Bill. One disadvantage of adopting the term "sustainable development" is that the concept outlined in the Brundtland Commission's report "Our Common Future" embraces a very wide scope of matters including social inequities and global redistribution of wealth. It is inappropriate for legislation of this kind to include such goals.

However, the definition of sustainable management in s 5(2) of the RMA provides that sustainable management will be achieved by (inter alia) "sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations".[49] This aspect of the RMA is remarkably close to the classic definition of sustainable development articulated in the Brundtland Report:[50]

> Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Section 5 of the RMA is supported by a series of provisions in ss 6, 7 and 8 that identify subsidiary "matters that are of special significance" for promoting sustainable management.[51] While the list of matters of national importance in s 6 of the RMA that decision-makers are required to "recognise and provide for" reflects the range of international environmental principles in terms of substantive content, a particular problem with the RMA "is that it

48 Anthony P Randerson and others *Report of the Review Group on the Resource Management Bill* (Ministry for the Environment, Wellington, February 1991) at 6.
49 RMA, s 5(2)(a).
50 The World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987) at 43.
51 Report of the Resource Management Review Panel, above n 1, at 46.

does not encourage prioritisation".[52] This task was left for the preparation of subsidiary instruments. However, the true impact of sustainable management articulated in pt 2 of the RMA in creating cultural and environmental "bottom lines" was only declared relatively recently in the New Zealand Supreme Court (NZSC) decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[53] where the NZSC clarified the legitimate role played by subsidiary instruments prepared under the RMA in making strategic policy choices between avoiding or remedying or mitigating adverse effects on the environment, and resolving conflict between the matters identified in ss 6 and 7, in order to provide clear "directive" guidance for deciding resource consent applications.[54]

The report of the Review Panel, *New Directions for Resource Management in New Zealand*, identified three general failures of the current resource management system. First, the link between poor states of environmental quality and the fact that the RMA statutory purpose "does not address … restoring or regenerating the environment".[55] Second, that the RMA does not provide sufficient "direction on desired environmental and development outcomes"[56] by providing a "strategic focus" for, in particular, "necessary housing, infrastructure and other development".[57] These objectives reflect the public-interest use principle advocated by EDS.[58] Third, that the RMA has failed to fulfil the promise of providing "better recognition and protection of Māori interests in resource management".[59]

The NBA exposure draft addresses these general concerns by requiring environmental limits to be prescribed either in the national planning framework (NPF) or via natural and built environment plans (NBEPs), and by requiring these subsidiary instruments to promote the 13 environmental outcomes listed

52 Jan Wright "The Environment: What matters most?" [2015] RM Theory & Practice 10 at 11; Report of the Resource Management Review Panel, above n 1, at 50.

53 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [151]; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [73] and [102]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169]; *Tauranga Environmental Protection Society Inc v Tauranga City Council and Bay of Plenty Regional Council* [2021] NZHC 1201 at [92], [95], [96], [98] and [100].

54 Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018) at 586–592; Malcolm Grant "Sustainable management: A sustainable ethic?" in Trevor Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (Thomson Reuters, Wellington, 2012) 47.

55 Report of the Resource Management Review Panel, above n 1, at 53.

56 At 56.

57 At 53.

58 EDS, Working Paper 1 (2018), above n 30, at 52.

59 Report of the Resource Management Review Panel, above n 1, at 56.

in s 13A of the NBA exposure draft. However, s 13A of the NBA is problematic because (like s 6 of the RMA) it fails to prioritise matters by defining what matters most in terms of resolving the inbuilt tension in s 13A between ecological and anthropocentric outcomes. These policy choices are (like the current position under the RMA) left for subsidiary instruments to resolve.

Beyond that, the statutory purpose in s 5 of the NBA exposure draft (enabling the welfare and well-being of the natural environment to be upheld, by inter alia protecting and enhancing the natural environment) appears to provide better recognition and protection of Māori interests in resource management. The strong ecological approach in s 5(3) of the NBA exposure draft is firmly anchored to the normative values embraced by whanaungatanga and the web of interrelationships with the natural environment and its life-sustaining capacity.[60]

The environmental triple bottom line in s 5(2) of the RMA is also clearly articulated in s 5(1)(b), 5(2)(c) and 5(3)(d) of the NBA exposure draft. In particular, the integrated definition of well-being found in s 5(2) of the RMA is reflected in s 3 of the NBA exposure draft which defines well-being as meaning "the social, economic, environmental, and cultural well-being of people and communities, and includes their health and safety". However, s 5(2) of the NBA exposure draft is problematic because the outcomes listed in s 13A of the NBA "must be promoted" notwithstanding the lack of any express relative priority between them — and the potential for conflict (noted above) between protecting and enhancing the natural environment on the one hand and development on the other hand. Delegating the task of conflict resolution to the relevant Minister or local authorities via the NPF or NBEPs[61] is not consistent with setting mandatory environmental limits for "key biophysical domains: freshwater, coastal water, air quality, soil quality, and habitat for indigenous species"[62] in order "to provide a margin of safety above the conditions in which significant and irreversible damage may occur to the natural environment".[63]

While the Review Panel expressed a desire to replace sustainable management "with a clearer and more positive focus on enhancing the quality of the natural and built environments", their report does not appear to include any analysis of the role played by international environmental law principles in the context of domestic law. Arguably, this view misses the point articulated by Dupuy and Vinuales that sustainable development is a concept and that, in practice, other principles are used "to convey the programme of sustainable

60 Horiana Irwin-Easthope "The Increasing and Enduring importance of Tikanga Māori and Cultural Evidence in the Environment Court" [2017] RM Theory & Practice 93 at 94.

61 Natural and Built Environments Bill [NBA], ss 12C(1)(b), 13B(1)(b).

62 Report of the Resource Management Review Panel, above n 1, at 80.

63 At 68.

development".[64] Similarly, a close and careful reading of the interconnected world-view for upholding the welfare and well-being of the natural environment expressed in s 5(3) of the NBA exposure draft appears to be consistent with a conceptual analysis of sustainable management. For example, Justice Joe Williams writing extra-judicially about the RMA and how the statutory infrastructure in the RMA "might better accommodate the principle of whanaungatanga" articulated the following analysis of pt 2 of the RMA from a "Kupean" perspective:[65]

> … Section 5 speaks to the Act's sustainable management purpose including the purpose of safeguarding the life supporting capacity of water and eco-systems. Mana and mauri seem to fit rather comfortably into that construct.

Reading s 5 of the NBA exposure draft in this way is also consistent with principle 22 of the Rio Declaration (considered further below) pertaining to the vital role of indigenous peoples in achieving sustainable development.

3.2 Intergenerational Equity

Article 4 of the Global Pact provides for intergenerational equity:

> Intergenerational equity shall guide decisions that may have an impact on the environment.
>
> Present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.

Article 4 codifies the provisions found in principles 1 and 2 of the Stockholm Declaration and principle 3 of the Rio Declaration that (inter alia) provide for the right to development and intergenerational equity. It has a strong and direct relationship with the concept of sustainable development.[66] The White Paper noted in relation to arts 3 and 4:[67]

> In the same pursuit of gaining a horizontal influence, Article 4 of the Pact is about intergenerational equity. The necessity to preserve the "interest" or

64 Dupuy and Vinuales, above n 11, at 93.
65 Justice Joe Williams "He Pukenga Wai" [2021] RM Theory & Practice 40 at 54.
66 Rio Declaration, principle 4; Claire Molinari "Principle 3: From a Right to Development to Intergenerational Equity" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 139 at 154.
67 Le club des jurists, above n 38, at 40.

> "needs" of future generations was mentioned as early as the 1972 Stockholm declaration, in its Article 1. Intergenerational equity is mentioned in the annex to the 1987 Brundtland report, in the legal principles for the protection of the environment and for a sustainable development, such as the principle of intergenerational equity, principle 2. Since then, this requirement has been taken up in all the main international environmental texts: Rio declaration, the UNFCCC, the Aarhus Convention. … The idea is to make sure that the long-term impact of environmental decisions is taken into account, considering the impact on future generations.

Edith Brown Weiss noted that some issues remain regarding the implementation of the principle of intergenerational equity. For example, the question of who should represent future generations through the office of ombudsmen, the appointment of litigation guardians, or by "children as representatives of future generations".[68] She also exposed the difficulty in assigning rights to correspond to any duties imposed on present generations, and found that such rights could be articulated as "group rights that protect interests held in common".[69] But Brown Weiss found that "the interests of future generations are well determined in specific settings, such as nuclear wastes, mining, deforestation, fossil aquifers, and toxic pollution".[70] While she noted that the relationship with intragenerational equity requires "tradeoffs" to "balance competing demands" of present and future generations.[71] More generally, Brown Weiss observed:[72]

> The recent emergence of cases concerned with climate change … implicitly reflects concerns with intergenerational equity and the well-being of future generations. These cases are likely to increase as we confront the potentially harrowing scenarios of climate change.

As noted above, the definition of sustainable management in s 5(2)(a) of the RMA provides (inter alia) for "sustaining the potential of natural and physical resources (excluding minerals) to meet *the reasonably foreseeable needs of future generations*" (emphasis added). Similarly, intergenerational equity is firmly embedded in the exposure draft for the proposed s 5(1)(a) of the NBA

68 Edith Brown Weiss "Intergenerational Equity" in Y Aguila and JE Vinuales (eds) *A Global Pact for the Environment: Legal Foundations* (C-EENRG, Cambridge, 2019) 51 at 56.
69 At 57.
70 At 57.
71 At 57.
72 At 54; *Thomson v Minister for Climate Change* [2017] NZHC 733 at [94] and [133]–[134].

which provides (inter alia) that the statutory purpose of the NBA (upholding the welfare and well-being of the natural environment) includes enabling "people and communities to use the environment in a way that supports the well-being of present generations *without compromising the well-being of future generations*" (emphasis added).

3.3 Prevention

Article 5 of the Global Pact provides for the principle of prevention:

> The necessary measures shall be taken to prevent environmental harm.
>
> The Parties have the duty to ensure that activities under their jurisdiction or control do not cause damage to the environment of other Parties or in areas beyond the limits of their national jurisdiction.
>
> They shall take the necessary measures to ensure that an environmental impact assessment is conducted prior to any decision made to authorise or engage in a project, an activity, a plan, or a program that is likely to have a significant adverse impact on the environment.
>
> In particular, States shall keep under surveillance the effect of an above-mentioned project, activity, plan, or program which they authorise or engage in, in view of their obligation of due diligence.

Article 5 codifies the provisions found in principles 21 and 24 of the Stockholm Declaration and principle 2 of the Rio Declaration (and also has a direct relationship with principles 1, 14, 17, 18 and 19 that (inter alia) provide for sustainable development and address the prevention of transboundary harm through their focus on dangerous activities and substances, EIA, notification and assistance in cases of emergency, and notification and consultation on activities with transboundary impact).[73] The White Paper noted:[74]

> Article 5 of the Pact concerns the obligation to prevent environmental harm, which is widely recognized but is consecrated in the Pact in an ambitious form, with both a trans-border and internal dimension. The obligation to prevent harm is present in many international treaties as well as the Rio declaration. In practice it includes two obligations — the obligation to prevent harm (Rio

73 Leslie-Anne Duvic-Paoli and Jorge E Vinuales "Principle 2: Prevention" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 107 at 134.

74 Le club des jurists, above n 38, at 40.

declaration, principle 2), and the obligation to inform other States in case of an emergency or, more generally, in case of activities which may cause harms on the territory of other States (Rio declaration, principles 18 and 19).

Leslie-Anne Duvic-Paoli also found that prevention is "the *raison d'etre* of international environmental law".[75] She observed that the principle imposes a positive obligation of due diligence rather than merely imposing a "negative duty of restraint", and that it is given effect to through the duty to carry out EIA and by providing for public participation in environmental decision-making.[76] While Neil Craik traced the origins of the duty to conduct EIA from the National Environmental Policy Act 1969 enacted by the United States Congress, the UN Convention on the Law of the Sea, and the Convention on Biological Diversity, and observed that EIA is primarily required where "planned activities" are "likely to have a significant environmental impact", that it triggers an obligation to notify and consult with potentially affected persons, but the procedural requirement to conduct EIA does not require that any environmental harm is mitigated because the EIA process and public scrutiny from notification and consultation should logically influence the substantive decision-making process.[77] Beyond that, Craik noted that where activities are allowed to commence, the EIA process imposes a further obligation to continuously monitor environmental effects where "reasonably necessary", and that extension of EIA obligations to the fields of biodiversity and climate change are emerging trends.[78]

Article 5 of the Global Pact (as noted by the above commentary) emphasises the importance of both EIA as part of the consent process, and consent and plan monitoring mechanisms.

Currently, s 32 of the RMA provides for strategic EIA in relation to the preparation of policy statements and plans and s 88(2)(b) of the RMA provides that every resource consent application must include an EIA which includes the information required by sch 4, while local authorities are required to monitor the efficiency and effectiveness of their policy statements and plans and the exercise of resource consents that have effect in their region or district under s 35(2)(b) and (d) of the RMA.

75 Leslie-Anne Duvic-Paoli "Prevention" in Y Aguila and JE Vinuales (eds) *A Global Pact for the Environment: Legal Foundations* (C-EENRG, Cambridge, 2019) 59 at 63.

76 At 62.

77 Neil Craik "Environmental Impact Assessment" in Y Aguila and JE Vinuales (eds) *A Global Pact for the Environment: Legal Foundations* (C-EENRG, Cambridge, 2019) 65 at 65–66 and 69–70.

78 At 70.

The Review Panel recommended that strategic EIA should be retained in the NBA for policy statements and plans but simplified to focus more on "expected outcomes".[79] The Review Panel also recommended that EIA should be retained for all resource consent applications but considered that there was "a good case for limiting the information requirements for controlled activities", and that the EIA methodology in sch 4 should "be revised to focus on how the application would help achieve the outcomes in a reformed RMA and the proposed combined plans, as well as dealing with adverse effects". However, it is unclear whether these recommendations signal a departure from the precautionary approach or the risk-based assessment currently found in s 32 and sch 4 of the RMA.

Beyond that, the "no harm" principle articulated in art 5 of the Global Pact is firmly embedded in the New Zealand resource management system via the requirement to avoid any adverse effects of activities on the environment in s 5(2)(c) of the RMA, s 5(2)(c) of the NBA exposure draft, and the NZSC decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[80] which clarified that avoid means "not allow" or to "prevent the occurrence of". Arguably, the policy choice implicit in these statutory provisions between avoiding or remedying or mitigating adverse effects could be assisted by including an effects hierarchy in pt 2 of the proposed NBA similar to that found in cl 3.21 of the National Policy Statement on Freshwater Management 2020 to provide clear direction about when it may be appropriate to remedy or mitigate rather than avoid any adverse effects, when offsetting or providing environmental compensation may be appropriate, and that where any residual adverse effects (that are not consistent with living within prescribed environmental limits or tikanga Māori)[81] remain unaddressed that resource consent should appropriately be declined. This approach would clarify the circumstances when it may be appropriate to prevent the occurrence of activities that are likely to give rise to adverse effects on the environment. It would also be consistent with the approach of the NZSC in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[82]

3.4 Precaution

Article 6 of the Global Pact provides for the precautionary principle:

79 Report of the Resource Management Review Panel, above n 1, at 255.
80 [2014] NZSC 38 at [96].
81 [2021] NZHC 1201 at [92], [95], [96], [98] and [100].
82 [2021] NZSC 127 at [5]–[6], [261], [302] and [315]–[317].

> Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.

Article 6 codifies the provisions found in principle 15 of the Rio Declaration regarding precaution. It also has a direct relationship with principle 2 (prevention or no harm).[83] The White Paper noted:[84]

> Article 6 is dedicated to the principle of precaution, applicable to situations when scientific uncertainty remains on the potential risks of a given activity. The precautionary principle is widely integrated in international and national texts. The Pact adopts a form of the precautionary principle which guarantees its adequate articulation with the prevention principle.

Alexander Gillespie noted that, generally, the precautionary principle (while not express) has been embedded in New Zealand law and policy through approaches to biodiversity protection and conservation.[85] Specific examples of the precautionary principle from across the New Zealand statute book include (at a strategic level) the requirements for preparing and publishing evaluation reports as part of the plan preparation process under the RMA, where s 32(2)(c) requires local authorities to "assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions". Similarly, s 18(g) of the NBA exposure draft will require the relevant persons exercising statutory functions under the NBA to "apply a precautionary approach". The precautionary approach is defined by s 3 of the NBA exposure draft as:

> … an approach that, in order to protect the natural environment if there are threats of serious or irreversible harm to the environment, favours taking action to prevent those adverse effects rather than postponing action on the ground that there is a lack of *full scientific certainty.* (emphasis added)

While the proposed definition of the precautionary approach in the NBA exposure draft is arguably closer to the restatement of the principle in the Global Pact than the more neutral provision in s 32(2)(c) of the RMA, the critical difference between the two definitions is that s 3 of the NBA is (arguably)

83 Rio Declaration, principle 2; Antonio Augusto Cancado Trinidade "Principle 15: Precaution" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 403 at 421.

84 Le club des jurists, above n 38, at 40.

85 Alexander Gillespie "Precautionary New Zealand" (2011) 24 NZULR 364 at 381–385.

expressed positively in favour of development. Additionally, the NBA may in practice impose a wider obligation on all persons to "take a precautionary approach" as part of the implementation principles included in s 18(g) of the NBA exposure draft (noted above). However, the reference to "full scientific certainty" is problematic for the reasons pointed out by Sir Peter Gluckman in his 2015 Salmon Lecture when commenting on differing epistemologies used in science and law. He stated:[86]

> … science is about reducing uncertainty — but paradoxically, in doing so it actually reveals more uncertainty. By contrast, law is largely about creating a decision based on presumed certainty …

Other examples of the precautionary approach from across the New Zealand statute book include s 34(2) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act)[87] which provides more emphatically that:

> If, in relation to the making of a decision under this Act, the information is uncertain or inadequate, the Minister must *favour caution* and environmental protection. (emphasis added)

Arguably, the very strong science-based approach to precaution in this provision and the definition of the precautionary approach in s 3 of the NBA exposure draft are at opposite ends of the precautionary spectrum. A strong science-based approach would be consistent with the decision of the NZSC in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd*, where the NZSC provided guidance about when an adaptive management approach could legitimately be used to implement the precautionary principle. The NZSC stated:[88]

> … there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk.

Most recently, the NZSC in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* considered the approach to applying the precautionary principle against the background context of s 34(2) of the EEZ Act (noted above). First, the NZSC acknowledged that in transposing

86 Peter Gluckman "The place of science in environmental policy and law" [2016] RM Theory & Practice 9 at 10.

87 Warnock and Wheen, above n 22, at 6–13.

88 *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40 at [125].

international obligations into domestic law Parliament may sometimes use "language which differs from the terms or substance of the international text".[89] However, this does not displace "the long-established presumption of statutory interpretation that so far as its wording permits, legislation should be read in a manner consistent with New Zealand's international obligations".[90] Second, the NZSC noted:[91]

> … there are suggestions that the "precautionary principle" may have a narrower effect than the wording adopted in the EEZ Act. This Court noted in *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* that there is material in the international law context to support the view that "rather than being concerned with taking precautionary measures in allowing development, the term is more often used for advocating precautionary measures to protect the environment". There is also debate in the international law context about the scope of the principle. Further, the references to the principle in international instruments are not uniform. Under Principle 15 of the Rio Declaration, for example, the threshold is "threats of serious or irreversible damage" and the approach is only to be applied by states "according to their capabilities". By contrast, art 3(1) of the 1996 London Protocol refers to the application of a precautionary approach where the dumping of waste is "likely to cause harm". Further, under the Protocol, dumping is not permitted unless specifically allowed.

Third, the NZSC held that there was "no apparent reason to read down the wording adopted in the EEZ Act",[92] while finding that the requirement to "favour caution" accorded "with the precautionary principle as it is generally understood".[93]

More importantly, the NZSC expressly referred to the Rio Declaration and Agenda 21 and the fact that New Zealand had "endorsed" them without making any distinction between the normative effect of "hard" (treaty based) or "soft" (declaratory) international law provisions.[94] This position is consistent with the increasingly "blurred" boundaries between these obligations.[95]

89 [2021] NZSC 127 at [108]; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.
90 [2015] NZSC 28, [2016] 1 NZLR 298 at [143].
91 [2021] NZSC 127 at [109].
92 At [111].
93 At [113].
94 At [107].
95 Lavanya Rajamani "The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations" (2016) 28 Journal of Environmental Law 337.

3.5 Polluter Pays

Article 8 of the Global Pact provides for the polluter pays principle:

> Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator.

Article 8 of the Global Pact codifies the provisions of principle 16 of the Rio Declaration. It also has a direct relationship with principle 2 (prevention or no harm).[96] The White Paper noted:[97]

> Article 8 picks up the polluter-pays principle: the polluter must, in theory, bear the costs of the pollutions, in accordance with the Rio Declaration.

The primary mechanisms for transposing the polluter pays principle into domestic New Zealand law are the declaratory, enforcement, and offence provisions in pt 12 of the RMA. For example, the powers to make enforcement orders requiring that any adverse effects on the environment must be avoided, remedied, or mitigated.[98] Beyond that, the focus on avoiding, remedying, or mitigating any adverse effects of activities on the environment in s 5(2)(c) of the RMA infuses the decision-making process under the statute. For example, EIA is required under s 88(2)(b) and sch 4 of the RMA as a prerequisite for a complete resource consent application, having regard to any actual or potential effects on the environment forms an essential part of deciding resource consent applications under s 104(1)(a) of the RMA, and the jurisdiction to include conditions on the grant of resource consent is (inter alia) a vital adjunct to prevent or minimise any actual or likely effects on the environment in relation to discharge permits or generally to offset any adverse effects under s 108(8) and (10) of the RMA.

3.6 Public Participation

Articles 9, 10 and 11 codify the provisions found in principle 10 of the Rio Declaration regarding public participation. They also have connections with

96 Rio Declaration, principle 2; Priscilla Schwartz "Principle 16: The Polluter-Pays Principle" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 429 at 446.

97 Le club des jurists, above n 38, at 41.

98 RMA, ss 314(1)(b)(ii), 314(1)(c), 314(1)(d), 314(1)(da), 339(5)(a).

principles 11 (effective legislation), 15 (precaution) and 17 (EIA).[99] The White Paper noted the interrelated nature of the "procedural" rights provided in arts 9, 10 and 11:[100]

> Articles 9, 10 and 11 consecrate the procedural obligations of information, public participation and access to environmental Justice. The right to access environmental information is mentioned in numerous international environmental texts (Rio Declaration, UNFCCC, Aarhus Convention or Paris Agreement). Public participation is its immediate inference, as it implies the right to express an opinion during the decision making process, in accordance with the Rio Declaration. Finally, access to environmental Justice is closely linked to the Pact's effectiveness. Considering the fact that this principle will be applied in countries with various judicial organisation, the chosen wording is general enough to respect national traditions.

3.6.1 Access to environmental information

Article 9 of the Global Pact provides for access to information:

> Every person, without being required to state an interest, has a right of access to environmental information held by public authorities.
>
> Public authorities shall, within the framework of their national legislation, collect and make available to the public relevant environmental information.

Local authorities have wide duties under s 35(1) of the RMA to gather information (including undertaking and commissioning research), monitor, and keep records to enable them to carry out their statutory functions effectively. In particular, they are required to monitor (inter alia) the state of the local environment,[101] the efficiency and effectiveness of their policy statement and plan provisions,[102] and the exercise of resource consents that have effect in their areas.[103] Additionally, local authorities are required to compile and publish monitoring reports periodically,[104] and to keep records available for

99 Rio Declaration, principles 11, 15, 17; Jonas Ebbesson "Principle 10: Public Participation" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 287 at 307.

100 Le club des jurists, above n 38, at 41.

101 RMA, s 35(2)(a).

102 Section 35(2)(b).

103 Section 35(2)(d).

104 Section 35(2A).

public inspection at their principal offices (including records about alleged breaches of the RMA and any enforcement action taken as a result).[105] The underlying objective is to better inform the public about environmental matters and to facilitate effective public participation.[106] Nationally, the Government Statistician and the Secretary for the Environment are responsible for state of the environment monitoring under the Environmental Reporting Act 2015, and New Zealand's environmental reporting series is published online by Statistics New Zealand. However, the Review Panel noted that currently there are "no direct" links between these two statutes, and recommended that the NBA "should clarify the data to be collected under each Act and how it should be collected, evaluated and used".[107]

Access to official information is provided for by the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 (LGOIMA) based on the principle of availability,[108] but subject to limited restrictions for withholding information.[109] Generally, international treaties provide for legitimate restrictions on access to information similar to the restrictions found in the OIA and LGOIMA.[110]

3.6.2 Public participation

Article 10 of the Global Pact provides for public participation:

> Every person has the right to participate, at an appropriate stage and while options are still open, to the preparation of decisions, measures, plans, programmes, activities, policies and normative instruments of public authorities that may have a significant effect on the environment.

Under the RMA, any person can make a submission about a proposed policy statement or plan, but people can only make a submission about a resource consent application when the application is notified in some way. Currently, about 3.26 per cent of resource consent applications are notified.[111] The ability to make submissions also triggers both the right to be heard before the relevant local authority, and statutory appeal rights to the Environment Court on merits

105 Section 35(3) and (5)(i).
106 Section 35(3).
107 Report of the Resource Management Review Panel, above n 1, at 382.
108 Official Information Act 1982 [OIA], ss 5, 12; Local Government Official Information and Meetings Act 1987 [LGOIMA], ss 5, 10.
109 OIA, ss 6–11; LGOIMA, ss 6–9.
110 Dupuy and Vinuales, above n 11, at 99.
111 Ministry for the Environment *Patterns in Resource Management Act implementation* (Wellington, 2021) at 11.

and law and beyond that to the High Court on questions of law only.[112] The NBA exposure draft does not provide any detail on what replacement provisions may ultimately be introduced, but the accompanying parliamentary paper indicates that the right to be heard in relation to NBEPs may be reduced to "requiring written submissions rather than oral".[113] Additionally, the Review Panel recommended that the requirements for notification should be "modified" so that resource consent applications for:[114]

- Controlled activities should not be notified "unless special circumstances exist".
- Restricted discretionary activities "could be notified" where specified in the plan.
- Discretionary activities should be notified in all cases.

However, it is unlikely that these procedural modifications would increase the number of resource consent applications that are notified.

3.6.3 Access to environmental justice

Article 11 of the Global Pact provides for access to environmental justice:

> Parties shall ensure the right of effective and affordable access to administrative and judicial procedures, including redress and remedies, to challenge acts or omissions of public authorities or private persons which contravene environmental law, taking into consideration the provisions of the present Pact.

Access to environmental justice is provided by statutory appeal rights under the RMA,[115] and the right to judicial review affirmed by s 27(2) of the New Zealand Bill of Rights Act 1990.[116]

However, the Review Panel recommended that appeal rights in relation to policy statements and plans under cl 14 of sch 1 of the RMA should be limited, similar to the process provided for in relation to the Auckland Unitary Plan by the Local Government (Auckland Transitional Provisions) Act 2010. For example, appeal rights to the Environment Court on merits and law were only available where the local authority rejected the independent hearings panel's

112 RMA, s 120, sch 1 cl 14, s 299.
113 New Zealand Government *Natural and Built Environments Bill: Parliamentary paper on the exposure draft* (Wellington, June 2021) at 41.
114 Report of the Resource Management Review Panel, above n 1, at 277–278.
115 RMA, s 120, sch 1 cl 14.
116 See also Judicial Review Procedure Act 2016.

recommendations on submissions,[117] and in all other cases appeal rights were to the High Court on questions of law only.[118]

There also appears to be a trend away from providing access to the NZSC. For example, appeals to the NZSC are now precluded under s 13 of the COVID-19 Recovery (Fast-track Consenting) Act 2020 in relation to development and infrastructure projects consented under that statute, and under s 22 of the Resource Management Amendment Act 2020 in relation to policy statements and plans prepared under the freshwater planning process. Where procedural rights are upheld — for example, where there has been a failure by a decision-maker to give reasons for a decision — the exercise of remedial discretion by the senior courts has been clouded by deference to the decision-maker and a reluctance to quash decisions for breach of natural justice.[119] While the Review Panel noted that any delay inherent in appeals is outweighed by the importance of preserving access to the senior courts, the Panel's report shied away from making a key recommendation supporting continued access to the NZSC in environmental cases.[120]

Beyond that, Carol Harlow noted the financial barriers to securing access to justice because "legal aid and advice is decidedly patchy".[121] For example, in the environmental context absent the ability of NGOs like Greenpeace to crowd-fund public interest litigation from donations (noted below), community and environmental groups rely primarily on the relatively meagre funding provided by the Environmental Legal Assistance Fund administered by the Ministry for the Environment.[122]

3.7 The Role of Non-State Actors and Subnational Entities

Article 14 of the Global Pact provides for the role of non-State actors and subnational entities:

> The Parties shall take the necessary measures to encourage the implementation of this Pact by non-State actors and subnational entities, including civil society, economic actors, cities and regions taking into account their vital role in the protection of the environment.

117 Local Government (Auckland Transitional Provisions) Act 2010, s 156.
118 Section 158.
119 *Franco Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175.
120 Resource Management Review Panel, above n 1, at 446.
121 Carol Harlow "The Political Constitution Reworked" in Rick Bigwood (ed) *Public Interest Litigation* (LexisNexis, Wellington, 2006) 189 at 202.
122 Amounts are funded up to $50,000 (excluding GST) per group per application for any one case.

Article 14 codifies the provisions found in the Johannesburg Declaration 2002 (Rio+10)[123] and the Declaration on Sustainable Development 2012 (Rio+20).[124] The White Paper noted:[125]

> Article 14 enshrines the essential role of non-State actors and subnational entities in the implementation of the Pact. Their inclusion gives them rights and duties, such as established by the Global Compact, a soft law instrument relating to corporate social responsibility.

Administration of the RMA is largely devolved to local authorities who are responsible for preparing subsidiary instruments (eg policy statements and plans) required to give effect to the framework statute, deciding resource consent applications, and monitoring and enforcement to ensure compliance with the law. Environmental NGOs and community groups also play a critical role through advocacy for environmental protection either via submissions on statutory amendments and reforms or subsidiary instruments; and court action via statutory appeals, declaratory proceedings, and judicial review. The recent decision in *Greenpeace of New Zealand Inc v Charities Registration Board* has (helpfully) clarified the law by confirming that advocacy about environmental issues is of public benefit and therefore charitable,[126] and should provide a smooth path to charity registration for NGOs and provide them with the ability to crowd-fund to support their activities. The NBA exposure draft clearly envisages a continued role for local authorities in preparing subsidiary instruments and deciding resource consent applications,[127] and it is highly likely that devolving monitoring and enforcement functions to local authorities will continue to be the most efficient and effective mechanism for ensuring compliance with the law under the NBA. The law relating to corporate responsibility is also developing as a result of novel tort actions,[128] but there is currently no clearly articulated statement of domestic law principles similar to the Climate Principles for Enterprises 2020 prepared by the Expert Group on Climate Change.[129]

123 Johannesburg Declaration 2002, arts 27, 29.
124 Declaration on Sustainable Development 2012, arts 46, 47, 48.
125 Le club des jurists, above n 38, at 41.
126 *Greenpeace of New Zealand Inc v Charities Registration Board* [2020] NZHC 1999.
127 NBA, s 23, sch 3, s 24(2)(d).
128 *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419.
129 Expert Group on Climate Change (Jaap Spier, ed) *Climate Principles for Enterprises* (2nd ed, Eleven International Publishing, 2020).

3.8 Indigenous Peoples and Sustainable Development

Unlike the Rio Declaration, no specific provision is made in the articles of the Global Pact regarding indigenous peoples and sustainable development. However, the preamble to the Global Pact envisages that parties would be:[130]

> Conscious of the need to respect, promote and consider their respective obligations on human rights, the right to health, *the rights and knowledge of indigenous peoples*, local communities, migrants, children, persons with disabilities and people in vulnerable situation [sic], under their jurisdiction. (emphasis added)

More robustly, principle 22 of the Rio Declaration[131] pertaining to indigenous peoples and sustainable development provides:

> Indigenous peoples and their communities … have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The principles of the Treaty of Waitangi are hard-wired into the DNA of environmental statutes. For example, s 4 of the Conservation Act 1987 provides that the statute "shall so be interpreted and administered as to *give effect* to the principles of the Treaty of Waitangi", and s 8 of the RMA and s 8 of the Hazardous Substances and New Organisms Act 1996 both require that all persons exercising functions and powers under these statutes "shall *take into account* the principles of the Treaty of Waitangi" (emphasis added). However, s 6 of the NBA exposure draft which provides that all persons exercising or performing powers, functions, or duties under the NBA "*must* give effect" to the principles of the Treaty of Waitangi (emphasis added) would if enacted likely be the strongest Treaty provision in the New Zealand statute book.

The majority of the NZSC in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* noted the wider statement of interlocking Māori

130 Le club des jurists, above n 38, at 45.

131 Rio Declaration, principle 22 also has a relationship with principle 10 (public participation); Dinah Shelton "Principle 22: Indigenous People and Sustainable Development" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 541 at 553.

concepts articulated in the RMA and their relationship with the principles of the Treaty of Waitangi. The NZSC stated:[132]

> Under s 8 decision-makers are required to "take into account" the principles of the Treaty of Waitangi. Section 8 is a different type of provision … in the sense that the principles of the Treaty may have an additional relevance to decision-makers. For example, the Treaty principles may be relevant to matters of process, such as the nature of consultations that a local body must carry out when performing its functions under the RMA. The wider scope of s 8 reflects the fact that among other matters of national importance identified in s 6 are "the relationship with Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" and protections for historic heritage and protected customary rights and that s 7 addresses kaitiakitanga.

More recently, the New Zealand High Court in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* confirmed that the strong directions in these RMA provisions are mandatory considerations.[133] Previously, Warnock and Wheen noted:[134]

> … the overarching Treaty principle is partnership. The Crown has the right to govern according to its chosen policies and in the national interest — but is also obliged to actively protect Māori interests, to be fully informed as to the consequences of its policies and activities for Māori, and to remedy any past breaches of Treaty principles.

The obligation to actively protect Māori interests therefore translates into both procedural and substantive rights.[135] As noted in part 4 below, New Zealand has emphasised the important role played by indigenous peoples in achieving sustainable development in its written response to the UN-led process leading towards a Global Pact.

3.9 Effectiveness of Environmental Norms

Article 15 of the Global Pact provides a guarantee for the effectiveness of environmental norms:

> The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.

132 [2014] NZSC 38, [2014] 1 NZLR 593 at [27].
133 [2020] NZHC 2768 at [30].
134 Warnock and Wheen, above n 22, at 12.
135 *Trans-Tasman Resources Ltd* [2021] NZSC 127 at [169].

Article 15 codifies the provisions found in principle 11 of the Rio Declaration pertaining to environmental legislation. It also has a relationship with principles 15 (precaution) and 17 (EIA).[136] The White Paper noted:[137]

> Article 15 states more generally the obligation to ensure the effectiveness of environmental norms, following principle 11 of the Rio Declaration. The fundamental principle requires both the adoption and implementation of necessary measures.

The White Paper also noted that national courts will generally be "best placed" to secure compliance with the principles included in the Global Pact "within the domestic legal order", and that apex courts in particular "play a crucial role in the implementation of environmental law principles".[138] In terms of the potential impact of art 15 on legal systems, Yann Kerbrat observed:[139]

> Article 15 in particular would provide arguments in internal judicial proceedings against the state to ensure it acts effectively. Some internal judicial precedents are already moving in this direction. Evidence for this is the decision taken by the Dutch courts in *Urgenda*. Article 15 might provide an incentive to generalise this.

He also noted that the effective implementation and enforcement of environmental law underpins access to environmental justice protected by art 11 of the Global Pact.

Previously, when analysing the scope of principle 11 of the Rio Declaration, Martina Kunz observed that it imposes "three cumulative conditions" on states. First, that law (statutes or regulations) should be enacted "instead of mere policies, action plans, strategies etc".[140] Second, that law should focus "on the environment" which implicitly takes a wider view of the application of law generally to the resolution of environmental issues.[141] Third, that the law should be effective, which is both a design issue and a matter of enforcement, monitoring, and review. Arguably, the RMA has not been effective, but this has arisen in part because the necessary subsidiary instruments have not been promulgated to complete the regulatory architecture of the framework statute

136 Rio Declaration, principles 15, 17; Martina Kunz "Principle 11: Environmental Legislation" in Jorge E Vinuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, Oxford, 2015) 311 at 321.
137 Le club des jurists, above n 38, at 41.
138 At 32 and 21.
139 Dupuy and Vinuales, above n 11, at 136.
140 Kunz, above n 136, at 315.
141 At 315.

(eg the proposed National Policy Statement for Indigenous Biodiversity remains under development notwithstanding the critical need to halt biodiversity loss that has been acknowledged since the publication of the report *The State of New Zealand's Environment 1997*).[142]

4. THE LIKELY WAY FORWARD

Following the launch of the Global Pact at the Sorbonne in June 2017, the instrument provided the catalyst for the adoption of the UN General Assembly (UNGA) Resolution 72/277, "Towards a Global Pact for the Environment", in May 2018 and production of the report by the UNSG, "Gaps in international environmental law and environment-related instruments: towards a global pact for the environment", in November 2018. These initiatives led in turn to the creation of the ad hoc open-ended working group (OEWG) established pursuant to UNGA Resolution 72/277, that convened three meetings in Nairobi in January 2019, March 2019 and May 2019, and recommended the preparation of a high-level political declaration "with a view to strengthening the implantation of international law and international environmental governance" for consideration at the commemoration of the creation of the UN Environment Programme (UNEP) by the Stockholm Conference.[143]

Subsequently, UNGA Resolution 73/333, "Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277", endorsed the OEWG recommendations in August 2019. Three informal online workshops on UNGA Resolution 73/333 were held in June–July 2021 under the auspices of UNEP, facilitated by Saqlain Syedah of Pakistan and Ado Lohmus of Estonia, to discuss the draft "Building Blocks of a Political Declaration" (Building Blocks).

The draft Building Blocks "reaffirm all the principles of the Rio Declaration",[144] and record the intention of States to strengthen international environmental governance via the coordinating and advocacy role of UNEP and the UN Environment Assembly (UNEA) as a decision-making body committed to implementing the SDGs, the commitment of States to the "development and adoption of efficient environmental laws" and ensuring "their effective and fair implementation and enforcement" at all levels,[145] and the desire of States to

142 Ministry for the Environment *The State of New Zealand's Environment 1997* (Wellington, 1997).

143 Report of the ad hoc open-ended working group [OEWG] established pursuant to General Assembly resolution 72/277 at [55].

144 Draft Building Blocks of a Political Declaration, para 5 <www.unep.org>.

145 Paragraph 14.

accelerate action by encouraging all States to ratify and implement all existing MEAs within their domestic jurisdictions.

New Zealand generally welcomed the draft Building Blocks in its written response following participation in the informal online workshops, but recommended that references to "the role and importance of indigenous peoples and traditional knowledge in addressing the three global environmental crises: climate change, biodiversity, and pollution" should be incorporated and mainstreamed throughout the draft Building Blocks where relevant.[146] Additionally, New Zealand also emphasised the importance of incorporating "the perspectives and interests of indigenous peoples and the unique insights of traditional knowledge" in relation to post COVID-19 green recovery initiatives.[147]

Currently, states remain divided over the venue and timing (during 2022) for the adoption of the political declaration, with options ranging from the UN high-level meeting in Stockholm in 2022 to commemorate the 50th anniversary of the Stockholm Conference, or in Nairobi for either the event commemorating the UNEP 50th anniversary or the fifth session of the UNEA. Sharp fault lines are also evident between the majority of States on the one hand who favour highlighting the importance of the Rio Declaration, and other States led by the European Union on the other hand who consider that a more clearly articulated statement of international environmental law principles would assist with better implementation of environmental law.[148] However, the likelihood is that a high-level political declaration that simply reaffirms the principles of the Rio Declaration will be adopted at Stockholm+50 in 2022.

5. CONCLUSIONS

What emerges from the above analysis is a reasonably clear affirmation of the continued importance of the Rio Declaration principles, and the critical role played by apex courts in applying them in the domestic context. From a New Zealand perspective, the concept of sustainable development and the related principles regarding intergenerational equity, prevention, precaution, polluter pays, public participation, and the vital role played by indigenous peoples in environmental management, underpin the resource management system and have continued relevance for the way forward.

146 New Zealand's Input on the draft building blocks of a political declaration under UNGA Resolution 73/333 <www.unep.org>.

147 New Zealand's Input, above n 146.

148 Global Pact for the Environment <www.globalpactenvironment.org>.

The basic architecture of the statutory purpose in s 5 of the NBA exposure draft is generally sound, and the strong emphasis placed on giving effect to the principles of the Treaty of Waitangi is welcomed. In particular, the extra-judicial writing of Justice Joe Williams indicates the dynamic potential for the concepts of whanaungatanga and sustainable development to work holistically in a complementary way.

However, the mandatory environmental outcomes listed in s 13A of the NBA, and referred to in s 5(2)(b), are problematic because they include a mix of ecological and anthropocentric outcomes. They are not prioritised in any way. Arguably, as currently drafted, s 13A and s 13B of the NBA detract from the strength of the statutory purpose and the intention to provide stronger protection for Māori interests. Put simply, there remains an urgent need to deconstruct these provisions to avoid these potential consequences.

Beyond that, while the Select Committee noted that certain environmental principles (eg precaution and non-regression) could be incorporated into the NBA,[149] there remains a missed opportunity to recognise the complementary international environmental norms derived from the Rio Declaration and enshrine them in s 18 of the NBA to assist with the interpretation and implementation of the new statute. The provisions in the TFEU and the UK Environment Bill provide architectural examples for how this could be achieved. More importantly, there is also a need for more ambition by embracing the new and emerging principles identified in the UNSG's gaps report. For example, the principles of non-regression and progression will be important for implementing the new mandatory requirement to protect and enhance the natural environment in s 5(1)(a) of the NBA exposure draft. However, the debate about these matters will continue during 2022 when the NBA is formally introduced in Parliament for enactment.[150]

149 Environment Committee Inquiry, above n 1, at 29–30.
150 At 58.