



European Union Action to
Fight Environmental Crime

International Environmental Law and Environmental Crime: An Introduction

WORK PACKAGE 2 ON "INSTRUMENTS, ACTORS, AND INSTITUTIONS"



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Abstract

This introduction to the International Environmental Law presents the general sources constituting the framework of the international community action towards a sustainable development: the Stockholm Declaration, the Brundtland Report, the Rio Declaration 1992, Agenda 21, Johannesburg Declaration on Sustainable Development 2002 and Johannesburg Plan of Implementation and the Rio+20 Declaration of 2012. These conferences have had a seminal effect on European Environmental Law and that of Member States in terms of goals, action programmes and procedures. However none of them refers specifically to environmental crime; although they address it indirectly since they deal with implementation and compliance with International Environmental Law agreements and soft law.

This introduction follows closely the developments of the UN Conference on Sustainable Development, Rio+20 and its possible implications for environmental compliance and enforcement. The institutional changes that this Conference has brought about will also be examined since one of the themes that have been proposed for the new United Nations Environment Assembly in its first session is the “Rule of Law, Illegal Wildlife Trade and Environmental Crime”.

Table of Contents

1	Introduction	6
2	UNEP and Environmental Crime.....	6
3	Overview of UN Conferences on the Environment	9
3.1.	The UN Conference on Human Environment 1972	9
3.2.	The Brundlant Report: Our Common Future of 1987	10
3.3.	UN Conference on Sustainable Development and the Environment of Rio 1992	10
3.4.	United Nations Conference on Sustainable Development of Johannesburg 2002.	12
3.5.	UN Conference on Sustainable Development of 2012, Rio + 20	13
	References.....	15

LIST OF ABBREVIATIONS

CoP	Conference of the Parties
EU	European Union
MEAs	Multilateral Environmental Agreements
NGO	Non-governmental organisation
UN	United Nations
UNEA	United Nations Environment Assembly
UNEP	United Nations Environment Programme

1 Introduction

As Professor Malgosia Fitzmaurice says “international environmental law is part and parcel of international law” and at the same time “has some special features which have actually contributed to the development of general international law itself. These peculiarities are a reflection of the requirements of environmental protection”.¹ The special features of International Environmental Law’ (IEL hereinafter) make it a unique sectoral self-contained regime of International Law characterised by the flexibility and softness of its rules and mechanisms of enforcement and compliance. Its guarantee mechanisms based on promoting compliance instead of sanctioning infringement², replace the deterrent effect of sanctions for the enhancing one of promoting compliance mechanisms and economic cooperation.

Most rules of IEL have to be introduced and enforced in the domestic legal system of states, and therefore require states to adopt legislative and implementing internal measures. Once IEL standards have been transposed into national law, its ultimate beneficiaries are not only public authorities but also actors of civil society: citizens, the judiciary, police forces in charge of the protection of the environment, NGOs, public and private companies, and they will play a key role in achieving the objectives of environmental protection and implementation of a sustainable development model.

United Nations has played a key role in the development of IEL through its Conferences on the protection of the environment and sustainable development. Through the Stockholm Declaration, the Brundtland Report, the Rio Declaration, Agenda 21, Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Implementation and the Rio+20 Declaration, the principles of IEL have been laid down and developed and the Multilateral Environmental Agreements (MEAs hereinafter) have resulted from the efforts to protect the environment.

These conferences have had a seminal effect on domestic law and, in particular, in the European Environmental Law and that of Member States in terms of goals, action programmes and procedures.

However none of these UN Conferences and declarations refers specifically to environmental crime; although they address it indirectly since they deal with implementation and compliance with IEL and soft law. UNEP, the programme that was created by the Stockholm Conference on the Human Environment of 1972, has been the one adopting soft law instruments on compliance that address environmental crime. These instruments define the basic concepts that are required to adopt further international instruments and to develop international actions.

2 UNEP and Environmental Crime

The UNEP Governing Council Decision 21/27, dated 9 February 2001, appointed an Intergovernmental Working Group of Experts to prepare Draft Guidelines on compliance with and enforcement of multilateral environmental agreements. In this decision, the UNEP’s Governing Council recalling the Nairobi

¹ See Fitzmaurice, M. (2002). *International Protection of the Environment, Recueil des Cours, Collected Courses of the Hague Academy of International Law 2001*, Vol. 293, p. 21.

² See Klabbbers, J. (2007). “Compliance Procedures”, D. Bodansky, J. Brunnée, y E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, New York, p. 1000.

Declaration on the Role and Mandate of UNEP and the Malmö Ministerial Declaration, requested the Executive Director “to continue the preparation of the draft guidelines on compliance with multilateral environmental agreements and on the capacity-strengthening, effective national environmental enforcement, in support of the ongoing developments of compliance regimes within the framework of international agreements and in consultation with Governments and relevant international organizations”.³

These guidelines are just advisory, a soft law instrument whose influence depends on the voluntary adherence of States and international organizations such as the EU and its Member States. Although the guidelines may inform and affect how parties implement their obligations under the agreements, they are non-binding and do not in any manner alter these MEAs obligations. The guidelines provide approaches for enhancing compliance with MEAs and strengthening the enforcement of laws implementing those agreements at the international and national levels. It responds to the logic that State parties to the agreements are best situated to choose and determine useful approaches in the context of specific obligations contained in the agreements, since most of them must be developed at the domestic level.

The guidelines were presented in two chapters: the first chapter dealing with enhancing compliance with MEAs and the second chapter with national enforcement and international cooperation. .

One of the most useful outcomes of these Guidelines on Compliance and Enforcement of MEAs is that they offer key definitions that will be very useful for the study of environmental crime at international, European and domestic levels. So they posit that:

- (a) “Compliance” means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements;
- (b) “Environmental law violation” means the contravention of national environmental laws and regulations implementing multilateral environmental agreements;
- (c) “Environmental crime” means the violations or breaches of national environmental laws and regulations that a State determines to be subject to criminal penalties under its national laws and regulations.

In its Guideline 46, UNEP’s Governing Council encourages: “States, within their national jurisdictions, can consider developing consistent definitions and actions such as penalties and court orders, with a view to promoting a common approach to environmental law violations and environmental crimes, and enhance international cooperation and coordination, for environmental crimes with transboundary aspects. This may be facilitated by:

- (a) Environmental laws and regulations that provide appropriate deterrent measures, including penalties, environmental restitution and procedures for confiscation of equipment, goods and contraband, and for disposal of confiscated materials;
- (b) Adoption of laws and regulations, implemented and applied in a manner that is consistent with the enacting state’s international obligations, that make illegal the importation, trafficking or acquisition of goods, wastes and any other materials in violation of the environmental law and regulations;

³ Council Decision 21/27, dated 9 February 2001.

(c) Appropriate authority to make environmental crime punishable by criminal sanctions that take into account the nature of the environmental law violation” (author’s bold).⁴

In 2006, these guidelines were developed in the UNEP’s Manual of Guidelines on compliance with and enforcement of multilateral environmental agreements, prepared by UNEP’s Division on Environmental Law and Conventions⁵.

Inside UNEP, its Division on Environmental Law and Conventions⁶(DELIC) is the organ dealing with transnational environmental crime. DELIC aims to enhance the implementation of, compliance with and enforcement of environmental law at all levels as mandated by UNEP’s Governing Council Decision GC/SS VII/4 and to further the mandate given to DELIC by it through its adoption of the Montevideo Programme IV⁷ to progressively review and develop environmental law. This field of engagement also complements and builds upon existing partnerships and initiatives such as the Green Customs Initiative or DELIC’s Capacity Building Programmes for the Judiciary. Together with its partners, DELIC works towards:

- A better understanding of the global problems and existing gaps on transnational or cross-border environmental crime;
- Common approaches to more efficiently and effectively tackle the problem of transnational environmental crime from a legal standpoint;
- Strengthening and reinforcing current international and national legal and institutional arrangements and law enforcement mechanisms to combat transnational environmental crime;
- Strengthening and reinforcing national environmental laws to counter environmental crime,
- Fostering and enhancing cross-border cooperation in the field of environmental crime,
- Strengthening and developing partnerships, coordination and cooperation between stakeholders.

The IV Montevideo Programme for the Development and Periodic Review of Environmental Law ⁸ foresees as one of the actions to achieve effective implementation of, compliance with, and enforcement of environmental law to:

- j) Evaluate and, as appropriate, promote the wider use of criminal and administrative law in the enforcement of domestic and national environmental law.

⁴ The Guidelines on compliance with and enforcement of multilateral environmental agreements are available at <http://www.unep.org/delc/EnvironmentalCrime/tabid/54407/Default.aspx>

⁵ This manual is available at www.unep.org/delc/portals/119/UNEP_Manual.pdf

⁶ See its website <http://www.unep.org/delc/EnvironmentalCrime/tabid/54407/Default.aspx>

⁷ GC Decision GC25/11.

⁸ Fourth Programme for the Development and Periodic Review of Environmental Law, Montevideo Programme IV, *UNEP/GC/25/INF/15*, 27 October 2008.

3 Overview of UN Conferences on the Environment

3.1. The UN Conference on Human Environment 1972

The UN Conference on Human Environment held in Stockholm in 1972 constitutes the awakening of UN and its Member states to environmental problems. The States met there to face “the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment”. Some of these principles were gathered in the final Declaration of principles that was adopted and that since then constitute some of the core rules of IEL, in particular, its principle 21. This principle that has been incorporated in subsequent UN conferences and treaties, acknowledges a consuetudinary rule that was grounded in IEL previously by the Trail Smelter case law.⁹

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

Even though the Stockholm Declaration addressed the problem of domestic and transnational pollution, it did not qualify it as a possible environmental crime but just as a concern that States had to face through cooperative action and a further development of “the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction”, as envisaged in its Principle 22. Civil liability regimes on particular sectors started to be adopted in the 1960s to compensate damage caused by oil pollution after disasters such as the Torrey Canyon accident in 1969. The efforts to adopt a general agreement on liability only started then.

In the absence of an international treaty on liability for environmental damage, the UNEP adopted in 2009 its *Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment*. This soft law instrument establishes that “any person should be liable for damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful international, reckless or negligent acts or omissions. Any violations of a specific statutory obligation constitutes fault per se”¹⁰.

The Stockholm Conference on Human Environment and
the European Economic Community in 1972

⁹ Trail Smelter Arbitration, *Reports of International Arbitral Awards*, Vol. III, 1941, p. 1906.

¹⁰ In 2007, UNEP convened an Advisory Expert Group on Liability and Compensation for Environmental Damage to prepare a set of recommendations containing Guidelines on Liability and Compensation for Environmental Damage. UNEP submitted these guidelines to a Consultative Meeting of Government Officials and Experts to review and further develop Draft Guidelines for the Development of National Legislation on Liability and Compensation for Environmental Damage, which was held in Nairobi on 18-19 June 2008. The guidelines were renamed as “Draft Guidelines for the Development of National Legislation on Liability and Compensation for Damage Caused by Activities Dangerous to the Environment”. They were adopted by the Governing Council/Global Ministerial Environment Forum in 2010, available at <http://www.unep.org/environmentalgovernance/>

After the United Nations' Stockholm Conference on Human Environment in 1972, the international environmental law had a special role in the inception of national and Community environmental legal regimes, identifying the problems, the solutions and the means to treat environmental issues that were incorporated into national systems and Community directives in fields where there was little or no domestic law.

3.2. The Brundlant Report: Our Common Future of 1987

The Brundlant Report¹¹ named "Our Common Future" is the outcome of the World Commission on Environment and Development that was requested by the UN General Assembly to prepare "A global agenda for change"¹². After 25 years from its adoption it is still a most relevant reference for the study of environmental problems that can be summarised in two: poverty in developing countries that leads to overexploitation of their resources and patterns of consumption and production in developed countries that exceed the capacity of the environment. It coined the principle of sustainable development and the other important principles that were endorsed by the Rio Conference of 1992.

Nevertheless, it does not address the problem of environmental crime; it refers to organised crime as one of those threats that jeopardises development, in particular, in developing countries affected by drugs trafficking.

3.3. UN Conference on Sustainable Development and the Environment of Rio 1992

Twenty years after the Stockholm Conference, the Rio Conference on Sustainable Development and the Environment assessed the state of the art of the Environment based on the Brundtland Report.

Its final Declaration introduced key principles for the protection of the environment that also inform IEL and condition the way their implementation and compliance are approached depending on whether the States are developed or developing countries, on their capacity and willingness to comply with international obligations and commitments. Thus, Principle 7 of the Final Declaration introduced the so-called principle of common but differentiated responsibilities:

Principle 7: States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

To implement this principle, cooperation to development is the most attractive incentive to ensure that developing countries will accept the enforcement of IEL as a priority of their national policies. Thus, protection of the environment is a requirement at the negotiating table. The EU has accepted and enforced this principle through its different instruments of cooperation to development.

¹¹ It is better known by the name of the Norwegian Prime Minister, Gro Harlem Brundtland, that led it.

¹² The Brundlant Report is available at <http://www.un-documents.net/wced-ocf.htm>

In the preparations for the Conference which widely discussed the effectiveness of IEL, one key question was precisely to establish appropriate measures to ensure a differentiated application of environmental law based on international financial and technical assistance to developing countries. This demand was accepted by all States of the world gathered in Rio, who accepted the moral duty, not legal obligation to assist developing countries in achieving economic, social and environmental objectives. For developing countries faced with chronic hunger, war, corruption and natural disasters, environmental protection was perceived as an unfair claim by developed countries. The claims from developed countries and international organizations requiring compliance with the basic standards of environmental protection were disqualified for lack of legitimacy and considered as interference in internal affairs, if not violation of the sovereignty of developing countries.

This Principle 7 must be read in conjunction with Principle 11 that foresees that:

“States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

The other main outcomes of the Rio Conference 1992 were:

1. The adoption of the Conventions:
 - UN Convention on climate change,
 - UN Convention on biodiversity and
 - UN Convention on desertification.

2. The reinforcement of the UN institutional structure for the environment creating:
 - The Global Environment Facility and
 - The Commission on Sustainable Development.

3. The adoption of Agenda 21.

Agenda 21 did not address environmental crime. It incorporated a Chapter 39 on International Legal Instruments and Mechanisms that foresaw a wider participation of developing countries in the treaty-making processes, better implementation and compliance with MEAs and dispute avoidance mechanisms¹³. The future developments of this chapter addressed environmental crime when dealing with improving implementation.

The most recent *Review of implementation of Agenda 21 and the Rio Principles - Detailed review of implementation of Agenda 21* was presented in 2012 as part of the previous reports to Rio+20¹⁴. The project was implemented by the Division for Sustainable Development of the United Nations Department of Economic and Social Affairs and funded by the European Commission, in the framework of its Thematic Programme for Environment and sustainable management of Natural Resources, including energy (ENRTP). This review does not address environmental crime, but emphasizes, as do many other reports, the importance of the implementation of the Agenda 21 as well as of MEAs. Criminal sanctions are just used

¹³ See Chapter 39, available at <http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=52&ArticleID=89&l=en>

¹⁴ This study is part of the Sustainable Development in the 21st century (SD21) project.

as an element to compare the international regimes established by the Basel Convention on hazardous waste with the Bamako Convention. Thus, both conventions require member states to introduce national laws to punish and prevent illegal trafficking, but the Bamako Convention takes a slightly stronger stance by imposing criminal penalties on those involved and not just administrative sanctions and fines. However, neither convention has any enforcement or monitoring mechanisms in place to implement strategies to prevent illegal trafficking. On the other hand, when assessing compliance, this Review comments that problems with forest law enforcement also remain widespread despite most countries already having reasonably dissuasive maximum penalties in place. Again in Brazil, for example, fines handed out for illegal forestry activities increased eightfold between 2003 and 2007, yet only 2.5% have been successfully recuperated¹⁵.

The principles of Rio de Janeiro and the European Community in 1992

The Conference on Environment and Sustainable Development held in Rio de Janeiro in 1992 influenced the reforms of the constituent treaties of the Treaties of Maastricht and Amsterdam. The principles most influencing these reforms were: the principle of sustainable development, the criterion of precaution that in the Maastricht Treaty was introduced as a principle as well as the principle of the integration of environmental requirements into the design of policies.

The reference to sustainable development was incorporated for the first time after the Treaty of Maastricht reform, linked to the protection of the environment and cooperation to development. Later, the European Council endowed this concept with an economic, social and environmental dimension and formulated a Sustainable Development Strategy 2001 which inspired all Community policies. The environmental dimension of sustainable development was formulated by the Communication from the Commission to the European Council in Gothenburg, entitled "*A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*", aiming at preparing the Community participation in the World Summit on Sustainable Development in 2002.

The Principle 7 of the Rio Declaration, the so-called principle of common but differentiated responsibilities has informed the design of international cooperation of the European Community with developing countries in order to increase their capacities and contribute financially to them.

3.4. United Nations Conference on Sustainable Development of Johannesburg 2002.

The World Summit on Sustainable Development that was held in Johannesburg in 2002 looked for further implementation of the Rio commitments. Its outcomes were a Final Declaration and a Johannesburg Plan of Implementation that affirmed UN commitment to "full implementation" of Agenda 21, alongside achievement of the Millennium Development Goals and other international agreements.

It does not address environmental crime. However in point 19 of its final Declaration it refers to organised crime as one of the "severe threats to the sustainable development".¹⁶

¹⁵ Sustainable Development in the 21st Century (SD21), Review of implementation of Agenda 21 and the Rio Principles, *Detailed review of implementation of Agenda 21*, January 2012, p. 123.

¹⁶ Point 19 of Johannesburg Declaration: *We reaffirm our pledge to place particular focus on, and give priority attention to, the fight against the worldwide conditions that pose severe threats to the sustainable development of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; **organised crime**; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis (author's bold).*

The EU played a leading role during the conference and afterwards committed with the implementation of the Johannesburg Declaration on Sustainable Development and Plan of Implementation, willing to exceed “the requirements agreed at the global level in Johannesburg”, looking to ensure “demonstrable progress towards sustainable development globally and within the European Union”.¹⁷

3.5. UN Conference on Sustainable Development of 2012, Rio + 20

The UN Conference on Sustainable Development that took place in Rio de Janeiro in 2012 tried to recover the spirit and commitment of the Conference of Rio 1992. On its agenda there were two main topics: green economy and the improvement of the environmental governance through the upgrading of UNEP.

The final Declaration, The Future We Want¹⁸ does not mention environmental crime.

Rio + 20 and the EU in 2012

Rio + 20 has had an important influence in the Seventh Environment Action Programme¹⁹ of the EU called *‘Living well, within the limits of our planet’*. In order to increase the Union’s effectiveness in addressing international environmental and climate-related challenges, the 7th EAP shall ensure that by 2020 “ the outcomes of Rio + 20 are fully integrated into the Union’s internal and external policies and the Union is contributing effectively to global efforts to implement agreed commitments, including those under the Rio conventions and to initiatives aimed at promoting the global transition towards an inclusive and green economy in the context of sustainable development and poverty eradication”.

This Programme foresees the implementation of Rio +20 Final Declaration The Future We Want goals, aims and outcomes:

- The sustainable development goals integrated into the post-2015 UN development agenda.
- Compliance and financing strategies of multilateral agreements on climate change, biodiversity and desertification.
- The 10-year Framework of Programmes on sustainable consumption and production.
- The Rio + 20 outcome recognising the economic and social significance of good land management, called for a "land degradation neutral world".
- The Strategic Approach to International Chemicals Management.
- Promotion of an integrated approach to planning, building and managing sustainable cities and urban settlements

¹⁷ Council Conclusions

¹⁸ United Nations General Assembly Resolution *A/Res/66/288* of 27 July 2012 on the outcome of the Rio + 20 Conference, entitled "The Future We Want".

¹⁹ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 *‘Living well, within the limits of our planet’*, *OJ L 354*, 28.12.2013, p. 171–200.

The main institutional changes adopted at Rio + 20 are:

- The UN Commission on Sustainable Development was replaced with a High-Level Political Forum, which will enhance the integration of the three dimensions of sustainable development –economic, social and environmental- and follow up and review progress on the implementation of the outcomes of Rio + 20 and relevant outcomes of other UN summits and conferences, thereby contributing to the implementation of sustainable development goals as part of the overarching post-2015 framework.
- UNEP is now upgraded as the leading global environmental authority²⁰ and its organs are now transformed as examined below.

Río de Janeiro + 20 and the International Environmental Governance

The UN Conference on Sustainable Development, Rio+20 agreed in Paragraph 88 of its Final Declaration on strengthening and upgrading UNEP as the leading global environmental authority that:

- 1) Has secure, stable, adequate & increased financial resources.
- 2) Coordinates environmental activities in UN system.
- 3) Promotes strong science-policy interface.
- 4) Disseminates evidence-based environmental information.
- 5) Provides capacity-building & facilitate access to technology.
- 6) Consolidates HQ functions & strengthen regional presence.
- 7) Ensures participation of all relevant stakeholders.

Forty years later, at the 2012 United Nations Conference on Sustainable Development, the international community has decided to strengthen and upgrade UNEP. Among the measures adopted, of particular importance is the establishment of universal membership in its Governing Council. As a follow up to this decision, the Governing Council held its first session with universal membership in February 2013, where countries agreed to rename it as the “United Nations Environment Assembly of the UNEP” (UNEA). Subsequently, the General Assembly adopted a resolution formally changing the designation to UNEA (67/251)²¹.

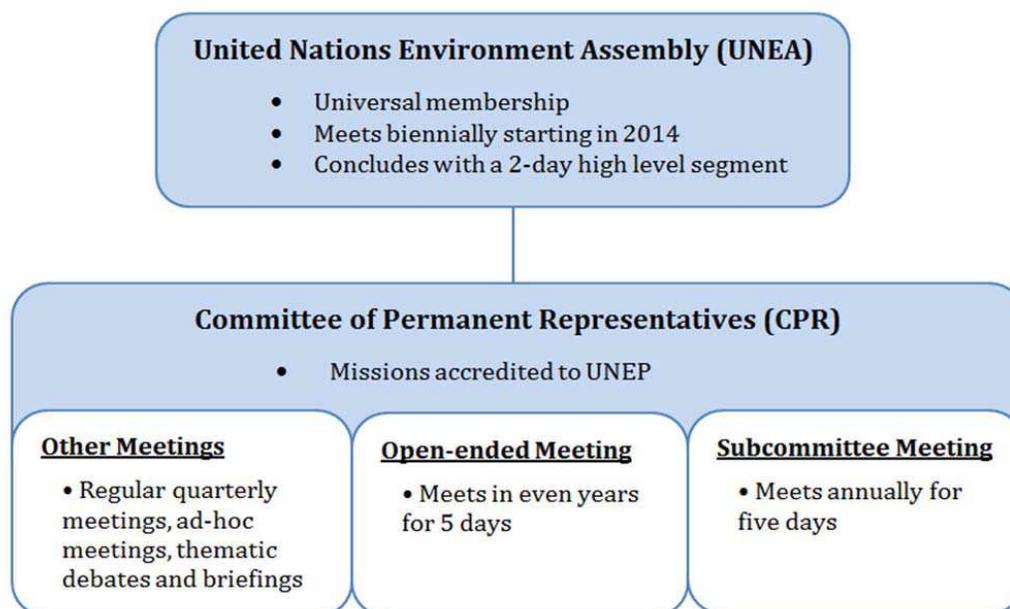
According to the decision adopted at the first session of the Governing Council with universal membership (27th session), UNEA will meet biennially in Nairobi starting in 2014. UNEA is mandated to ensure the active participation of all relevant stakeholders in the governance of UNEP and to promote a strong science-policy interface.

From now on, the United Nations Environment Assembly (UNEA) is the main governing body of UNEP with the following functions:

²⁰ Paragraph 88 of the Final Declaration, The Future we want.

²¹ Note on International Meetings and Events 27th Session of the UNEP Governing Council/Global Ministerial Environment Forum (GCSS-XII GMEF) (Nairobi, 18-22 February 2013), Information from the Presidency and the Commission, *ST 7530-2013 INIT*, 18 March 2013.

- Setting the global environmental agenda;
- Providing overarching policy guidance and defining policy responses to address emerging environmental challenges;
- Undertaking policy review, dialogue and exchange of experiences;
- Setting the strategic guidance on the future direction of UNEP;
- Organizing a multi-stakeholder dialogue;
- Fostering partnerships for achieving environmental goals and resources mobilization.



The first session of the new UNEA will take place from 23-27 June 2014 in Nairobi. One of the themes proposed by the Regional Group of Asian Countries is the Rule of Law, Illegal Wildlife Trade and Environmental Crime.

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