| Chapter 11 |

International Environmental Law from a Central European Perspective

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"Let us be proud of who we have been and
let us try to be more than a match for who we are."

"Legyünk büszkék arra, amik voltunk,
és igyekezzünk különbek lenni annál, ami vagyunk!"
Ottó Herman[1]

ABSTRACT

International Environmental Law is relevant one way or another for every state as a field where innovative solutions may sculpt the future of international law. Globally connected through climate, the never-changing quantity of waters on Earth, or the potential devastating effects of certain transboundary pollutions, states regularly face international environmental challenges. It is even more true for Central European states whose geographical, historical, and cultural proximity explains why this region faces challenges that only partly correspond to the general European trends. The chapter reflects briefly on the economic and social heritage of the region as a possible reason for the particularities of the countries within the region before turning to certain general questions of international environmental law. While presenting some key features of the evolution of international environmental law, we draw attention to issues and achievements relevant for Central European states, in particular in relation to sovereignty and demographic questions. Apart from the main features of international treaties in the field of international environmental law, the chapter refers to the Central European attitude toward IEL treaties. Finally, international environmental adjudication is treated in general, highlighting the main opportunities and possible shortcomings of this field.

KEYWORDS

international environmental law, Central Europe, international environmental treaties, international environmental adjudication, evolution of international environmental law

1 Quoted by Vértes, 2011, p. 41.

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1. Introduction

International Environmental Law (IEL) is the field of international law with the most potential. Being relevant one way or another for every state, it is the realm where innovative solutions may sculpt the future of international law. Globally connected through climate, the never-changing quantity of waters on Earth, or the potential devastating effects of certain transboundary pollutions, states regularly face international environmental challenges. The majority of these challenges stems from human activities, namely from the unsustainable use of resources or from environmental pollution whose scale exceeds the capacity of the environment to render it harmless.[2] However, it is not only our responsibility as human beings recognizing the need to be capable and liable to act upon the consequences of our own activities that urges us to turn to the tools of international environmental law; it is also the certainty that there is a power far beyond us and that the rules of nature are unavoidable. This chapter focuses on the main features of international environmental law and the issues most relevant in the Central European context. After highlighting some of the challenges of the Central Eastern European region, the chapter elaborates the evolution of international environmental law before turning to international environmental treaties and international environmental adjudication in order to give both a brief overview of IEL and a Central European perspective.

2. Challenges in the Central Eastern European region

The Central Eastern European (CEE) region faces challenges that only partly correspond to the general European challenges and trends. Given that every region has its own particularities, it is no surprise that it is the case here as well. The post-socialist heritage (in both society and economy) to a great extent explains certain difficulties.

Heritage No. 1: Economic structure. The economies of the socialist era were far from a concern for sustainability or even rentability/profitability (it is sometimes forgotten that being profitable actually *is* an important form or element of sustainability[3]). The economic structure of the Central Eastern European states—maintaining certain elements logical for their survival—was far from viable, but, illogically, it was not necessarily an expectation at the time. Political ideologies, often coming from abroad, influenced the direction of economic policy more than the actual interests of the peoples living there. In the 1990s, the change of political regime resulted in a change in both the economic structure and society, with a strong shift in the direction of the so-called "Western model." Nevertheless, the wind of change—however strong it was—could not erase certain columns of the former regime. We find here and there

2 Shelton and Kiss, 2005, p. 3.
3 In this regard see World Economic Forum, 2015; Csath, 2020.

in this region concrete columns towering as mementos of an era gone with this wind, but leaving memories behind, for instance, in former barracks of the foreign troops stationed in these countries or in factories whose profitability (from the point of view of the economy of the given country/region[4]) has always been at least questionable. These columns quite often serve as signs of places of extreme environmental pollution and constitute—among others—a very expensive heritage for the countries of the region (see e.g., rustbelts[5]). Cases before the European Court of Human Rights have shown what devastating results such policies had.[6] However, admittedly, this problem is not a particularity of former socialist countries.[7] A short-sighted profit orientation can also lead to similar results.[8] From a purely economic point of view, such extreme environmental pollutions always, without exception and inevitably, become enormous debts for coming generations. Not only have such costs (the costs of recultivation) not originally been calculated (and, hence, have to be produced typically from a different source), but such costs also become higher as time goes by. However, the Central Eastern European states had such a high number of projects needing recultivation at the crash of the socialist regime that even with regard to the above facts, a complete and immediate remedy of the situation was not possible; the only hope was that technology and innovation may help in the near future to solve the remaining problems.[9]

Heritage No. 2: Environment and the society. One of the greatest disasters the socialist era caused in the Central Eastern European region was social change: ever more and increasingly violent measures de-rooting the population from the land, making society forget the formerly evident symbiosis. Generations passed and a fast-growing percentage of the population has forgotten how lands should be used so that the very same lands shall serve not only the given generation, but also those coming afterwards. Now a fair balance shall be found in the society between economic and social

4 See e.g., the practice that what should be produced and where was often decided based on political considerations and completely regardless of e.g., the availability of the raw materials in the neighborhood, resulting in extreme unsustainable, i.e., utmost expensive and polluting production techniques ranging from extremely long supply chains to harsh groundwater pollutions on the spot. See cf. Lakatos, 2017, p. 28.

5 See the different efforts as attempts to normalize the situations, e.g., the attempts to clean the soil of former Soviet military barracks in Hungary from the beginning of the 1990s where yearly several hundreds of thousands of cubic meters of contaminated soil and water were cleaned of polluting materials like liquid paraffin, BTEX compounds, heavy metals, or chlorocarbons. See the document provided by the Hungarian Academy of Sciences in a case in front of the Constitutional Court: Németh et al., 2018, p. 5; or see e.g., Government decrees Nos. 444 and 619 of 2021 in Hungary (rustbelts) with which the Hungarian regulation seeks to favor and promote investments that undertake to tackle the environmental problem in the frame of their investment, e.g., with taxation rules.

6 See European Court of Human Rights (ECtHR), Fadeyeva v. Russia, Judgment of 9 June 2005.

7 See e.g., ECtHR, Howald Moor and Others v. Switzerland, Judgment of 11 March 2014.

8 See Inter-American Commission on Human Rights (IACHR), Mossville Environmental Action Now v. United States of America, Judgment of 17 March 2010.

9 As for Hungary, see Baross et al., 2016.

interests of current and future generations, i.e., the notion of sustainability shall be revisited in a somewhat broader sense than usual. It is of particular importance that common sense prevail over trendy but unsustainable ideas. In this region, despite this heritage, the sense of balanced environmental protection being a Christian obligation still seems to prevail,[10] and happens to occur also in legal texts such as the Hungarian Fundamental Law,[11] the Slovakian,[12] the Serbian,[13] the Croatian,[14] the Slovenian[15] or the Polish Constitutions,[16] as societies that wish to stay on their lands and preserve their culture necessarily need children and a healthy mental and material (natural and built) environment in order to achieve this goal.

3. The Evolution of International Environmental Law and the CEE countries

In order to put our current situation in context, we should turn our attention to the evolution of international environmental law, best described with reference to the United Nations (UN) conferences held in Stockholm (1972), Johannesburg (2002), and Rio de Janeiro (1992, 2012). This is more than reasonable, as their very titles show the change of attitude and focus of the global community. While the very first, 1972 Stockholm conference was entitled "on the Human Environment," the 1992 Rio de Janeiro conference was called "United Nations Conference on Environment and Development"; moreover, in 2002, in Johannesburg, the World Summit already had the title "on Sustainable Development," just like the Rio+20 Conference, held in 2012.

The Stockholm Conference adopted the Stockholm Declaration and an Action Plan for the Human Environment as well as a few resolutions.[17] The starting point is clearly stated in Article 1 of the Declaration, namely that "*[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.*" Everyone with a basic understanding of natural sciences would regard this statement as self-evident. Nevertheless, in 1972 it was of a great importance that it could appear as such in a UN document. Looking back at the events thereafter, drawing the parallel between the well-being of the environment and economic growth in Point 2 was perhaps one of the wisest statements of the declaration, pointing to another evident issue that nevertheless paved the way to ensure the willingness of states to participate even at a later stage in a project with few apparent direct advantages.

10 See among others the Encyclical Letter Laudatio Si' of the Holy Father Francis on Care for Our Common Home.
11 See Articles XX and XXI.
12 See Articles 20, 23, 44, and 45.
13 See Articles 74, 83, 88, 97, 183, and 190.
14 See Articles 3, 50, 52, 70, and 135.
15 See Article 72.
16 See Articles 5, 31, 68, 74, and 86.
17 See United Nations, 1973.

Based on the equality of states, Stockholm Principle 24 paved the way for regional (and of course sub-regional) cooperation and was particularly helpful when trying to handle cases of trans-boundary pollution. By quoting the ever-lasting principle and real basis of international law, "*the sovereignty and interests of all States*," the Stockholm Declaration has already drawn attention to an often forgotten aspect of international environmental disputes: the source of the conflicts is rarely easily avoidable, for differing interests—and, in their own aspect, well-based interests—stand behind it. Hence, the solution of international disputes—as we will see—has a greater chance of success when this is taken into account.

The United Nations Conference on Environment and Development, held in Rio de Janeiro between June 3 and 14, 1992, shows in its title that the issue of environment had received an important co-traveller that would stay by its side (forever): the economic aspect. It clearly shows that at the international level the road to success usually leads through compromises (a.k.a. political reality). The Rio documents do not hesitate to emphasize the needs of developing states, who (for obvious reasons) refused to participate in the common project unless their needs were taken into account (at least to a certain extent). The Rio Declaration on Environment and Development is understood in its Principles 3, 4, 6, and 12 as guarantees.[18]

The Declaration includes many of the principles directly or indirectly connected to international environmental law relevant at the time of the adoption, such as sustainable development, a principle best explained[19] in the closing report (Our Common Future, 1987) of the so-called Brundtland Commission, formerly known as the World Commission on Environment and Development, founded in 1983 by the then Secretary-General of the United Nations, Javier Pérez de Cuéllar; the integrity of the Earth's ecosystem; common but differentiated responsibilities; the different position of the developed and the developing countries and their societies; (a reserved version of) the polluter-pays principle; the significance of environmental impact assessment; the necessity of information about possible harmful effects on the environment of other states;[20] and the peaceful settlement of international environmental disputes.

Rio Principle 8 addresses the promotion of "*appropriate demographic policies*." Being a highly sensitive question, the document elegantly stops there. This is a question relevant not only for Europe, but particularly for the Central European region, as here demographic decrease is more than visible: according to the World Bank data, the population of Central Europe has decreased by 7 percent over the last three

18 See United Nations General Assembly, 1992.

19 See Report of the World Commission on Environment and Development: Our Common Future, p. 41.

20 It had particular significance in 1992, just a few years after the Chernobyl disaster. See international activity after the catastrophe, especially in the framework of the International Atomic Energy Agency (IAEA), e.g., Lamm, 1998, pp. 170 et seq. For On the Convention on Early Notification of a Nuclear Accident, see Moser, 1989, pp. 119–128.

decades.[21] With this process having clear societal consequences (see, e.g., the questions of economy or migration), certain European countries have effectively decided to face the challenge and try to elevate the highly problematic fertility rates (or at least try to slower the reduction of the population). According to the UN-based data of the World Bank,[22] the general total fertility rate has decreased significantly since 1960, when the fertility rate (births per woman) was globally and generally 5, while in 2019 this number was 2.4 (demographers more or less agree that approximately 2.1 is needed[23] in order to maintain a society).

In Europe (we work with the data of the World Bank regarding the territory of the European Union), the numbers are equally telling: Europe never had a peak close to the global one, and since its rate of 2.6 in 1960, it has practically steadily decreased to 1.5.[24]

The fertility rates of Central European states were clearly below even the EU average at the time of their accession to the European Union and far under the desired 2.1. These states seem to have decided to try to solve this problem, with certain results giving room for optimism, see e.g., the Czech Republic, where over the past two decades the fertility rate has increased from 1.1 to 1.7; Hungary, where from a very low 1.2, the past decade—due to an intense support from the government for families—has seen an increase of 0.3 percentage points; Poland, where there has been a rather steady increase to 1.4 since the nadir of a rate of 1.2; or Slovakia, where in the past two decades, there has been an increase of over 0.37 since the nadir (1.19).[25] These numbers have to be considered with regard to the following: The 10 countries with the highest fertility rates in the World Bank's 2021 report are all from the African continent, with Niger leading at 6.8,[26] while 10 of the 15 countries with the lowest fertility rates are European (South Korea's figure of 0.9 is followed in fourth place by the first European nation on the list, Malta, with 1.1).[27]

Naturally, from an international environmental point of view, population and fertility are not the only factors that have to be taken into consideration. Another widely acknowledged factor—which is in fact, just like the fertility rate, not real data but a calculated average number based on real data—is the so-called ecological footprint, where we can see that countries with the largest impact are mostly (but not

21 Population, total—Central Europe and the Baltics. In 1989, at the peak, it was 110 million, in 2020 only over 102 million.

22 Fertility rate, total (births per woman).

23 See among others Fertility rate; Total Fertility Rate 2022; Organisation for Economic Cooperation and Development, 2016.

24 Fertility rate, total (births per woman)—European Union.

25 Fertility rate, total (births per woman)—Czech Republic, Slovak Republic, Poland, Hungary.

26 As we can see from the data, the fertility rate of heavily indebted countries (Fertility rate, total (births per woman)—Heavily indebted poor countries (HIPC) as well as low-income states (Fertility rate, total (births per woman)—Low income) have also decreased significantly by approximately 2 units, from 6.6/6.7 to 4.6 (1.8 since the adoption of the Rio Declaration); of course, the two lists overlap remarkably.

27 Fertility rate, total (births per woman).

entirely) developed countries.[28] In the Central European region the country having the largest ecological footprint (according to 2018 data[29]) is the Czech Republic (with 5.72 gha)[30] at 24, with Slovenia at 29 (5.37), Poland at 37 (4.75), Slovakia at 38 (4.73), Croatia at 59 (3.88), Hungary at 60 (3.87), and Serbia at 77 (3.07), while the global average is 2.77.[31] These data may also be modulated by other factors (e.g., absolute size of the population), but they give an insight into the global situation and the place of Central Eastern Europe within it, and also show that an approach that tries to separate the economy and environment would always have a limited scope of validity.

This is also reflected in Rio Principle 25, according to which "*[p]eace, development and environmental protection are interdependent and indivisible*." It is important to note that not only development and environmental protection, but also peace and environmental protection are indivisible. This is another obvious statement of the Rio Declaration which has long been disregarded, but it has significance in various respects. First, however complicated the issue of aggression is, the question arises whether such an attack (i.e., an attack causing "only" environmental harm amounting to an "armed attack" in the sense of Article 51 of the UN Charter) could be regarded as an act targeting the sovereignty, territorial integrity, or political independence of another state (but obviously by other means, without the classical use of armed forces).[32] Second, when already at the stage of war, is the destruction of the environment a tool of warfare worth paying extra attention to? Although the Rio Declaration does not go further, we know that it is, and not only in the case of direct destruction of the natural environment of the state under attack (see operation Agent Orange, for instance), but also with the deliberate destruction of the cultural (built) heritage of a country, also belonging to the notion of "environment."[33] The world is slowly taking a different view in this regard: while there were already a few scholars talking about the possibility of ecocide in in the 1990s,[34] especially since the International Criminal Court (ICC) Policy Paper of 2016, there has been an even greater shift of interest in this direction.[35] The Rio Declaration included in Principle 24 a clear statement that

28 The countries with the highest fertility rates all rank between 136 and 182 in the ecological footprint list.

29 See https://data.footprintnetwork.org/#/compareCountries?type=EFCpc&cn=167,198,199,97,173,98,272&yr=2018.

30 "Global hectare": the measurement unit for ecological footprint.

31 See https://data.footprintnetwork.org/#/compareCountries?cn=all&type=EFCpc&yr=2018.

32 See Raisz, 2015.

33 See e.g., Hungarian Act 1995/LIII on the General Rules of the Protection of the Environment quoting in its Article 4 that an element of the environment also includes "man-built environment"; as well as International Criminal Court, Office of the Prosecutor, 2016, p. 14, quoting the "destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land." See furthermore the so-called Al Mahdi case of the ICC, The Prosecutor v. Ahmad Al Faqi Al Mahdi, 27 September 2016, No. ICC-01/12-01/15. See furthermore Trindade, 2010, pp. 340 et seq.; Kovács, 2020, pp. 100 et seq.

34 See among others Higgins, 2012; Gray, 1996; Teclaff, 1994.

35 See among others Ahmed, 2017; Lambert, 2017; Prosperi and Terrosi, 2017.

"[w]arfare is inherently destructive of sustainable development" and invited the states to protect the environment even during an armed conflict.

One of the most important principles of the Rio Declaration, a key to the willingness of states to further cooperation, is No. 2 stating another principle evident at the time of the creation of the United Nations but partly questioned from time to time ever since: the sovereign right of states to exploit their own resources and follow their own policies.[36] That this is problematic is most visible in the case of groundwater in aquifers or fossil waters.[37] Fossil waters were regarded in certain cases as a secret and "cheap" source of water even for territories that are not so rich in surface/rainwaters.[38] However, reality soon knocked on the door: with the majority of the resource exploited came the realization that the fossil waters need significantly more time (essentially a hundred thousand years) to recover. This bitter experience in California or Spain's Valladolid (both being the "vegetable gardens" for their continents) as well as in Libya (where water was mostly used for oil production) suddenly brought to prominence the idea that states having fossil waters should henceforth no longer regard it as something under their sovereignty and promote their recognition as the common heritage of mankind, i.e., a good everybody should be given access to.[39] Given the above background (former almost complete exploitation of its own resources), such ideas originating from the concerned regions cannot really be expected to be taken seriously, it is thus in the essential interest of all states (as clarified already in the Rio Principles) that countries that had the means to exploit (alone) their own resources earlier than the others do not tend to vindicate a right to have a share from the resources of other states (who have not yet exploited their own resources for one reason or the other). However humane and sustainable this idea may sound at first sight, it would be unwise to take this path and—under a seemingly august pretext—infringe the sovereignty of other states, among others Central European states. Such ideas may give anyone pause, especially developing countries dubious about the real intentions of environmental legislation (not to even mention that it would not promote the responsible management of resources) and are hence contrary to the global interest. This example shows the extent to which we should be cautious with majestic ideas and double-check the real consequences.

Rio Principle 2, however, has not simply declared the sovereignty of states; it has equally stated the other side, the responsibility of states vis-à-vis activities under their control that cause harm to the environment of other states, a principle already present in every international-environment-related judgment since the Trail Smelter case. Furthermore, Principle 13 envisages international cooperation in order to find ways to settle liability questions through international law-making. Clearly it is only a declaration that has had limited results ever since.

36 Schrijver, 1988, pp. 95 et seq.
37 Raisz, 2013.
38 See e.g., the case of Libya and its use of fossil waters for oil production. See Voss and Soliman, 2014.
39 See Martin-Nagle and Aquifers, 2011.

However, the fact that even such binding documents as conventions could be adopted in 1992 indicates the success of the Rio Conference, as it was a clear point of reference twenty years on as well.

The Rio+20 Conference, entitled "United Nations Conference on Sustainable Development," released a final document, the General Assembly Resolution called *The future we want*.[40] Essentially, it reaffirmed the Rio Principles and hinted that there have been progress and setbacks at the same time. It referred among others to poverty, developing countries, and sustainable development.[41] It reaffirmed the devotion toward the territorial integrity and the political independence of states, and also to the national sovereignty of states over their national resources.[42]

It made concrete reference to multinational environmental agreements, among others—logically—on climate change and biodiversity, but also on desertification, chemicals, and waste, as well as the law of the sea,[43] giving insight into the areas the UN regards itself to have made significant progress in.

4. IEL Treaties and CEE countries

In the following, we will focus on international environmental regimes highly relevant for the general development of international environmental law, and therefore on the law affecting Central European countries as well.

Concerning the *ratio materiae*, international environmental law has three major fields: i. the protection against/consequences of certain types of pollution, ii. the protection of certain species or the natural environment, and iii. the regulation of certain elements of the environment. These are of course complemented with specific issues, such as regulation of the right to information.

Concerning the form, insight is needed into the sources of international law relevant in international environmental law. Being a complicated issue (see Article 38 of the Statute of the International Court of Justice), although many other sources[44] have relevance (see, e.g., resolutions, the highly interesting question of customary law, and

40 United Nations General Assembly, 2012.

41 Cf. Hallgren, 1990.

42 See among others points 20, 22, 23, 25, 28, 31, 36, etc.

43 See among others United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and Stockholm Convention on Persistent Organic Pollutants, United Nations Convention on the Law of the Sea, and Convention on International Trade in Endangered Species of Wild Fauna and Flora.

44 Or subsidiary means for the determination of rules of law, as stated in Article 38 of the Statute of the International Court of Justice

certain principles[45]), this chapter only reflects on two specific issues—treaties and the judicial decisions of international courts and tribunals.

According to a study by the University of Oregon,[46] there are over a thousand multilateral and over two thousand bilateral international environmental agreements worldwide, and the intensity of concluding multilateral environmental agreements reached a peak in the 1990s. International environmental agreements have the following main characteristics:[47] i. frequent cross-references to other international environmental agreements, eventually causing the states to accept obligations stemming from treaties they are not direct parties to; ii. frequent so-called framework conventions where only the principles are elaborated in common and the detailed rules are either stated in so-called protocols or left entirely to the states; iii. the possibility for the states-parties to adopt a provisional (interim) application of the treaty even before its entry into force; and iv. simplified forms of modification of the treaty (in order to allow a quick reaction to the change of situation[48]).

Among the numerous international agreements (concentrating on multilateral agreements), the question arises how should we choose the most relevant ones? Two methods seem to be the most obvious: the treaties with the most states-parties or the treaties that are the most frequently cited (by other agreements, court cases, jurisprudence, media, etc.).[49]

The treaties with the most state parties are quite logically those adopted within the framework of the United Nations. Hence, the "leading" documents are the Montreal

45 As it can be deducted from the presentation of the world conferences that the principles of international environmental law include state sovereignty, sustainable development, the duty not to cause environmental harm, common but differentiated responsibilities, the precautionary principle, the prevention principle, the polluter pays principle, and the environmental impact assessment. The principles of international environmental law are in constant change and development. New principles emerge, while others strengthen their status (for instance through receiving a normative form) or remain/become mere political declarations. Although the majority are known and used in national laws, their role in international environmental law is far more profound and practical than in national law. They are used to fill gaps, but one has to take into consideration the particularities of international law: A fair balance should be found between the extended use of these principles and the sovereignty of the states. As the advisory opinion in the genocide case has already shown: Pragmatic solutions, however un-progressive they may seem at first sight, help to maintain international cooperation (International Court of Justice, 1951, p. 15; in this case, the ICJ changed the thus far prevailing principle of the "absolute integrity" of a treaty, facilitating the wilfullness of states even belonging to opposite political families to enter into international treaties.)

46 See International Environmental Agreements Database Home. The research was conducted between 2002 and 2020, with a major update in 2017. According to their statistics (see International Environmental Agreements Project Contents), there are 2296 bilateral environmental agreements, 1450 multilateral environmental agreements, and 250 other international agreements that do not belong to either category.

47 Shelton and Kiss, 2005, pp. 15–16.

48 For instance, including the actual list of protected species "only" in the appendix.

49 The first method's results can be found in Hunter, 2021, while the second is in Treaties.

Protocol on Substances that Deplete the Ozone Layer of 1987 (198 signatories[50]), the UN Framework Convention on Climate Change of 1992 (UNFCCC), and the Convention to Combat Desertification of 1994 (with 197 signatories each),[51] the Convention on Biological Diversity of 1992 (196 signatories), the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Convention of 1972 (194 signatories), the UNFCCC's Kyoto Protocol of 1997 (192 signatories), and the Paris Agreement of 2015 (193 signatories). Other relevant treaties include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 (189 signatories),[52] the Stockholm Convention on Persistent Organic Pollutants of 2001 (185 signatories), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973 (184 signatories), the Ramsar Wetlands Convention of 1971 (171 signatories), the Cartagena Protocol on Biosafety of 2000 (173 signatories), and the Law of the Sea Convention of 1982 (UNCLOS, 168 signatories). Of course, treaties with a later adoption date (notwithstanding their actual date of entry into force) reflect the intense willingness of the states to participate in such projects (as these treaties surely had less time to gain a place in this illustrious list)—the Paris Agreement clearly leads the way in this regard.

The list of most frequently cited treaties includes many of the documents mentioned above: the Basel Convention, the Cartagena Protocol, the UNFCCC, the UNCLOS, the Kyoto Protocol, the Paris Agreement, the Stockholm Convention, and the CITES are excellent examples. However, there are other treaties that gained relevance despite not having reached such a broad recognition on the part of the states as the other documents just mentioned. Hence, we have to pay attention to the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997, the International Convention for the Prevention of Pollution from Ships (MARPOL) of 1973, and the International Convention for the Regulation of Whaling of 1946. (These conventions appear in international court cases, thus further facilitating their frequent citation.)

Apart from these conventions, a few others also deserve to be noted, especially for their Central Eastern European relevance. First is the Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo in 1991 in the

50 A UN convention having more signatories than the UN has member states (as of today, 193) comes from the fact that these treaties often have non-state members or states that, for one reason or another, e.g., because of small size, cannot strive for a UN membership (however, in this regard a kind of uncertainty remains, cf. Nauru vs. the Cook Islands). For instance, the Montreal Protocol (the first "universally" ratified treaty of the United Nations) also has the Holy See and the European Union as signatories, as well as Niue or the Cook Islands.

51 The number of signatories is based on information from the UNTC, as of April 7, 2022.

52 In its framework works the Basel Convention Regional Centre for Training and Technology Transfer for Central Europe in Slovakia. This regional center is responsible for Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Montenegro, Poland, the Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, the Republic of North Macedonia, and Ukraine. For the national legislation adopted by the countries in the region see National Legislation.

framework of the UNECE, the United Nations Economic Commission for Europe, one of the five regional commissions of the United Nations. It was the first multilateral treaty to address the rights and duties of states with regard to planned activities with transboundary effects. Although a highly sensitive issue (especially as it touches upon sovereignty and the principle of not causing harm in the territory of another state), the success of this document will be examined with regard to the fact that its adoption preceded the adoption of the Rio Principles. It has 45 signatories (44 states plus the European Union), excluding the United States of America.[53] The parties to the convention undertake to apply environmental impact assessments before authorizing an activity that may cause significant transboundary harm. Such a convention is of utmost importance in a region where borders of different countries are much closer to each other than, for instance, on the Northern American continent.[54]

The Aarhus Convention, i.e., the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, was also adopted in the framework of the UNECE. The Aarhus Convention, which was signed in 1998 and entered into force in 2001, has 47 signatories (46 states and the European Union), which clearly represents the majority of the United Nations Economic Commission for Europe (UNECE) member states, however, excluding the United States of America. It takes a rights-based approach,[55] i.e., it aims to take into consideration the interest of present and future generations via access to information, access to justice, and broadening the possibility of public participation in decision making in environmental matters. The Aarhus Convention clearly includes in certain cases well-detailed rules on the obligations of the public authorities or the types of information that should be made available to the public. As part of a visible trend in international law, it includes provisions on a possible settlement of disputes, referring—on the basis of mutuality—the disputes to either the International Court of Justice or arbitration (Article 16). As both the Espoo and the Aarhus Conventions are treaties that the European Union (or rather its predecessor) adheres to, they often appear in cases in front of the Court of Justice of the European Union.[56]

In 1992, two other important UNECE conventions were adopted. The Convention on the Transboundary Effects of Industrial Accidents, adopted at Helsinki, aims at protecting human health and the environment against industrial accidents whose effects exceed the borders of states, as well as promoting cooperation between those states concerned before, during, and after such events. It has 41 signatories, including

53 Despite its name, the UNECE represents not only European countries (including Russia), but also the United States of America and Canada. The Espoo Convention was in fact signed but never ratified by the USA, which is in a way particularly interesting with regard to the fact that the complete international environmental adjudication started in a case where the USA cited Canada (just) before a tribunal for a similar omission (Trail Smelter arbitration).

54 See among others Emmerechts, 2008, pp. 96 et seq.; Schrage, 1999; Leb, 2015, pp. 100 et seq.

55 See the Preamble and Article 1.

56 See e.g., Case C-411/17, Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen vzw v. Conseil des ministers.

the European Union but excluding both the USA and Canada, who signed the document but have not ratified it. (Notwithstanding, it took eight years for the convention to enter into force.) The Convention on the Protection and Use of Transboundary Watercourses and International Lakes, also adopted at Helsinki, needed only half the time of the previous one to enter into force and has even more signatories (46).[57] Although it has even more major absentees (besides the USA and Canada, also the United Kingdom), given the specificity of the topic, it is far more relevant that states on the old continent chose to accept it (for whom it has actual—geographical—relevance). The vast majority of Central European states are parties to these conventions.

It is of significance for the region that there is a sub-regional understanding concerning one of its most important watercourses: the Danube River Protection Convention, adopted in Sofia in 1994 (as well as the international organization created as a result, the International Commission for the Protection of the Danube River), includes all the states of the Danube River Basin, being one of the first examples of an integrated and holistic approach to the protection and sustainable and equitable use of waters, including groundwater. Apart from the Danube, which is the river with the most states in its basin, other similar commitments have been made in the region, e.g., concerning the Sava River.[58]

Within the framework of the Council of Europe, an organization relevant for the countries of this region, as a symbol of their active participation in common European projects for more than three decades now, there are also several conventions related to environmental questions. Some of them have been more successful than others; e.g., the Convention on the Conservation of European Wildlife and Natural Habitats (of 1979) has been a single success (and not only for Central Europe). The original European Convention for the Protection of Animals during International Transport of 1968 also had the Russian Federation as a party before its accession to the Council of Europe and needed an additional protocol to enable the European Union to enter the convention; however, it has remained relatively unpopular among Central European countries. On the other hand, the Council of Europe Landscape Convention (2004) has basically all the Central Eastern European states among its parties. At the same time, attempts like the Convention on the Protection of the Environment through Criminal Law (of 1998) or the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (of 1993) have not even entered into force despite needing only three ratifications (the latter has not even produced one). Without going into the details, these examples show that political reality is just as interesting for the success and possible effects of an international agreement as accurate and professional wording.[59]

57 Boisson de Chazournes, 2015, pp. 33 et seq.
58 See https://www.savacommission.org/.
59 Furthermore, for many Central European states the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes of 1986 is of interest.

5. International Environmental Adjudication: First Steps on a Long Way

The following section focuses on international environmental adjudication, and an overview is given of the most relevant cases that bear direct or indirect relevance for the Central European countries.

It is generally accepted that international environmental adjudication has three major judgments as its basis: the Trail Smelter, Lake Lanoux, and Corfu Channel cases.[60] The Trail Smelter award[61] was an arbitral award based on a 1935 special agreement between Canada and the USA to handle the conflict that arose over transboundary pollution coming from a smelter operating on the Canadian side but also causing damage to US farmers. It was the first judgment where an international tribunal declared that due to the sulphur emitted into the air, Canada illegally caused harm in the territory of the USA, thus infringing international law (as no state may use its territory in such a way that its activities cause harm in another state; *sic utere tuo, ut alienum non laedas*). In the Corfu Channel case, the very first decision of the International Court of Justice (ICJ),[62] where—among others—the ICJ established the liability of Albania for not having removed the naval mines in the channel after World War II (which led to loss of life and significant damage to British vessels crossing the channel), questions of responsibility, i.e., responsibility for acts within a state's frontiers (exclusive control) were clarified, paving the way for establishing state responsibility more easily in the future. The Lake Lanoux judgment[63] concerned plans of the French government to use the waters of Lake Lanoux (a lake in French territory that feeds a river that crosses the French-Spanish border) in such a way that after utilization, only a certain amount of the water in the river would be returned, an amount that would correspond to the actual needs of the Spanish users. The Spanish government opposed the plan and considered it to be contrary to the Treaty of Bayonne of 1866 (and its Additional Act), one of several treaties settling the borders between the two countries; however, the arbitration tribunal found no breach on the part of the French government, taking into consideration the negotiations between the parties as well as the interests taken into account. As the Additional Act provides for a regime for the use of common waters and expressly refers to the requirement for consultations before exactly such interference,[64] the decision of the tribunal seems disappointing for those arguing for the interests of so-called downstream countries. It should however be noted that the decision was made in 1957, in an era when the theory of the so-called Harmon doctrine was relatively strong (or was at least not questioned as strongly as afterwards), as it was only in the second half of the twentieth century

60 Shelton and Kiss, 2005, p. 41.
61 Award, 1938, 1941.
62 International Court of Justice, Corfu Channel, United Kingdom of Great Britain and Northern Ireland v. Albania, Judgments of March 25, 1948, April 9, 1949, and December 15, 1949.
63 United Nations, 1957.
64 See MacChesney, 1959.

when we see a true proliferation of the related doctrines[65]—without there being a standstill among them even to date.

These judgments, however, mark only the beginning of international environmental adjudication, the complexity of which derives from the fact that the notion includes a variety of tribunals dealing with or potentially dealing with international environmental issues. For instance, special tribunals like human rights courts on the European or American continent have a significant jurisprudence in this regard. Similarly, in the framework of the present chapter neither the International Criminal Court, the Court of Justice of the European Union, the WTO dispute settlement bodies, nor the International Tribunal of the Law of the Sea will be treated. These courts all have a specific mission and hence, completely understandably, treat potential international environmental issues through such spectacles. This chapter can only discuss a limited number of cases and thus focuses on the decisions of certain arbitral tribunals and the already mentioned International Court of Justice.

The International Court of Justice has often had the opportunity to treat cases with a focus on an element of the environment (land, sea, lake, etc.). However, this mere fact does not make such cases automatically part of international environmental adjudication, and hence this chapter focuses on cases with more direct environmental relevance.

Central Eastern Europe has provided the most famous case[66] of international environmental law so far in the history of the International Court of Justice. The Gabčikovo-Nagymaros case[67] is in the center of attention even if—given the circumstances—it could not serve as "the" precedent for all future international environmental law cases. One of the most cited cases of the ICJ,[68] it could only partly touch upon environmental issues, as the parties could only agree on questions in a special agreement turning to the ICJ that does not even mention the word "environment"... The case has to be decided "on the basis of the Treaty [on the Construction and Operation of the Gabčikovo-Nagymaros Barrage System of 1977] and rules and principles of general international law, as well as such other treaties as the Court may find applicable"—not too much space was left for revolutionary environmental adjudication. Besides Judge Herczegh's pragmatic-environmentalist view in his dissenting opinion, Judge Weeramantry's separate opinion concentrating on various issues of international environmental law (e.g., sustainable development, continuing environmental impact assessment), and especially the parts declaring the customary law feature of the principle of sustainable development, is often cited, but another part of his separate opinion deserves even more attention: "Environmental rights are human

65 See among others the doctrines of absolute territorial sovereignty, absolute territorial integrity, prior use, no substantial harm, equitable utilization, or optimal use. Cf. Moermond III and Shirley, 1987, pp. 140 et seq.

66 See Nagy, 2020.

67 International Court of Justice, Case Concerning the Gabčikovo-Nagymaros Project, Judgment of September 25, 1997.

68 See Nagy, 2020.

rights. [...] A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights"—referring to the difference of the framework of international environmental law in 1977 and 20 years later.[69]

Although a small step in the right direction, the ICJ seems to have missed the opportunity to adequately elaborate on international environmental issues in a case where both parties referred to the principles of international environmental law in the Pulp Mills case between Argentina and Uruguay in 2010.[70] Despite recognizing the violation of certain rules on consultation by Uruguay (based on a 1975 treaty between the two states regarding the rational utilization of the river), as the Court did not find it proven that the contested industrial activities would or could have an adverse impact on the quality of waters and thus cause transboundary harm, it finally concluded that there has been no substantial violation of international law.[71]

However, in 2010, two other environmental cases started in front of the ICJ. The first—however heart-warming for environmentalists—reminds us again in its aftermath of the necessity to take political reality and pragmatism into account. In the Whaling in the Antarctic case[72] Australia claimed that Japan's whaling activity in the Antarctic within the so-called JARPA II Programme was in breach of its obligations under the International Convention for the Regulation of Whaling. Japan unsuccessfully tried to maintain that its techniques constitute activities that—being "scientific" activities—are exempted from the obligations deriving from the convention, and the ICJ in its 2014 judgment found Japan in breach of some of its obligations, ordering it to stop such activities. First, Japan declared that it would accept the judgment, but a year later decided to resume whaling activities in the Antarctic[73] and even resumed commercial whaling in 2019, withdrawing from the International Whaling Commission.[74]

The second case started as a crystal-clear environmental case—dredging activities in the San Juan river bank (mostly) in the territory of Nicaragua but obviously threatening the flora and fauna of the river's riparian, Costa Rica. Soon, Nicaragua also started a case against Costa Rica, claiming the harmful environmental effects of the construction of a road next to the San Juan River. The ICJ decided to join these cases and found violations on both sides in its solomonic judgment of 2015.[75] This judg-

69 Judge Weeramantry's opinion is only visible in Part C of the Decision when voting against the legality of putting the so-called "provisional solution" in operation.

70 International Court of Justice, Pulp Mills on the River Uruguay, Argentina v. Uruguay, Judgment of April 20, 2010. See Separate Opinion of Judge Cançado Trindade, p. 53.

71 See furthermore Foster, 2013, pp. 49 et seq.

72 International Court of Justice, Whaling in the Antarctic, Australia v. Japan, Judgment of March 31, 2014.

73 Japan to resume whaling in Antarctic despite court ruling.

74 Kolmaš, 2020.

75 [75] International Court of Justice, Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica), Judgment of December 16, 2015.

ment seems to be one where the ICJ took political considerations into account, trying to maintain the willingness of the states to turn to them with their disputes (and not to choose other, perhaps illegal forms of dispute settlement). While acknowledging this objective of the ICJ (present since the very beginning), as well as noting that this judgment elaborates at least on one aspect of international environmental law in detail, namely environmental impact assessment, the emphasis seems to have been shifted in the wrong direction: The breach of substantive obligations seems to be harder to establish than procedural ones.

Within the framework of the Permanent Court of Arbitration, this chapter only mentions two awards. First is the 2014 Arctic Sunrise award,[76] the relevance of which for international environmental law is of a completely different nature than those we have already discussed. It concerned the seizure of an environmental activist (Greenpeace) vessel under Dutch flag protesting oil drilling in the exclusive economic zone of Russia. Russia was found in violation of the International Tribunal for the Law of the Sea (ITLOS) Convention, as the Court did not find it proven that the actions taken by the activists (e.g., climbing on the platform) or their consequences would have been dangerous to the marine environment. It is interesting that it was not Russia that referred to this kind of defense, as they refused to take part in the procedure, but it was the Court which systematically went through all the possibilities that could, upon the ITLOS Convention, justify the actions of the Russian authorities—and the protection of the marine environment was one of these possibilities.

Another judgment with far more direct relevance for Central Europe is the Kishenganga award of 2013.[77] The proceedings were initiated based on the 1960 Indus Waters Treaty. It basically concerned water supply questions (as well as sewerage, waste management, and remediation). Even interim measures were issued in 2011, prohibiting India from proceeding "with the construction of any permanent works" that "may inhibit the restoration of the full flow of that river to its natural channel."[78] The final award upheld India's right to divert water from the Kishenganga River in order to realize its hydro-electric project, but issued a judgment that India should release a certain minimum amount of water at all times in order to maintain the environment downstream. The award—however solomonic—is of high relevance for international environmental law, and especially international water law, as it clearly addresses the issue of the environment downstream of such a project (Point 92ff), drawing scientific evidence into the examination and trying to take into consideration Pakistan's holistic approach to the situation; however, in the end, the amount of water India was obliged to provide is far less than what Pakistan asked for.

Although the majority of these cases do not concern Central Europe directly, we may easily recognize issues essential for Central European countries, particularly

76 Permanent Court of Arbitration, The Netherlands v. The Russian Federation, Awards of November 26, 2014, August 1, 2015, July 10, 2017.
77 Permanent Court of Arbitration, Indus Waters Kishenganga Arbitration, Pakistan v. India, Award of December 20, 2013.
78 Ibid, p. 2.

transboundary pollution, as well as questions of water quality and quantity. History has taught us in this region of the world to value the peaceful settlement of eventual disputes, hence it is in our interest to make such efforts successful.

6. Conclusions

International environmental law is one of the youngest fields of international law. This fact provides both opportunities and difficulties, making it one of the most interesting fields of international law in the next few decades. In this chapter we mentioned some of the challenges that the Central European region faces and offered insight into the existing international legal framework.

Besides giving an overview of the standing of international environmental law, this chapter focused on the question of political reality within the framework of international environmental lawby assessing its development, the most influential international treaties and judgments, concluding hereby that in this field—as in many others—cooperation is essential for the Central European region.

It is important to note that international environmental law reflects many of the issues relevant for Central Eastern Europe: questions of sovereignty, demography, economy and development, war and peace, and cooperation, including possible dispute settlement. Obviously, the more the answers given by this field are adapted to the circumstances in which the states find themselves, the more successful this field of international law may be. Therefore, international cooperation on the most pressing international environmental issues of the region is essential for the states concerned, and thus Central Eastern Europe has a potential to play a significant role in the future development of international environmental law.

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