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# Climate Change Law
## A Primer

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Date: June 2021



Ivano Alogna, *Climate Change Law: A Primer*, British Institute of International and Comparative Law, (June 2021), available at:

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## *1. Introduction*

Climate change, as the defining issue of our time – according to the last two United Nations Secretaries-General, Ban Ki-moon and António Guterres – poses a global and 'super-wicked' policy challenge.

As for its causes, they come from a broad range of production and consumption processes, as an accumulation of several factors, and, therefore, are global in nature.

The impacts are also affecting the whole global community of humankind, which has the only choice of responding collectively. This is well highlighted by the Preamble of the United Nations Framework Convention on Climate Change (UNFCCC), which considers that the 'change in the Earth's climate and its adverse effects are a common concern of humankind' and 'that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response'.

*Climate Change*

Article 1 of the UNFCCC, which is the fundamental text at the basis of concerted international action to tackle climate change, provides an important definition of this issue:

> 'Climate change' means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

This kind of change goes from changing weather conditions and variables, such as temperatures, rainfall and greater frequency of extreme weather events (heat waves, floods, droughts, etc.), with their effects on agricultural and food production, to rising sea levels and melting of certain glaciers, or even a redistribution of species and vectors of diseases.

As it is now well known, climate change is mainly caused by human activity and particularly by the large use of fossil fuels. These are to be considered the basis of our civilisation since the Industrial Revolution, and their consumption in the last two

centuries have exacerbated a natural phenomenon known as 'greenhouse effect',[1] which allows that the global temperature, on average 15°C, is conducive to the development of living things. In fact, the combustion of fossil fuels, necessary for heat and electricity generation, is a major contributor to the increase in the atmosphere of the quantity of the 'greenhouse gases' – such as carbon dioxide (the most abundant one, two-thirds of the total amount), methane, nitrous oxide and others – up to levels never reached in three million years. These gases are currently responsible (together with other factors, such as deforestation and large-scale agriculture) for an average world temperature augmentation by approximately 1°C from pre-industrial levels, which is at the basis of climate change and its extreme consequences. A recent United Nations (UN) report (The Human Cost of Disasters 2000-2019) confirms how extreme weather events have come to dominate the disaster landscape in the 21st century, registering a sharp increase of extreme weather events over the last twenty years, with much of the difference explained by a rise in climate-related disasters.

To respond to this issue, the international community must face considerable challenges, both scientific and (geo)political. Efforts made over several decades have resulted in a better understanding of the problem, as well as the creation of an institutional framework for negotiating solutions.

*The Scientific Challenge*

The scientific challenge in the realm of international climate action has been taken up by the Intergovernmental Panel on Climate Change (IPCC). This panel was established in 1988 by the World Meteorological Organization (WMO), the UN Environment and the International Council for Science (ICSU) in order to provide detailed assessments of the state of scientific, technical and socio-economic knowledge on climate change, their causes, their potential repercussions, and strategies for coping.

In 2007, IPCC received the Nobel Peace Prize for its 'efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change'.

[1] It can be simplistically explained as the phenomenon by which the atmosphere – notably its first layer, the troposphere, up to around 12 km above sea level – filters solar radiation, only part of which reaches the ground, but it also retains part of the heat returned by the ground to the space, thanks to a set of gases known as 'greenhouse gases' (GHG).

During its three decades of life, the IPCC produced five assessment reports (1990, 1995, 2001, 2007 and 2013), made up of thousands of pages, organised in three volumes dealing, respectively, with the scientific elements (vol I), consequences, adaptation and vulnerability (vol II), and mitigation measures (vol III). To this is added a summary report, with a 'Summary for Policymakers', each line of which must be approved by the representatives of the States Parties to the IPCC. The sixth report is expected to be released in April 2022.

In the meantime, the fifth assessment report demonstrates that: the warming of the climate system is unequivocal; most aspects of climate change will persist for several centuries, even if emissions are stopped; and important tipping points, causing irreversible changes in the major ecosystems and the global climate system, may already have been reached or crossed. Moreover, in 2018, the IPCC released a special report on the impacts of global warming of 1.5°C above pre-industrial levels. This report has shown that limiting global warming to 1.5°C instead of 2°C can go hand in hand with a more sustainable and equitable society. While previous reports focused on estimating damage if average temperatures were to increase by 2°C, this special report shows that many of the negative impacts of climate change will happen at 1.5°C, while establishing that for a limitation of global warming to this temperature, rapid changes – which have far-reaching effects and unprecedented – would be necessary in all aspects of society. In order to do so, global net anthropogenic $CO_2$ emissions are projected to be reduced by about 45% from 2010 levels by 2030, and a 'zero balance' of emissions should be achieved around 2050, which means that the remaining emissions should be offset by removing $CO_2$ from the atmosphere.

*The Geopolitical Challenge*

The only way of addressing this issue effectively requires large-scale transformations in most national economies through a real energy transition. Moreover, climate change is considered an always more evident 'super-wicked problem': time is running out, there is no central authority to tackle it and those seeking to end the problem are also causing it. Without immediate action, it will be much more difficult and costly to adapt to the future consequences of these changes (see The Economics of Climate Change: The Stern Review, 2006).

Therefore, the challenge of tackling climate change is necessarily 'geopolitical' (being now at the core of international relations, and at the top of the international political and diplomatic agenda) and global in its nature, both from an environmental and an equity point of view. On the one hand, the speed of the diffusion of GHGs in the

atmosphere (a few days for $CO_2$) makes it possible to consider the climatic effects of emissions as independent from their location. Thus, the increase in GHG emissions in a State or a region of the world is likely to have consequences in places really far away from their origins. On the other hand, it is also global from the perspective of equity or climate justice. While the countries of the North have historic responsibility for the current climate crisis, the countries of the South have to pay, and will pay, the heaviest price.

Climate change will, therefore, affect regions of the world unequally and the most vulnerable populations will be the most affected. According to a report by the United Nations Development Programme (UNDP), 'in the long run climate change is a massive threat to human development and in some places it is already undermining the international community's efforts to reduce extreme poverty'.

In addition to the 'intra-generational' dimension, the issue of climate justice also has an 'intergenerational' perspective (concerning future generations). Because of the accumulation of greenhouse gases in the atmosphere, their lifespan (up to 50,000 years) and the damage they are likely to cause by warming in the medium and long term, will tremendously affect future generations.

In order to take into consideration all these different aspects of an always more urgent and global issue, and in the effort to tackle what was defined as 'humanity's greatest threat in thousands of years', a new legal discipline is emerging: *Climate Change Law*. Therefore, a concise introductory overview of this new legal field will be provided through its two main components, which constitute the fundamentals of the discipline: 2) the UN Climate Change Regime; and 3) the Principles of Climate Change Law.

## *2. The United Nations Climate Change Regime*

The last decades have witnessed the emergence of an 'international climate regime', in the sense Krasner pointed out: 'as a set of principles, norms, rules and procedures of implicit or explicit decisions, around which the expectations of the actors converge in a specific domain and which can help to converge behaviors'. In the climate domain, this regime plays, because of the very global nature of the issues at stake, a central and decisive role. A structuring role, which ensures consistency horizontally between the various policies conducted on an international scale (trade, development, investment, finance, etc.), but also vertically by allowing the nesting of different scales of action there again from local to global and from global to local. It also plays a dynamizing role, advancing the positions of each party in a dynamic of negotiation,

and allowing to build an international consensus and to promote increasingly ambitious climate policies.

States have tried to organise themselves since the 1980s. A global governance has gradually been proclaimed. Various courses of action have emerged: firstly, the reduction of GHG emissions – also called 'mitigation' policy: from the reduction of extraction, production and consumption of fossil fuels to energy transition, with the shift toward a less energy-consuming economy. Secondly, the need for 'adaptation' to climate change and its negative consequences for the different populations and communities around the world. And finally, the aid to the poorest countries, who have contributed to the current climate crisis in a negligeable way in comparison to the developed economies, but will likely be more affected by the consequences of climate change and won't have the means neither for adaptation nor mitigation.

The creation of an international climate regime by the members of the UN can be divided into three stages of its evolution, corresponding to the three main international conventions dealing with the issue of climate change: the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

*United Nations Framework Convention on Climate Change (UNFCCC)*

In 1992, countries joined the first international treaty on climate change, the UNFCCC, in order to consider what could be done to reduce global warming and to tackle any inevitable rise in temperatures. With 197 Parties, the UNFCCC enjoys almost universal membership. The UNFCCC establishes a comprehensive framework for the intergovernmental effort to meet the challenge posed by climate change. However, while it lays down the fundamental principles in the domain, it only contains very general obligations. As a 'framework' convention,[2] it had to be supplemented by another instrument which specified the commitments to reduce GHGs. It represents, therefore, only a first step in the definition of an international regime for combating climate change. However, it turns out to be important because it will provide the legal

[2] On the terminology, the framework treaty (or convention), according to the definition given by Professor Alexandre Kiss, is 'a treaty instrument which lays down the principles which should serve as the basis for cooperation between States Parties in a given field, while leaving it to them to define by separate agreements [the protocols], the modalities and the details of the cooperation, providing, where appropriate, one or more institutions suitable for this purpose.' ([Translation] A.Ch. Kiss, « Les traités-cadre: une technique juridique caractéristique du droit international de l'environnement », Annuaire Français de Droit International, 1993, 39, pp. 792-797).

and institutional framework for the negotiation of subsequent commitments, in the form of additional protocol(s) (as we will see with the Kyoto Protocol and the Paris Agreement).

Although the UNFCCC does not contain a very specific commitment, its article 2 provides as 'ultimate objective' to 'achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' and to do it 'within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'. This objective has the merit of underlining the source of the emissions which is a question of limiting – anthropogenic emissions – on the one hand, as well as, on the other hand, of remaining open to the scientific understanding of the problem which will be developed in coming years. Indeed, it was only after the fourth IPCC assessment report in 2007 that the Conference of Parties to the UNFCCC interpreted the target in the light of a specific figure, namely an increase of no more than 2°C at the end of the 21st century.

In its article 3, the UNFCCC lays down certain fundamental principles of the regime, including the precautionary principle (art.3-3), the principle of intergenerational equity (art. 3-1) and the principle of common but differentiated responsibilities (art. 3-1), while article 4 distributes the various obligations of the Parties on three levels. First, obligations incumbent on all parties, concerning the reduction of emissions (art. 4-1), and the communication of information (art. 12-1). Second, obligations incumbent only on developed States and States in transition ('Parties included in Annex I'): emissions reduction (art. 4-2 and art. 4-6 with regard to the flexibilities granted to States in transition); communication of additional information (art. 12-2). Third, obligations in matters of assistance incumbent only on developed States ('Parties included in Annex II') (arts. 4-3, 4-5 and 12-3), in addition to the obligation to be at the forefront of the fight against climate change and its harmful effects.

In addition, with regard to the institutional aspects of the UNFCCC, a framework has been established for the progressive development of obligations. This is achieved through the creation of: a Conference of the Parties (COP, art. 7), the supreme body of the Convention, composed of all the States Parties, which verifies their proper implementation of the objectives of the Convention; a Secretariat (art. 8); two subsidiary bodies: the Subsidiary Body for Scientific and Technological Advice (art. 9), and the Subsidiary Body for Implementation (art. 10); a financial mechanism at the level of the UNFCCC (art. 11), created in 2010 under the denomination of Green

Climate Fund, endowed with significant resources to finance mitigation or adaptation projects presented by developing States.

*The Kyoto Protocol*

When the States adopted the UNFCCC, they already knew that their commitments as expressed in that text would not be enough to seriously address climate change. Therefore, article 17 of the UNFCCC expressly provides for the adoption of protocols with more specific obligations.

In 1995, in a decision known as the Berlin Mandate, the Parties to the UNFCCC entered into a round of negotiations with a view to decide on stronger and more detailed commitments for the industrialised countries. After two and a half years of intense negotiations, the Kyoto Protocol was adopted in Japan on December 11, 1997. However, article 25-1 of the Protocol provided that it would not enter into force until the ratification of 'not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I'. Following the refusal to ratify the Protocol by the United States (US), this requirement could only be satisfied with the ratification of Russia in November 2004.

Unfortunately, by the time it entered into force in 2005, it was already clear that the reduction targets set out in Annex B to the Protocol were largely insufficient to control atmospheric concentrations of greenhouse gases. Moreover, one of its most important issues concerned the fact that emerging States, which were to drive the largest increases in emissions in the coming years, had not signed up to mandatory commitments under the Protocol.

This is because the Kyoto Protocol did not put all States on the same level, in application of the 'principle of common but differentiated responsibilities': on the one hand, only the industrialised countries are imposed quantified and binding targets for reducing their GHG emissions; on the other hand, the objectives differ, sometimes even considerably, from one industrialised country to another. Thus, GHG emission reduction obligations are based only on the 37 industrialised countries plus the European Community listed in Annex B to the Protocol.

In order to provide countries with additional means of meeting their commitments, the Kyoto Protocol introduced three market-based mechanisms (also called 'flexible mechanisms'): a) Joint Implementation (JI) (art. 6), taking the form of a project organised in the territory of another Annex I State, with the objective of transmitting

technologies to States in transition as well as to reduce emissions at the lowest cost by redeveloping highly polluting facilities (as an alternative to domestic emissions reduction); b) Clean Development Mechanism (CDM) (art. 12), through which industrialised countries can meet their domestic emission reduction targets by buying from developing countries (Parties not included in Annex I) GHG certified emission reductions related to projects implemented in their territory, thus assisting them in both achieving the goal of sustainable development and contributing to the ultimate objective of the UNFCCC; and c) Emission Trading (ET) (art. 17), setting a global ceiling on GHG emissions and, using a top-down mechanism, distributing shares between States in the form of emission 'rights'. The States in turn allocate these 'rights' to polluting entities, which can sell or buy them in order to meet their emission reduction targets.

Unlike the UNFCCC, the Protocol specifies the GHGs concerned, six in number, which are listed in its Annex A: *carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_20$), hydrofluorocarbons (HFCs), perfluorocarbons (PFC), sulfur hexafluoride ($SF_6$)*. $CO_2$ serves as a reference unit, because by calculating the global warming power of the emissions of the other five GHGs, these are counted in tonnes of '$CO_2$ equivalent', which designates the global warming potential of a GHG, calculated by equivalence with an amount of CO2 that would have the same warming potential (or according to the IPCC Glossary definition, 'the amount of $CO_2$ emission that would cause the same integrated radiative forcing or temperature change, over a given time horizon, as an emitted amount of a GHG or a mixture of GHGs*')*.

The Kyoto Protocol first commitment period was from 2008 to 2012. The second commitment period started on January 1, 2013 and lasted until 2020.

*The Paris Agreement*

In 2015, the UNFCCC Parties reached a historical agreement, a landmark in the evolution of the international climate regime, with the adoption of the Paris Agreement at the end of the negotiations held at the Paris Climate Conference (COP 21) of the UNFCCC. The Agreement was signed by 175 countries on April 22, 2016 at the UN Headquarters in New York and entered into force on November 4, 2016, after being ratified by at least 55 states representing 55% of GHG emissions. As of today, 191 Parties out of 197 Parties to the UNFCCC are Parties to the Paris Agreement.

Within the framework of this agreement, the Parties committed themselves to take ambitious measures to keep the rise of the world temperature below 2°C by the end of the century, nevertheless inciting each to pursue efforts to not exceed 1.5°C. Art. 2 (a) of the Paris Agreement expressly recognises that 'this would significantly reduce the risks and impacts of climate change'.

Ambitious, evolutionary and universal, this agreement applies to all countries and to all emissions and is designed to last. This agreement consolidates the international cooperation in the fight against climate change and shows the way forward. It is also particularly important because it will mainly serve as the basis for many of the trials in question today, as well as a lever for the actions of civil society.

In addition, the 'adaptation' component is more pronounced, and even that of 'resilience' to the negative consequences of climate change over time, as well as the commitments of the world of finance. Thus, the particular difficulties of developing and island countries whose resources are limited, are also taken into account under the Green Climate Fund, planned to be supplied up to 100 billion per year until 2025 and mainly focused on adaptation.

According to the Paris Agreement, all countries are now concerned with the purpose of GHGs emission limitation, with a common objective: a global framework for cooperation and generalised solidarity. They are bound by a set of common core obligations, including legally binding obligations of conduct, following a principle of progression and within a framework of transparency. Finally, a key focus to achieve the Paris Agreement goals is based on renewable energy sources and on the need for a substantial decline in fossil fuel production and consumption.

In order to promote effective implementation, the Paris Agreement establishes 'an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience' (art. 13-1). Therefore, States are committed in a differentiated manner and in relation to the state of their development (according to the principle of common but differentiated responsibilities). The text requires: emission reduction targets in absolute figures for developed countries, that 'should continue taking the lead' (art. 4-4); 'mitigation efforts' for those in development, which 'should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances' (art. 4-4); and specific measures for the least developed countries and small island developing States, recognised as vulnerable, such as 'prepar[ing] and communicat[ing]

strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances' (art. 4-6).

In conclusion, each State declines its voluntary contributions (nationally determined contributions, art. 4) in order to achieve the objective of maintaining the average temperature well below 2°C and to pursue efforts not to exceed 1.5°C, and communicates them regularly and updates them every five years according to a progression 'reflecting its highest possible ambition' (with the first assessment planned in 2023), always 'reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.' (art. 4-3).

## *3. Principles of Climate Change Law*

A fundamental component of Climate Change Law can be found in the UNFCCC, which after defining the regime's ultimate objective (art. 2), provides several guiding principles in the field, necessary for the Parties 'in their actions to achieve the objective of the Convention and to implement its provisions' (art. 3, titled 'Principles'). These are, in order of appearance in the text: the common but differentiated responsibility principle, the intra- and intergenerational equity principle, the precautionary principle, and sustainable development.

*Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC)*

As one of the most debated principles in this field, CBDRRC constitutes an exception to the International Law cardinal principle of 'sovereign equality', taking into consideration the unequal historical contribution to the climate crisis by developed and developing countries, as well as their priorities capability to address the related issues. For this reason, art. 3-1 of the UNFCCC mentions the need for the Parties to protect the climate system 'in accordance with their common but differentiated responsibilities and respective capabilities'.

This differentiation has been one of the most fundamental issues in the evolution of the international climate regime, because it constitutes the departure from the traditional approach of international conventions, with common obligations for all parties. The CBDRRC principle is featured in both the Kyoto Protocol and the Paris Agreement, although with slightly different wordings, as 'common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances' (art. 10, Kyoto Protocol), and as 'common but differentiated responsibilities and respective capabilities, in the light of different

national circumstances' (Preamble and arts. 2 and 4, Paris Agreement). The main elements of the principle of CBDRRC can also be found in a shorter and more general formulation: Principle 7 of Rio Declaration, which states that 'in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities'.

The reason for these various wordings depends on the rationale for differentiation: the developing countries focused more on the term 'responsibilities', as related to the historical emissions at the origin of the climate crisis (mostly from the most advanced economies), while some developed countries (and particularly the US) stressed the utilisation of the term 'capabilities', in order to consider the fast economic development of some countries as basis for the evolution of their climate obligations. Therefore, the formulation in the UNFCCC with both terms is a compromise to preserve both positions as basis for differentiation.

*Intra- and Intergenerational Equity*

The consequences of climate change can, and will, affect both present and future generations. The intra and intergenerational equity principle is recognised in article 3-1 as the obligation for Parties to protect the climate system 'for the benefit of present and future generations of humankind, on the basis of equity'. It constitutes an important principle of international and intergenerational solidarity, seeking to redress the inequalities caused by the climate crisis and concerning the current and future generations.

On the one hand, intragenerational equity – the spatial-based dimension of the principle – emphasised particularly by southern countries, is related to the 'equitable' use of natural resources and the necessity for each country to take into account the needs of the others (which was ignored for long time, in consideration of the false myth of Earth's unlimited resources and its corollary of the infinite economic growth). This is certainly also related to the issue of vulnerability of developing countries, as well as to their resilience to the adverse consequences of climate change.

On the other hand, intergenerational equity – the temporal-based dimension of the principle – take into consideration the impact that the current generation's activities, production and consumption, will have on the possibility of future ones to enjoy a stable climate and a healthy environment. This principle was also confirmed by the International Court of Justice, which noted in its advisory opinion on The Legality of the Threat or Use of Nuclear Weapons (1996) that 'the environment is not an

abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'. This principle has finally been reaffirmed in the Preamble of the Paris Agreement, confirming the international effort to safeguard the quality of life of posterity toward a stable climate system.

*Precautionary Principle*

The precautionary principle has been contested and debated since its inception at the international level, in the regime governing the ozone depletion (Vienna Convention, 1995). In the Rio Declaration (1992), it appears as an 'approach' (Principle 15), while in the UNFCCC it is part of article 3 as one of the 'Principles', and especially declined as an obligation for the States to 'take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects'. Whether the precautionary one should be called a principle, an approach or a guideline, its content is defined as follows: 'where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost' (art. 3-3 UNFCCC). During its negotiation at Rio, the US and other countries pushed for the inclusion of cost-effectiveness and economic considerations into what was supposed to be a purely environmental norm, and they eventually succeeded against the opposition of some European countries. Today the principle is often invoked in climate litigation, and also by small island States urging other countries to adopt more ambitious and urgent policies to tackle climate change.

*Sustainable Development*

Since its inception in the 1987 Brundtland Report, which provides its most famous definition (as the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'), the principle of sustainable development has created serious contention. The task of this principle has never been easy: reconciling economic development and environmental protection, bridging the gap between Southern and Northern countries, between the right to development and the environmental protection.

The UNFCCC considers sustainable development as one of the principles necessary to protect the climate system against human-induced change, as it is provided in its article 3-4: 'the Parties have a right to, and should, promote sustainable development',

also adding that 'economic development is essential for adopting measures to address climate change'. The Kyoto Protocol shows its nature of objective to be 'achieved' internationally while simultaneously curbing the GHG emissions (arts. 2, 10 and 12), and the Paris Agreement emphasises the 'intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty', while recognising the importance that 'sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change' (Preamble).

It is still to be seen whether the adoption of the Sustainable Development Goals by all UN Member States in 2015 will fill the still existing gap between the Northern and the Southern countries of the world, through the implementation of Goal 13: 'Take urgent action to combat climate change and its impacts'. In the meantime, it is necessary to keep enforcing and improving domestically the necessary policies and measures to protect the climate system, both mitigating the GHG emissions and adapting the territories to the risks and consequences of climate change, whereas aligning all the legal systems towards a real sustainable development.

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