

Environmental Law in Poverty-Environment Mainstreaming

A Primer for Legislative Assessment and Reform

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The Poverty-Environment Initiative (PEI) of the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP) is a global UN effort that supports country-led efforts to mainstream poverty-environment linkages into national development planning. The PEI provides financial and technical assistance to government partners to set up institutional and capacity-strengthening programmes and carry out activities to address the particular poverty-environment context.

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Preface

This primer was prepared with funding from the Poverty-Environment Initiative (PEI). The PEI is a joint program of the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP) to provide financial and technical support to countries to build capacity for mainstreaming poverty-environment linkages into national development planning processes, such as poverty reduction strategy papers and Millennium Development Goal achievement strategies. The PEI is supported by the governments of Belgium, Denmark, Ireland, Norway, Spain, Sweden, the United Kingdom and the United States of America, and by the European Commission.

Environmental law is one of many important tools for achieving policy objectives related to mainstreaming poverty-environment linkages into national development planning. This primer aims to empower poverty-environment mainstreaming professionals by delineating the potential role of environmental law in a mainstreaming context and enabling them to engage in an informed dialogue with legal professionals on these issues with a view to assessing and, if appropriate, initiating legislative reform. The primer puts particular emphasis on the law governing sustainable use and management of natural resources, given the relative importance of these resources for the poor and for the economies of developing countries.

The primer was written by Håkan Bengtsson, whose tenure with the UNDP-UNEP Poverty-Environment Facility has been made possible through a generous contribution by the Swedish government's Environmental Protection Agency. We are very grateful to Mr. Bengtsson for his efforts in writing this primer and to the members of the PEI team who have made valuable contributions to its preparation.

The primer is meant to be a working document and to be tested at the country level in order to obtain feedback from country practitioners and others so as to improve its content and utility. Any comments, enquiries and suggestions should be directed to:

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1. Summary

This primer provides guidance for professionals involved in mainstreaming poverty-environment linkages in national development planning on the potential role and importance of environmental law in the context of their work.¹ The primer is designed as a resource to help PEI country staff and their counterparts engage in an informed dialogue with legal professionals on these issues in order to assess and, if appropriate, initiate legislative reform. The primer puts particular emphasis on laws governing the sustainable use and management of natural resources, given the relative importance of these resources for the poor and the economies of developing countries.

In support of the programmatic approach to poverty-environment mainstreaming, the primer is intended to provide guidance in performing the following:

- Making early *preliminary assessments* with a view to understanding the governmental, institutional and political contexts of a country
- *Developing and costing policy measures* in support of agreed goals, targets and strategies

The primer is relevant at other stages in the programmatic approach and in other contexts as well.

1.1 Opportunities and Challenges of Environmental Law

Environmental law is an important tool, alongside other tools (i.e. economic instruments), for achieving policy objectives related to poverty-environment mainstreaming. While recognizing the important role of the law in achieving environmental and poverty reduction objectives, there are certain limitations that may decrease the potential and utility of legal interventions. Consequently, such interventions must be assessed, among other things, in light of the strength of the rule of law in a given country and any limitations in terms of outreach and effectiveness that might result therefrom in legally pluralistic societies (which developing countries generally are).

Customary law and traditions can, in some cases, be built on to enhance the implementation and enforcement of state environmental law, but they can also work to the detriment of the legitimate intentions of state law. In analyzing the intersection of state environmental law and customary law and traditions, the manner and extent to which state law can recognize customary tenure and access rights to natural resources

¹ Poverty-environment mainstreaming is defined as: The iterative process of integrating poverty-environment linkages into policymaking, budgeting and implementation processes at national, sector and subnational levels. It is a multi-year, multi-stakeholder effort that entails working with government actors (head of state's office, environment, finance and planning bodies, sector and subnational bodies, political parties and parliament, national statistics office and judicial system), non-governmental actors (civil society, academia, business and industry, general public and communities, and the media) and development actors. (*Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners*, p. 6)

should be considered. Not recognizing such rights can contribute to the marginalization of the poor.

It is important to be aware of the **structure of the environmental law framework** and the national legislative approaches used when assessing its suitability to achieve poverty reduction objectives and sustainable use and management of natural resources. The relevant provisions are rarely found in a single statute in modern environmental law frameworks. Rather, relevant provisions exist at various levels ranging from international environmental law and constitutions to regulations and bylaws.

Environmental Law and Development

In some cases and places, environmental law continues to be seen as hampering economic progress and development. This misperception is grounded in a narrow and discredited context. In general, environmental law shares the same objectives as sectoral law for the use and management of natural resources: to contribute to sustainable development. Environmental sustainability is a precondition for such development.

National and International Environmental Law

International environmental law is binding upon the parties and signatories to the various international treaties. **National law** must conform to these international obligations. In most countries, international law is part of the national legal system and hence directly applicable. This is another issue to take into account when assessing national legal frameworks. For example, many developing countries have yet to fully implement their obligations under the major multilateral environmental agreements (MEAs).² Enhanced implementation of the MEAs can be an opportunity to consolidate poverty-environment mainstreaming, as this well require legislative reform, and such reform could easily take into account broader poverty-environment considerations. Implementation of the MEAs could thus constitute an entry point for poverty-environment mainstreaming.

Environmental Law and Poverty Reduction

Environmental law has a role to play in the broader agenda of the **legal empowerment of the poor**. Such empowerment entails giving the poor enhanced legal protection and opportunities—providing them with legal tools to assist them in improving their lives and lifting themselves out of poverty. Environmental law can make contributions to the four legal empowerment pillars identified by the Commission on the Legal Empowerment of the Poor: e.g. through strengthening the rule of law in the environmental sector, recognizing customary law and tradition in formal state law and providing broad access to justice in environmental matters; securing the poor’s tenure to land , and to access and use other natural resources; protecting the work environment by regulating the use of chemicals and hazardous substances; and creating business opportunities in the wake of

² “Multilateral environmental agreement” is a generic term referring to treaties, conventions, protocols, and other binding instruments related to the environment. The term is usually applied to instruments of a geographic scope wider than that of a bilateral agreement (i.e. between two states).

environmental regulation. Understanding that environmental law has a role to play in the legal empowerment of the poor is the first step in maximizing its contribution in this regard.

Key Building Blocks for Poverty-Environment Law

This primer identifies key legislative building blocks for the sustainable use and management of natural resources. National legislation should be assessed in relation to these building blocks in the various natural resource sectors to identify areas where reform may be needed. The primer additionally provides initial guidance for such reform. Further, it cites references to numerous useful resources and publications.

- Key Legislative Building Blocks Important sustainability principles should be manifested in law.
- Institutional arrangements should be logical and coherent, and inter-institutional coordination should be ensured.
- Adequate planning is essential to the good management and use of natural resources and should therefore be ensured.
- Natural resource use should be controlled through permits, licenses and concessions.
- Effective public participation should be provided for, including access to information and access to justice in environmental matters.
- Management and decision-making authority for natural resources should be decentralized and devolved to the appropriate level.
- Strategic environmental assessments and environmental impact assessments should be conducted for all plans, programmes and activities that affect the environment.

Some of these key building blocks, notably effective public participation and decentralization and devolution of decision making, are essential mechanisms both for achieving the environmentally desired outcomes and for legally empowering the poor.

2. Why Make the Case?

2.1 Primer Purpose

Getting the law right is an essential part of creating a strong foundation for sustainable use of natural resources, broader environmental sustainability and thus for sustainable development and poverty alleviation. Law is also fundamental in empowering the poor, and the areas of law upon which this primer focuses—those relevant to the environment—can make important contributions in this regard.

The primer provides guidance to PEI staff and their counterparts on two issues:

- What are the fundamental components of law considered to be essential in promoting sustainable use and management of natural resources?
- How can environmental laws be designed to address the needs of the poor beyond the benefits of achieving a desired environmental outcome, and what issues need to be considered in so doing?

The primer aims to enhance understanding of the role of environmental law in general and sectoral natural resource law in particular (e.g. forest, water, biodiversity) in the context of poverty-environment mainstreaming at the national level. Given the importance of natural resources to the economies of developing countries and to the poor, the primer particularly focuses on law that promotes the sustainable use and management of these resources.

The primer takes into account the unique national circumstances of each country and the need for correspondingly unique legal responses. Environmental standards, management objectives and priorities must reflect the environmental and development contexts and cultural milieus to which they apply.

2.2 Primer Target Groups

The primer is intended as a resource for PEI staff and their counterparts as well as other mainstreaming practitioners who wish to deepen their understanding of the role of environmental law in a poverty-environment mainstreaming context. This target audience can use this primer as a resource in seeking to assess the suitability of the existing legal framework to meet the objectives of environmental sustainability, particularly with regard to the sustainable use and management of natural resources, and poverty reduction. The primer aims to empower mainstreaming professionals to engage in an informed dialogue with lawyers and other stakeholders on these issues.

The primer should also be of interest to legal professionals responsible for assessing environmental law frameworks and to legal professionals and development practitioners interested in this topic.

2.3 Primer Organization

The primer is divided into two sections.

Section I discusses the linkages and potential contributions of environmental law to poverty reduction.

- Chapter 3 serves as a general background to the topic, providing a concise introduction to the links between environment, poverty and development.
- Chapter 4 describes various types of laws and key features of modern environmental law including the norm hierarchy and the influence of international environmental law. It also looks at the role and potential use of environmental law in both a rule-of-law context and in the context of legal pluralism.
- Chapter 5 highlights the potential contribution of environmental law in the legal empowerment of the poor.

Section II looks at experiences with sector legislation for the sustainable use and management of renewable natural resources, and describes entry points for reform efforts; it highlights key legal building blocks for the sustainable use and management of renewable natural resources.

- Chapter 6 discusses salient cross-cutting features that characterize laws—whether a general environmental law, sectoral law or both—for the sustainable use and management of natural resources in accordance with national circumstances, preferences and legal tradition.
- Chapter 7 looks at important sector-specific issues that should be considered when assessing or reforming laws supporting the sustainable use and management of natural resources, specifically water, forests, land, biodiversity and marine fisheries.

2.4 How to Use the Primer

Key messages and **action points** are highlighted throughout the primer. The key messages provide general background information; the action points identify actions that could/should be taken. These action points are consolidated in figures 2.1 and 2.2 as a proposed two-phase approach for assessing legal frameworks to determine the extent to which they support poverty-environment mainstreaming objectives and the extent to which legal reform may be necessary. .

PEI Programmatic Approach to Poverty-Environment Mainstreaming:

- Finding the entry points and making the case, which sets the stage for mainstreaming,
- Mainstreaming poverty-environment linkages into policy processes, which is focused on integrating poverty-environment linkages into an ongoing policy process, such as PRSP or sector strategy, based on country-specific evidence,
- Meeting the implementation challenge, which is aimed at ensuring integration of poverty-environment linkages into budgeting, implementation and monitoring processes.

Source: *Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners*, Chapters 3 – 6.

The two phases of this approach are as follows:

- **Making preliminary assessments** to understand the country's governmental, institutional and political contexts, including the quality of the environmental law framework supporting sustainable use and management of natural resources in the overall country and programmatic context
- **Developing and costing policy measures** in support of agreed goals, targets and strategies to support sustainable land and natural resource management

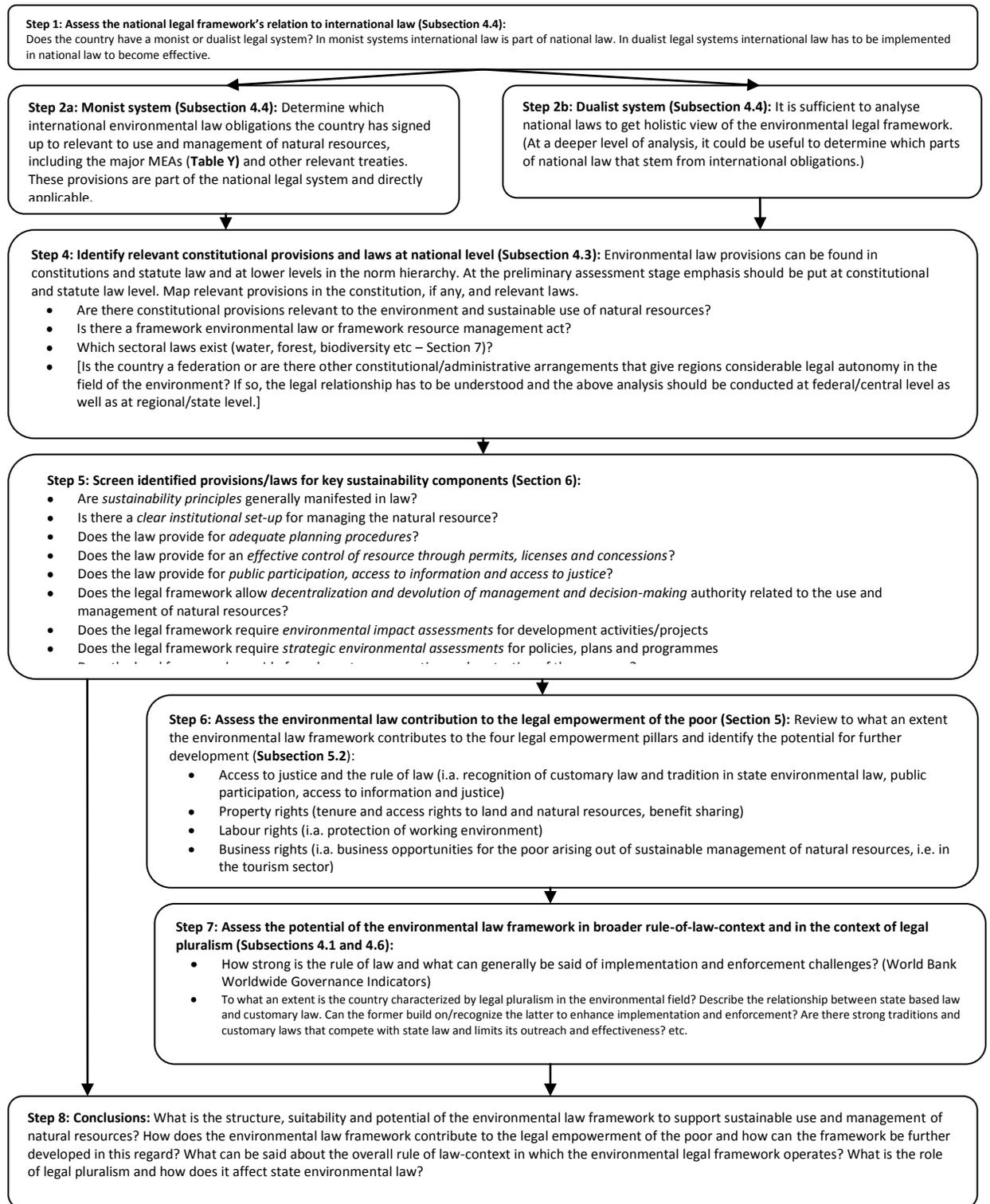
The analyses of the relevant legal framework during the two phases are largely similar in scope and methodology. The difference lies primarily in the depth of the analysis. When making a **preliminary assessment**, it makes sense to make a less comprehensive analysis—i.e. to screen the situation—in order to reach a broad understanding of the strengths and weaknesses of the legal framework for supporting sustainable use and management of natural resources. Similarly, the strengths and weaknesses from the perspective of the legal empowerment of the poor and the relationship between state law and customary law and tradition should be analyzed at this screening level.

When the legal framework's strengths and weaknesses to support specific policy objectives related to sustainable management of natural resources are considered, the analysis required to **develop and cost policy measures** *must* necessarily be more in depth. The objective for such a qualitative analysis should be to assess in more detail if the legal framework sufficiently supports the overall policy objectives and to identify areas in which legal reform may be necessary.

The flowcharts presented in figures 2.1 and 2.2 outline a proposed approach for making the analyses at the two phases, respectively. The boxes in the flowcharts contain examples of questions and issues to be considered at the various steps in the process. They also reference the relevant sections in the primer where the user can find additional information. Note that the precise route to follow when making the analyses, as well as additional issues to consider, will ultimately depend on the specifics of each case.

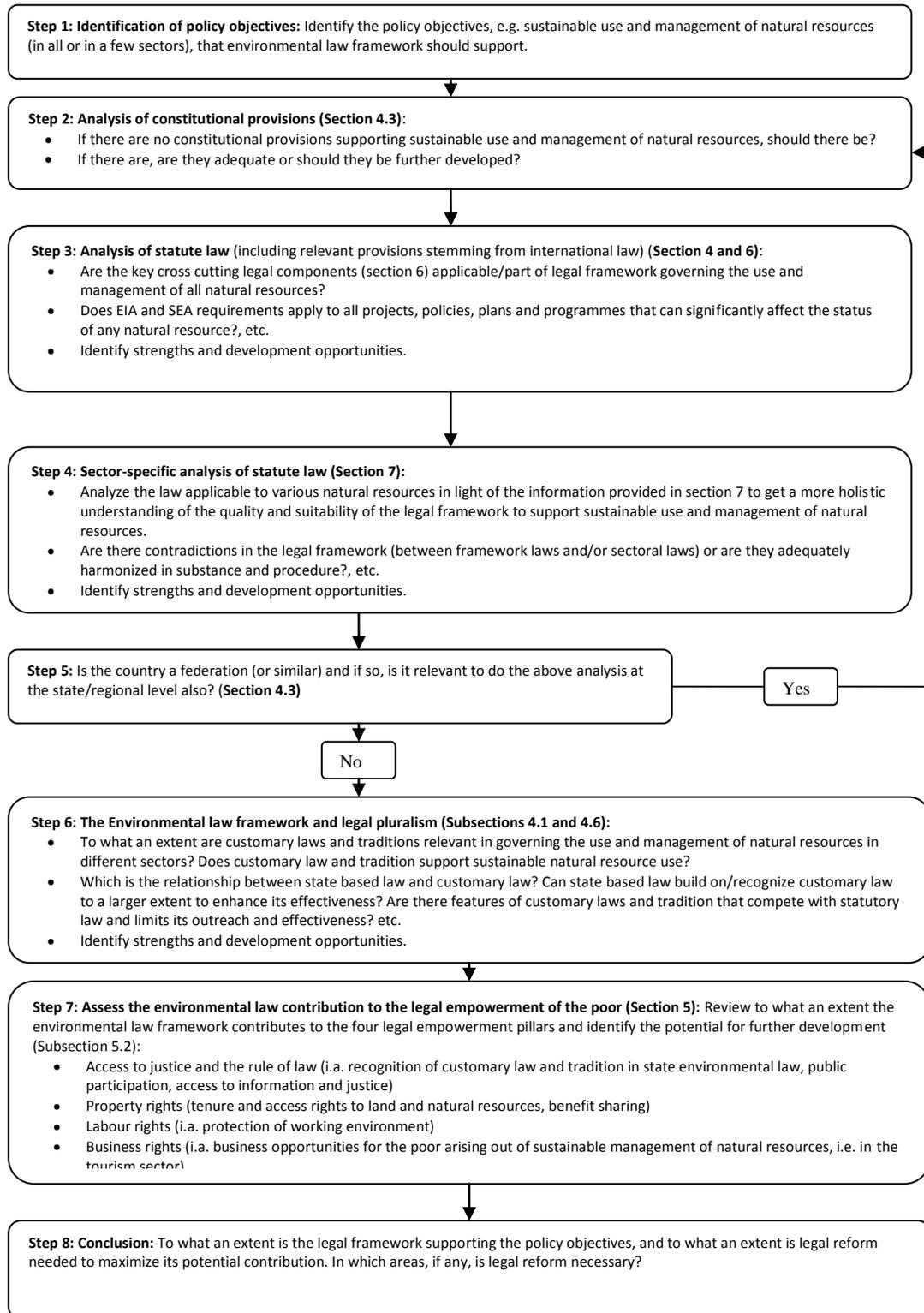
Also note that the primer does not aim to provide detailed guidance for legal professionals in making in-depth reviews of legislation or drafting new laws.

Figure 2.1: Preliminary Assessment—Screening the Environmental Law Framework’s Suitability to Support Sustainable Use and Management of Natural Resources and the Legal Empowerment of the Poor



Note: Even though the assessments referred to in steps 6 and 7 would be useful at this phase, they could entail a significant amount of work. Consequently, they are optional.

Figure 2.2: Developing and Costing Policy Measures: Qualitative Analysis of the Legal Framework Supporting Sustainable Use and Management of Natural Resources and the Legal Empowerment of the Poor



I. FRAMING THE ARGUMENT: ENVIRONMENTAL LAW AND THE LEGAL EMPOWERMENT OF THE POOR

3. Environment, Poverty and Development

3.1 The Poverty-Environment Link

Key Messages

- The poor rely disproportionately on the environment for their livelihoods.
- Nature's capacity to sustainably deliver ecosystem services for human well-being is a precondition for economic and human development.

Experience shows that better environmental management contributes greatly to improving health, resilience to environmental risks, economic development and livelihood opportunities. Poor households rely disproportionately on natural resources and the environment for their livelihoods and income. The poor are also more vulnerable to natural disasters and to the impacts of climate change. They bear the immediate burden when ecological resources and services deteriorate or collapse.

Natural resource sectors such as agriculture, forestry and fisheries play a relatively larger role in the national income and wealth of less-developed economies. Thus, a healthy and productive environment contributes significantly to human well-being and pro-poor economic development, provided that sound policies advancing these objectives are in place. Intact, functioning ecosystems provide services—such as the provision of food, water, fuel and fibre, as well as regulation of climate—on which nations and people rely to earn income from agriculture, fishing, forestry, tourism and other activities (see box 3.1 below). Sustainable use of these ecosystem services and natural resource assets is increasingly recognized as a key factor in lasting economic development and improvement in human welfare. And using these resources sustainably is a necessary condition for achieving the Millennium Development Goals (MDGs) (see subsection 3.3).

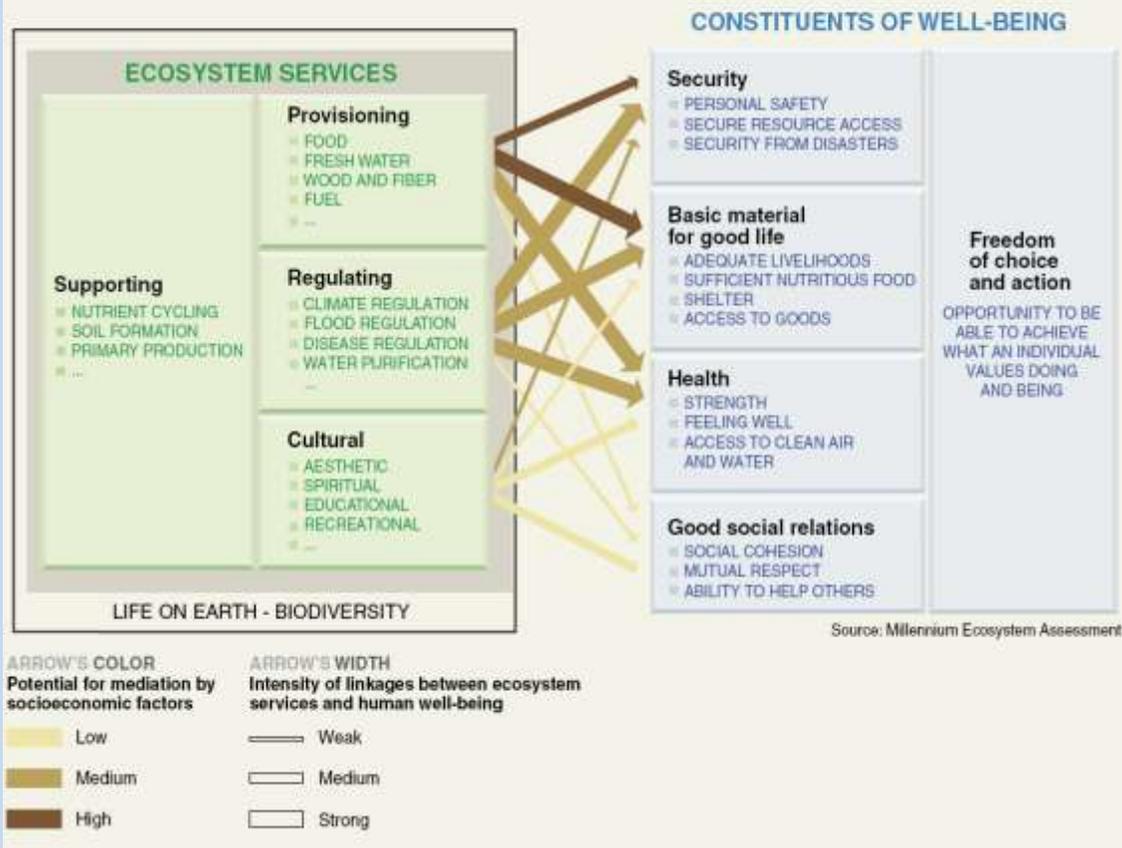
The Millennium Ecosystem Assessment Report provided authoritative global scientific evidence of the urgency of addressing the issue of environmental sustainability and of the inextricable link between environmental sustainability and other development objectives, such as the fight against poverty.³ The report concluded that approximately 60 percent of the ecosystem services that support life are being degraded or used unsustainably, and warned that the harmful consequences of this degradation could grow significantly worse in the next 50 years. It underlined that any progress achieved in addressing the goals of poverty and hunger eradication, improved health, and environmental protection is unlikely to be sustained if most of the ecosystem services on which humanity relies continue to be degraded (see box 3.2).

³ www.millenniumassessment.org.

Box 3.1: Ecosystem Services and Human Well-Being

Ecosystem services are described as the benefits people obtain from ecosystems. There are four types of services: (1) *provisioning services* such as food, water timber, fuel and fibre); (2) *regulating services* that affect climate, floods, disease, wastes and water quality; (3) *cultural services* that provide recreational, aesthetic and spiritual benefits; and (4) *supporting services* such as soil formation, photosynthesis and nutrient cycling. The figure below illustrates how ecosystem services underpin human well-being and their importance in poverty alleviation.

This Figure depicts the strength of linkages between categories of ecosystem services and components of human well-being that are commonly encountered, and includes indications of the extent to which it is possible for socioeconomic factors to mediate the linkage. (For example, if it is possible to purchase a substitute for a degraded ecosystem service, then there is a high potential for mediation.) The strength of the linkages and the potential for mediation differ in different ecosystems and regions. In addition to the influence of ecosystem services on human well-being depicted here, other factors—including other environmental factors as well as economic, social, technological, and cultural factors—influence human well-being, and ecosystems are in turn affected by changes in human well-being. (See Figure B.)



Box 3.2: The Contribution of the Environment to Livelihoods, Resilience, Health and Economic Development

Livelihoods. Ecosystems provide services on which poor people rely disproportionately for their well-being and basic needs. Populations also depend on the environment to earn incomes in sectors such as agriculture, fishing, forestry and tourism, through both

formal and informal markets.

Health. Environmental conditions account for a significant portion of health risks to poor people. Environmental risk factors, such as occupational exposures to chemicals and indoor air pollution from household solid fuel use, play a role in more than 80 percent of the diseases regularly reported on by the World Health Organization. Globally, nearly a quarter of all deaths and of the world's total disease burden can be attributed to the environment. As many as 13 million deaths could be prevented every year by making the environment healthier. Improved health from better environmental conditions would also contribute to improvements in livelihoods, economic development and resilience to environmental risks.

Resilience to environmental risks. Poor people are more vulnerable to natural disasters such as floods and droughts, the effects of climate change and other environmental shocks that threaten their livelihoods and undermine food security. Improving the ways in which environmental resources, such as forests, are managed increases the resilience of poor people and their livelihoods to environmental risks.

Economic development. Environmental quality contributes directly and indirectly to economic development and employment. These contributions are particularly important in developing countries in such sectors as agriculture, energy, forestry, fisheries and tourism.

3.2 Natural Resources and Sustainable Development

Key Messages

- All states have the sovereign right to exploit and use their natural resources if it does not cause environmental damage to others.
- Contemporary environmental and development policy implies restrictions on the exploitation and use of national resources, acknowledging that sustainable use/environmental sustainability is a prerequisite for long-term sustainable development.
- Natural resources are relatively more important to the economies of low-income countries.

All states have the sovereign right to exploit and use their own resources pursuant to their own environmental and developmental policies, as long as the exploitation and use do not cause environmental damage to others states or to areas beyond the national jurisdiction.⁴

It is clear that the vast majority, if not all, of national environmental and developmental policies in the 21st century imply restrictions on the use and management of natural resources. The restrictions are often a result of increased awareness that economic

⁴ This is a well-established principle in international environmental law and has been expressed in, among others, Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and in Principle 2 of the 1992 Rio Declaration on Environment and Development.

development and human well-being rest upon the goods and services that nature can provide, and that these goods and services must be adequately governed and managed to sustain development in the long run.

Economic development and enhanced human well-being is dependent on the exploitation and use of natural resources in all societies, to a greater or lesser extent. As economies have grown, so has the use of natural resources. Direct dependence on natural resources is higher in low-income countries, which have less-developed and -diversified economies and hence fewer alternative income-generating activities and sectors. Accordingly, in these countries, natural resources—particularly agricultural land, subsoil minerals, and timber and other forest resources—make up a relatively larger share of the national wealth.⁵ Circumstances like these underscore the importance of using and managing natural resources sustainably.

3.3 Meeting the MDGs: Ending Poverty and Hunger and Achieving Environmental Sustainability

Key Messages

- A healthy environment is essential to the achievement of the MDGs.
- The rule of law, a sound legal framework and strong institutions enhance achievement of the MDGs.

A healthy environment is essential to achieving the MDGs (see table 3.1). It is widely recognized that the MDGs are inextricably intertwined; achievements to implement one of the goals both depend on and can contribute to the achievement of other goals.

One example of interdependence and indivisibility among the MDGs is MDG 1 (eradicate extreme poverty and hunger) and MDG 7 (environmental sustainability). It is evident that sustainable access to and use of such natural resources as land, water and fisheries is crucial to ensuring the achievement of the three poverty- and hunger-related targets associated with MDG 1. It is equally evident that eradication of poverty and the improved living conditions resulting from this contribute to the fulfillment of MDG 7, and its targets relating to drinking water, sanitation and improvement in the lives of slum dwellers, among others.⁶ As illustrated in table 3.1, the contribution of the environment in the achievement of the MDGs is by no means limited to MDG 1.

One of the governance failures that stalls development and hampers the achievement of the MDGs is the inability or unwillingness of states to uphold the rule of law.⁷ The rule of

⁵ World Bank, *Where is the Wealth of Nations? Measuring Capital for the 21st Century*, Washington DC, 2006.

⁶ For more information on the MDG targets, see www.un.org/millenniumgoals

⁷ *Investing in Development, A Practical Plan to Achieve the Millennium Development Goals (Overview)*, Millennium Project, 2005, p 15-16)

law implies basic standards in society that are conducive for development such as security in private property and tenure rights, safety from violence and physical abuse, honesty and transparency in government functions, and predictability in government behaviour according to law. Upholding the rule of law requires strong institutions, including for government accountability. A strong, sound legal and institutional framework is thus critical for achieving the MDGs. The legal components highlighted in subsequent chapters of this primer form part of such a framework.

Table 3.1: Contribution of the Environment in Achieving the MDGs—Poverty-Environment Linkages

Poverty

MDG 1. Eradicate extreme poverty and hunger

- Livelihood strategies and food security of poor households typically depend directly on ecosystem health and productivity and the diversity of services they provide.
- Poor households often have insecure rights to land, water and natural resources, and inadequate access to information, markets and rights to participate in decisions that affect their resource access and use, thus limiting their capability to use environmental resources sustainably to improve their livelihoods and well-being.
- Vulnerability to environmental risks—such as floods, droughts and the impacts of climate change—undermines people’s livelihood opportunities and coping strategies, thus limiting their ability to lift themselves out of poverty or avoid falling into poverty.

Gender and education

MDGs 2. Achieve universal primary education and 3. Promote gender equality and empower women

- Environmental degradation contributes to an increased burden on women and children (especially girls) in terms of the time required to collect water and fuel wood, thus reducing the time they have available for education or income-generating activities.
- Including the environment within the primary school curriculum can influence the behaviour of young people and their parents, thereby supporting sustainable livelihoods.
- Women often have limited roles in decision-making, from the community level to national policymaking, which prevents their voices from being effectively heard, particularly with respect to their environmental concerns.
- Women often have unequal rights and insecure access to land and natural resources limiting their opportunities and ability to access productive assets.

Health

MDGs 4. Reduce child mortality, 5. Improve maternal health and 6. Combat HIV/AIDS, malaria and major diseases

- Water- and sanitation-related diseases (such as diarrhea) and acute respiratory infections (primarily from indoor air pollution) are two of the leading causes of under-

five child mortality.

- Damage to women's health from indoor air pollution or from carrying heavy loads of water and fuel wood can make women less fit for childbirth and at greater risk of complications during pregnancy.
- Malaria, annual killer of an estimated 1 million children under age five, may be exacerbated as a result of deforestation, loss of biodiversity and poor water management.
- Up to a quarter of the burden of disease worldwide is linked to environmental factors—primarily polluted air and water, lack of sanitation and vector-borne diseases; measures to prevent damage to health from environmental causes are as important, and often more cost-effective, than treatment of the resulting illnesses.
- Environmental risks, such as natural disasters, floods, droughts and the effects of ongoing climate change, affect people's health and can be life threatening.

Development partnership

MDG 8. Develop a global partnership for development

- Natural resources and sustainable environmental management contribute to economic development, public revenues, the creation of decent and productive work and poverty reduction.
- Developing countries, especially small island states, have special needs for development assistance, including increased capacity to adapt to climate change and to address other environmental challenges, such as water and waste management.

Source: Adapted from table 2.1, p 10, *Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners*.

4. Environmental Law

This chapter provides a general introduction to the role and function of environmental law and describes the different levels at which it operates.

While constitutional and statutory law are most often of importance in connection with policy and legislative reform, international environmental law also exerts a strong influence on national environmental law. Regulations and bylaws, which are lower levels of the norm hierarchy and derive their authority from the higher levels, also form part of the body of environmental law. Additionally, this chapter discusses the interaction between formal state-based law and customary law and traditions in countries with legal pluralism.

Action Points

- Assess the status and strength of the rule of law in countries where assessment and reform of the environmental law framework is being considered.
- When assessing the quality and suitability of the environmental law framework, identify relevant provisions at the various levels of the norm hierarchy, particularly at the constitutional and statutory levels.
- Understand the relationship between international environmental law and the national legal framework, and determine the extent to which the latter has been influenced by the former.
- Analyze the relationship between state environmental law and customary law and traditions to better understand the potential for synergies and to identify areas of conflict between these two legal frameworks.

4.1 The Role and Rule of Law

Key Messages

- Law is an important tool in achieving policy objectives related to poverty reduction, environmental sustainability and sustainable development.
- The effectiveness of the legal framework's contribution to these objectives is likely to be higher in societies where the rule of law is strong.
- There is a strong rationale for proceeding with legal reform in countries where the rule of law is weak.
- Legal and judicial reform is a constitutive part of holistic development.

Action Points

- Assess the status of the rule of law in countries where the suitability of environmental law to support poverty-environment objectives is being assessed and legal reform is under consideration.
- Consider using the World Bank Worldwide Governance Indicators as a useful tool in this regard.

The law is and will remain one of the most important tools for implementing policy objectives related to environmental sustainability and sustainable development.⁸ The significant role of law in poverty reduction is undisputed. Entrenchment of legal rights empowers the poor, weak and marginalized and provides them with a means to improve their lives. (Legal empowerment of the poor is addressed in the chapter 5.)

A well-written law is not sufficient in itself, as –it cannot implement or enforce itself. Political will and strong institutions are required to ensure effective implementation and enforcement and for making use of the law’s full potential. Many countries experience a considerable disconnect between the letter of the law and the law in action. Government bodies and public institutions, including the police and the judiciary, have a key role in ensuring implementation and enforcement. To perform these functions, they must have adequate resources. In addition, to be effective, a law must be legitimate and relevant to the particular circumstances of the jurisdiction. People must be aware of the law in order to exert their rights and to have a fair chance to comply with it.

The above requirements for effective and efficient laws largely coincide with the characteristics of a society governed by the rule of law: (1) the creation of legal norms that apply equally to everyone through a legitimate, participatory and transparent process; (2) the proper establishment and functioning of adequately resourced institutions of governance, including an independent judiciary; and (3) appropriate enforcement and compliance procedures, including access to justice for those whose international, constitutional or statutory rights have been violated.

It is important to make a thorough analysis of the expected costs, benefits and effectiveness associated with legal reform and the enactment of new legal rules. The potential success of legal interventions is less in societies where the rule of law is weak as compared to societies in which it is stronger. The World Bank’s Worldwide Governance

⁸ For example, the international community has repeatedly emphasized the key role of an adequate legal framework in achieving sustainable development. In Agenda 21, for instance, the state community noted that “laws and regulations suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action, not only through ‘command and control’ methods, but also as a normative framework for economic planning and market instruments.” The 2002 World Summit on Sustainable Development Plan of Implementation called upon countries to promote sustainable development at the national level by, among other things, enacting and enforcing clear and effective laws that support this objective.

Indicators, which include an indicator on the rule of law, could be a useful tool in assessing country performance in this regard.⁹ The possible benefits of legal reform for poverty-environment mainstreaming, though duly adapted to the local circumstances, are likely to be realized to a lesser extent where the rule of law is weak.

Even if circumstances are difficult, there might be a strong rationale to proceed with such reforms. Begin by determining the alternative to legal reform would be in cases where the existing legal framework is not conducive for achieving agreed and prioritized policy objectives. The idea of continuing with an insufficient legal framework should be unattractive to policy makers, since there would be a risk that the legal framework would undermine the achievement of the objectives. This is also true in situations with well-recognized implementation and enforcement challenges. Legal reforms will still have a positive impact under such circumstances, though less so than in an ideal case.

In addition, Legal interventions will in themselves contribute to the creation of a sound legal framework and to strengthening the rule of law, even if limited in scope.

Reforms also may take place in a broader context in which efforts are made to promote good governance and strengthen the rule of law in general.

Legal and judicial development should not only be viewed as causally linked to economic and social development. Rather, they are part of a holistic development: “It is hard to think that development can really be seen independently of its economic, social, political or legal components. We cannot very well say that the development process has gone beautifully even though people are being arbitrarily hanged, criminals go free while law-abiding citizens end up in jail, and so on. This would be as counterintuitive a claim as the corresponding economic one that a country is now highly developed even though it is desperately poor and people are constantly hungry.”¹⁰

4.2 Definition of Environmental Law

Environmental law can be broadly defined as the body of law that contains elements to control the human impact on the Earth and on public health.¹¹ It is a broad category that includes laws that specifically address environmental issues as well as more general laws that have a direct impact on environmental issues. Environmental law addresses two major issues: (1) the use of resources at unsustainable levels, i.e. to promote sustainable use; and (2) the limited capacity of the environment to absorb or render harmless contamination through pollution and waste.

⁹ Available at <http://info.worldbank.org/governance/wgi/index.asp>

¹⁰ *Role of Legal and Judicial Reform in Development*, World Bank Legal Conference, Washington, DC, Amartya Sen, June 5, 2000. Available at

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>. Quote from p 9.

¹¹ *Training Manual on International Environmental Law*, UNEP, 2006, p 15.

4.3 Types of Environmental Laws

Key Messages

- Countries have different legislative approaches and have adopted different types of environmental laws.
- National environmental law can be found at various levels in the norm hierarchy (directly applicable international law, constitutional provisions, statutory provisions, regulations and bylaws).
- The role of a country constitution as a driver for environmental and poverty objectives may be particularly important in countries where a long tradition of environmental management and awareness is lacking.
- States within a federal system may have considerable legal autonomy in the environmental field.

Action Points

- Identify relevant provisions at different levels in the norm hierarchy, particularly at the constitutional and statutory levels, when assessing the quality and suitability of a country's environmental law framework to achieve policy objectives related to the environment and poverty.
- Determine the relationship between relevant environmental laws at the federal and state levels, where appropriate. Also assess the relevant environmental law provisions at the state level in order to obtain a complete picture.
- When developing and costing policy measures, or conducting any other in-depth legal framework assessments, include a review of the extent to which the laws and regulations are harmonized in substance and procedure.

Countries have varying legislative approaches and have adopted different types of environmental laws (see box 4.1).¹² It is important to be aware of which approach has been used and at what levels in the norm hierarchy relevant environmental law provisions can be found. Such awareness facilitates understanding and efficient assessment of the relevance and adequacy of a country's legal framework for achieving specific policy objectives—for example, within a process of poverty-environment mainstreaming.

¹² This section largely draws upon the *UNEP Training Manual in International Environmental Law*, chapter 2, “The Role of National Environmental Law.”

Box 4.1: Approaches and Types of Environmental Laws

- Constitutions
- Sectoral laws (i.e. regarding specific natural resources, land use and land-use planning)
- Framework environmental laws
- Framework resource management laws
- Comprehensive codification of environmental laws
- Penal codes (environmental crimes)
- Implementation of international environmental legal instruments

Directly applicable international environmental law could be added to the list in box 4.1 in jurisdictions where international law is directly applicable at the national level (see subsection 4.4). The following further delineates and describes these various types of environmental laws.

- **National constitutions** are superior to statutory law and lay down the fundamental principles and norms by which society is organized. They are a source of environmental law when they, for example, provide environmental rights to citizens, or make reference to sustainable development and sustainable use of natural resources. Generally, the role of constitutions in environmental law might be less important in countries with a long tradition of environmental management and awareness. In such cases, these issues may already have become part of the political and legal tradition, and there may not be a need to embody them in the constitution.¹³ However, in countries without such a tradition, the potential role of constitutions can be considerable for poverty reduction and environmental sustainability. Constitutional provisions can be a powerful driver, as they can lift these concerns to the highest level, and lower-level norms need to be in conformity with them. Further, constitutional provisions may serve to guide courts and administrative bodies in interpreting and applying the law.

For example, in Tanzania, a legal analytical review for implementation of some multilateral environmental agreements concluded that the absence of a constitutional chapter clearly spelling out basic environmental matters “poses a major national challenge” to policy makers and legislators in developing an appropriate environmental policy and legal framework. To overcome this challenge, the “environment may need to

¹³ Calestous Juma, *Private Property, Environment and Constitutional Change*, in *In Land We Trust*, (Calestous Juma and J.B. Ojwang editors), 1996.

be a constitutional category for the same to be assigned appropriate impact on all national cross-sectoral and sectoral policies and laws.”¹⁴

Box 4. The Importance of Constitutional Reform in Argentina for the Development of Environmental Law

A landmark in the evolution of environmental law in Argentina was the amendment to the constitution carried out in 1994, and, among other things, the explicit recognition in Article 41 of the right to enjoy a healthy environment:

All inhabitants of the nation shall enjoy the right to a healthy and balanced environment, apt conducive to for human development so that productive activities may satisfy the needs of present generations without compromising those of future generations; they have a duty to preserve the environment. Environmental harm will generate, on a priority basis, an obligation to restore or remediate such impairment, in accordance with the law.

Authorities will provide for the protection of this right, the rational use of natural resources, preservation of natural and cultural heritage and biological diversity, information and environmental education.

It is the duty of the nation to establish norms that contain the minimum requirements for protection, and the duty of the provinces to state such norms as may be necessary to complement them, without such minimum standards altering local jurisdictions.

Entry of actual or potentially hazardous and radioactive waste to the national territory is forbidden.

The basis for implementing environmental policies in Argentina lies in the terms of the 1994 constitutional reform. In recognizing the right to a healthy environment and formally adopting the definition for sustainable development, Argentina established a human rights–based justification for public policy decisions related to environmental protection and sustainable development. This in turn has provided the legal and intellectual arguments for much of the citizen activism and judicial decisions that have pushed environmental law forward since 1994.

Source: Argentina’s Constitution and General Environmental Law as the Framework for Comprehensive Land Use Regulation, Juan Rodrigo Walsh, published in *Land Use Law for Sustainable Development* (Edited by Nathalies J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye, John R. Nolon), IUCN Academy of Environmental Law Research Studies, IUCN Academy of Environmental Law 2007, Cambridge University Press).

- **Sectoral legislation** addresses specific aspects of the environment and human activity such as laws on water, land and land-use planning, energy, forest, wildlife, marine environment, and protected areas. Sectoral law is sometimes characterized by fragmented and uncoordinated legal regimes, many of which were initially developed to facilitate resource allocation and use, and to deal with the environmentally adverse effects of resource exploitation. In some countries, there has been a growing realization that a fragmented approach is not the most effective way to maximize

¹⁴ *Legal Analytical Review for Implementation of Rio MEAs in Relation to Poverty Reduction and Assessment of the Needs for Capacity Building in Tanzania*, p 21, United Republic of Tanzania (Vice Presidents Office, Division of Environment) and UNEP, January 2007, p 21.

synergies, adequately address linkages in environmental stresses and guarantee sustainable development.

- **Framework environmental legislation** is a single law that provides the legal and institutional framework for environmental management without seeking to legislate everything in detail. Flexibility is achieved through investing relevant authorities with wide regulatory powers to promulgate subsidiary legislation (regulations) addressing specific environmental issues. Such laws have been developed with a view towards creating a comprehensive, internally coherent, easily understandable and user-friendly legal framework; frequently, this is in response to the deficiencies of the sectoral approach described above. A framework environmental law typically represents an integrated, ecosystem-oriented legal regime that permits a holistic view of the ecosystem/environment, the synergies and interactions within it, and the linkages in environmental stresses and between administrative institutions. Although framework laws address the environmental issues unique to each country, some common elements can be distinguished, such as the following:

- ✓ Definitions
- ✓ Declaration of general objectives and principles
- ✓ Establishment of relevant environmental management institutions and principles for common procedures for environmental decision-making applicable to all sectors
- ✓ Environmental policy formulation and planning
- ✓ Environmental impact assessment and audits
- ✓ Environmental quality criteria and standards
- ✓ Integrated pollution control
- ✓ Environmental management
- ✓ Public participation in decision-making and implementation
- ✓ Environmental inspectorates
- ✓ Dispute settlement procedures
- ✓ Establishment of links and hierarchy with other laws affecting the environment

Most countries have both sectoral legislation and a framework environmental legislation; others have either one or the other. Regardless, it is important to make sure that the laws and regulations are coherently harmonized, both in substance and procedure, to guarantee the legal framework's optimal contribution to its objectives.

Federal states—such as the United States—constitute a special case, and are characterized by a union of partially self-governing states united by a central (federal) government. The states may have considerable legal autonomy with regard to the environment, which could mean that differences may be found in the environmental law frameworks between the states. The states also may have norms at various administrative levels as described above.¹⁵

4.4 International Environmental Law

Key Messages

- There are many bilateral and multilateral environmental agreements (international environmental law) that exert a strong influence on national law and policy, as they are binding upon countries (parties).
- International environmental law implies limitations for national policies and laws as they must be consistent with international obligations.
- Implementation of MEAs provides an opportunity to strengthen poverty-environment mainstreaming.

Action Points

- Determine the extent to which the national legal framework is influenced by, and must conform to, obligations under international environmental law when assessing the quality and suitability of a country's environmental law framework to achieve policy objectives related to the environment and poverty
- In monist countries, where international environmental agreements are part of national law, directly analyze the relevant international environmental law instruments to obtain a holistic understanding of the legal framework in force at the national level.

International environmental law is law developed between two or more sovereign states with a view to develop environmental objectives and standards and to regulate state behaviour at the international level in environmentally related matters. International law-making relating to the environment has resulted in a large number of bilateral treaties and

¹⁵ For instance, U.S. states have the power to provide their citizens with rights additional to those contained in the federal constitution. State constitutions revised or amended from 1970 to the present have added environmental protection among their provisions, i.e. to elevate environmental protection as a fundamental value to a constitutional status above the states' legislative and regulatory norms and to protect the environment beyond issues of human health. (Source: *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, Background Paper by Dinah Shelton, presented at the UNEP/OHCHR High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Nairobi, 30 November – 1 December 2009.)

MEAs. Such law should be seen as establishing minimum standards, allowing countries to take further regulatory steps at the national level.

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹⁶ This signifies that parties have to take appropriate and adequate measures to comply with their obligations under the treaty. Such measures often include enactment of appropriate laws and regulations at the national, state/provincial or local/municipal levels; many of these treaties include obligations to report on relevant legislative measures. While many developing countries have made considerable efforts and progress to implement their obligations under international environmental law, an implementation gap exists. Numerous countries need to take additional steps to be in full compliance.¹⁷

There is a strong link between international and national environmental law in most countries, the strength of which depends on the extent to which a given country has entered into its international obligations.¹⁸ It is necessary to have an understanding of a country's relevant international obligations in assessing and developing its national priorities, policies and laws in a poverty-environment context.

It is particularly important to have a good understanding of international obligations in a monist legal system where international law is part of national law (see box 4.3). In such legal systems—which are common in Eastern Europe, the Caucasus and Central Asia—there is a risk that the international component does not receive the attention and exert the impact it should. International law runs the risk of being less accessible, less well known and less understood (for instance, not being translated into the national language and adequately disseminated). In a dualist legal system, where international law must be implemented through national legislation to become effective, the situation is different. In these countries, understanding the international obligations can serve as a background to better understand national legislation and to identify which norms/regulations stem from international law and therefore cannot be compromised at the national level.¹⁹

Box 4.3: Monism and Dualism

Countries can follow one of two legal traditions in making international law part of their national law. Within the *monist* legal tradition, national law and international law form a unity. In such a system, international treaties automatically become part of national law upon acceptance of the treaty and can be applied directly. In a *dualist* system, the

¹⁶ Article 26, the 1968 Vienna Convention on the Law of Treaties.

¹⁷ In this regard, for example, the United Nations Environment Programme coordinates and facilitates a capacity-building project aimed at supporting African, Caribbean and Pacific countries in their efforts to implement MEAs. For more information, see the project website: www.unep.org/AfricanCaribbeanPacific/MEAs.

¹⁸ Even in the absence of treaty obligations, states have certain obligations under customary international environmental law; these also exert an influence on national law. This discussion is beyond the scope of this primer, however.

¹⁹ This assumes that international law has been correctly transposed to national law. If not, a comparison between international and national law could reveal implementation gaps, i.e. situations where a party does not live up to its obligations under international law. In such cases, appropriate measures to remedy the situation should be taken.

difference between national and international law is emphasized. International law must be translated into national law through implementing legislation. Otherwise, the international obligations of the country will have no effect nationally.

However, even in monist countries, implementing legislation may be necessary for effective implementation of international obligations. For example, additional rules could be needed to clarify how a certain target should be met or how a right accorded to citizens could be invoked. Most countries in Eastern Europe, the Caucasus and Central Asia have a monist legal tradition, which means that the convention is directly applicable in the countries in this region that have ratified it. Yet, these countries have been criticized for not having enacted the necessary procedural legislation for the rights to become effective nationally.

The Major MEAs: An Opportunity for Poverty-Environment Mainstreaming

The MEAs listed in table 4.1 are major global MEAs. They have all entered into force and have a large number of signatory parties. Together, they exert a strong influence on national legislation.

The Rio MEAs—the United Nations Framework Convention on Climate Change and its Kyoto Protocol, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification—are among the most well known and widely ratified of all MEAs.²⁰ These agreements make reference to sustainable development and identify measures and obligations to promote it. In so doing, they balance developmental and environmental needs and concerns. The United Nations Convention to Combat Desertification is particularly explicit regarding the poverty-development-environment link. If effectively implemented, all three MEAs are important to environmental sustainability and have many benefits for the poor—including, for instance, by aiming to maintain a stable climate, maintain biodiversity and halt land degradation and rehabilitate drylands. The same is true for other treaties listed in table 4.1. Implementation of MEAs therefore constitutes an opportunity to strengthen poverty-environment mainstreaming through legislative and policy reform. It could also be an entry point for poverty-environment mainstreaming.

Table 4.1: Major Multilateral Environmental Agreements

Nature conservation	<ul style="list-style-type: none"> • Wetlands – Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 • Heritage – Convention for the Protection of World Cultural and Natural Heritage 1972 • Endangered species – Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 • Migratory species – Convention on the Conservation of Migratory
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²⁰ The Rio MEAs were drafted and negotiated in conjunction with the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.

	<p>Species of Wild Animals 1979</p> <ul style="list-style-type: none"> • Biological diversity – Convention on Biological Diversity 1992 • Deserts and Land degradations – United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994 • Plant genetic resources – International Treaty on Plant Genetic Resources for Food and Agriculture 2001
Hazardous materials	<ul style="list-style-type: none"> • Hazardous wastes – Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 • Dangerous chemicals – Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 • Biosafety – Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 5 June 1992, 2000 • Persistent organic pollutants – Stockholm Convention on Persistent Organic Pollutants 2001
Atmospheric emissions	<ul style="list-style-type: none"> • Ozone layer – Vienna Convention for the Protection of the Ozone Layer 1985 • Ozone depleting substances – Montreal Protocol on Substances that Deplete the Ozone Layer 1987 • Climate change – United Nations Framework Convention on Climate Change 1992 • Greenhouse gas emissions reductions – Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997
Marine environment	<ul style="list-style-type: none"> • Whaling – International Convention for the Regulation of Whaling 1946 • Sea dumping – Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 • UNCLOS – United Nations Convention on the Law of the Sea 1982 • Fish Stocks – Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995

Source: The list of these 19 major global MEAs is taken from *Compliance Mechanisms Under Selected Multilateral Environmental Agreements*, UNEP, 2007, p 27.

MEAs at the Regional Level

There are also relevant MEAs at the regional level whose implementation can support poverty-environment mainstreaming. Three of the most prominent such MEAs have been

developed under the auspices of the United Nations Economic Commission for Europe;²¹ they are the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, see also subsection 5.1 and chapter 6), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment.²²

4.5 The Convergence of Environmental Law and Sectoral Natural Resource Law

Key Message

- General environmental law and sectoral law for the use and management of natural resources generally have the same objective: to contribute to environmental sustainability and sustainable development.

During recent decades, sustainable development has become a widely accepted overarching policy objective.²³ This adoption has led many countries to governance and legal reform. A key objective of these reforms has been to ensure that constitutions, statutes and regulations promote sustainable development.

Among other things, these reforms have decreased or eliminated the gap between older environmental laws and sectoral natural resource laws. These latter typically emphasized natural resources as an economic asset to be exploited in the name of development while not taking into account broader environmental and sustainability dimensions. Older environmental laws, on the other hand, might have been excessively oriented towards protection and conservation without adequately recognizing the legitimate and necessary use of natural resources for development purposes.

The reforms brought about revision of existing laws and the introduction of new general environmental laws as well as of sectoral natural resource laws. Both types of law have grown in ambition and scope, and there has been an increasing convergence in their objectives.²⁴ As a result, the different laws blend resource extraction, development and

²¹ www.unece.org/env/welcome.html

²² Not yet in force (February 2010).

²³ It was the World Commission on Environment and Development (the Brundtland Commission) which coined the commonly cited definition of sustainable development as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs” in its 1987 report *Our Common Future* (Oxford University Press, 1987). Subsequently, sustainable development was accepted by the international community as a leading concept in environmental policy at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.

²⁴ The following excerpt from *Forest Law and Sustainable Development*, World Bank, 2007, is illustrative: “In recent years a series of influences primarily from outside the forest sector has had a substantial impact on the objectives of forestry and on the contents of forest law. In common with other sectors, forestry has been profoundly affected by the emergence of environmental awareness and by environmental legislation in the last generation. The greening of forest law has brought greater emphasis on nonfinancial values, including the protection of wilderness and esthetic values. As Cirelli and Schmithüsen note with respect to

environmental protection; and contribute to sustainable natural resource use, overall environmental sustainability and sustainable development. The dichotomy of the past has fundamentally been reduced or eliminated in most countries. There might, however, still be some countries in which disharmony and contradictions exist between general environmental law and sectoral natural resource law. In such cases, there may be considerable scope for further legal development and improvement to align the two sets of laws.

This increased harmony aside, conflicts of interest do continue to arise, with one set of stakeholders favouring exploitation and use of natural resources, and the other favouring protection and conservation interests. There will always be different views from various stakeholders regarding how resources and land should be used. This is a normal feature in any pluralistic society, and laws and regulations are there to guide the government and its agencies, companies, individuals, associations and judicial institutions in resolving such conflicts and making the necessary decisions to arrive at acceptable outcomes.

4.6 Legal Pluralism: The Relationship between State-Based Law and Customary Law

Key Messages

- Developing countries are generally characterized by legal pluralism. Customary law continues to be a strong source of law alongside formal state law. Understanding the interaction and relationship between state law and customary law, and the extent to which customary law influences how poor people order their lives and habits, is critical.
- Customary law can be effective, as it is based on long experience of what works and what does not. State law can recognize this history and, where appropriate, build on it.
- Customary law can limit the outreach, efficiency and effectiveness of state law.
- Customary law can cement discrimination of marginalized groups.

Developing countries are generally characterized by legal pluralism—a situation in which multiple legal systems such as customary law, religious law and formal state law coexist within the same geographic area.²⁵ Pluralism can be understood as a compromise between indigenous groups and ancient ways of life and new rules and institutions (see box 4.4). It is in contrast to the relatively more homogenous situation in developed countries. This subsection focuses primarily on the relation and interaction between

Western Europe: ‘Moving away from a perspective which focused on wood as a sustainable resource, forest laws are now addressing a wider range of private and public goods and values.’” (page 117)

²⁵ This background draws on *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (Leila Chirayath, Caroline Sage and Michael Woolcock), July 2005. The paper was prepared as a background paper for the *World Development Report 2006: Equity and Development*. It is available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf

customary law and state law. Laws of the colonial powers were introduced in the colonies and existed alongside customary law and continue to do so after independence. Customary law is rarely uniform within any given country, as it depends on ethnic diversity and the cultures and traditions of various groups. It is typically unwritten and transferred and developed in an oral tradition.

Box 4.4: Customary Law Has a Strong Position in Many Societies

The degree to which customary laws and practices are still prevalent within a society varies. Modern states are split between people and areas where modern law and institutions are enforced and accepted, and areas where customary law and tradition has a stronger influence. In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution; this is the case for up to 90 percent of the population in parts of Africa. In Sierra Leone, for example, approximately 85 percent of the population falls under the jurisdiction of customary law, defined under the country's constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone." Senegal is an example of a country where customary law provides alternatives to state law. Here, the French Civil Code was introduced in 1830. A study conducted in the early 1990s, some 160 years after the introduction of the code, revealed that only 10 percent of the Senegalese people felt that the "modern" legislation of civil law, which the code was perceived to be, was of concern to them.* Apparently 90 percent of the population relied on other sources of law in the areas covered by the code, a fact limiting the code's outreach and effectiveness.

* Customary Water Rights and Contemporary Water Legislation: Mapping Out the Interface, FAO Legal Papers No. 76, December 2008, p. 29.

Relation between State Law and Customary Law

State law can be very effective if it builds on or recognizes customary law and traditions, both in terms of outreach and implementation and in terms of achievement of intended objectives. Customary law can be very effective, for instance, with regard to the use and management of natural resources, as it is based on long experience of what works and what does not.

The relation between state law and customary law varies from one jurisdiction to the other. Some countries have tried to integrate traditional systems into wider legal and regulatory frameworks; others have not (see box 4.5). Customary law also continues to be in effect in countries that have not officially recognized its existence. Even in countries where customary systems are formally recognized, these systems generally continue to operate independently of the state system.

Box 4.5: State Law vis-à-vis Customary Law in Africa

As noted in box 4.4, the constitution of Sierra Leone recognizes customary law. In Kenya too, customary law is recognized in civil cases and can be applied in courts "if not repugnant to justice and morality or inconsistent with any written law."* Other countries in sub-Saharan Africa have made attempts to recognize customary law, including tenure

and customary marriage arrangements, within their state laws. Efforts to recognize customary land rights have been made in countries in other regions as well, including Latin America and South East Asia.

* Kenyan Judicature Act, Section 3(3).

It is important to be aware of the pluralistic legal environment when undertaking legal reform of state law. It is also important to have an understanding of the extent to which customary law influences how poor people order their lives and habits, particularly in the field in which legal reform is considered.

Environmental Law and Customary Law

Key Messages

- The nexus between customary law and state environmental law is important, particularly with regard to tenure and access to and use of natural resources.
- A lack of recognition of customary tenure and access rights can contribute to the marginalization of the poor.
- Customary law can complement state environmental law and contribute to enforcing it, but it can also work to defeat the intentions of state law.
- Undertaking assessments to understand the extent to which customary law and tradition is prevalent in the field of environmental law.
- Actively involving local communities in environmental decision-making and devolving and decentralizing management authority and decision-making power are measures that could be used to facilitate the coexistence of state environmental law and customary law.

Action Points

- Analyze the role of customary law and tradition for regulating land tenure and access and use of natural resources when seeking to promote the sustainable use and management of natural resources.
- Determine the degree to which formal state law recognizes customary law and traditions. Also determine the extent to which an opportunity exists for formal state law to further build on/recognize customary law and traditions as a means to strengthen implementation and enforcement and to promote sustainable use and management of natural resources.
- Determine the extent to which customary law and tradition can hinder effective implementation and enforcement of formal state law.
- Use the above information when assessing the formal legal framework's suitability to promote sustainable use and management of natural resources and to guide legislative reforms.

It is clear that customary law is important to regulate access to and use of renewable natural resources by members of the community in many developing countries and that the nexus with state law is of prime interest. Understanding customary law relating to the environment and its interaction with state environmental law can present a huge challenge.

State law and policies can change the degree of freedom with which customary rules operate. Lack of state law recognition of customary tenure and access rights facilitates neglect or abuse of these rights and may contribute to further marginalizing the poor. Recognition of these rights not only gives the poor enhanced security in tenure and access to resources but also constitutes grounds for compensation should the land or other resources be exploited for other (development) purposes, for instance mining, hydropower or infrastructure. It should therefore be considered to recognize customary tenure and use, preferably in a flexible way so as to cover different levels of rights (individual, family, group, village and community).

Customary law and practices can supplement state efforts to enforce state law in cases where these can be reconciled with state law objectives. There are examples of customary law and traditions that discourage wasteful and destructive practices and promote sustainability, based on long experience of what works and what does not.²⁶ The converse can also be true: there can be a level of unsustainable resource use and environmental degradation inherent in customary law and practices that may ultimately limit livelihood opportunities. In situations where customary law can complement state law, the responsibility to manage natural resources can be vested in local communities. This can be achieved by decentralization and devolution of management authority and decision-making power, both in areas where the state is present and in areas where the presence of the state and public authorities is weak.

Planners and legislators should be aware of situations where customary law and tradition may operate to defeat the prioritized and legitimate objectives of state law. Customary law should therefore be viewed through a critical lens. For instance, if statutory law has been passed with the intention of ensuring participation of all relevant stakeholders in decision-making related to the environment with a view to, among other things, enhancing the quality and legitimacy of decisions, customary law and tradition may discriminate against certain segments of the population—for example, women—and can effectively hinder or prohibit their participation. The rights conferred upon women under the state law may in such a case be ineffective or useless.

²⁶ The Addis Ababa Principles and Guidelines, which have been developed under the Convention on Biological Diversity (available at www.cbd.int/sustainable/addis-principles.html), states in its fifth operational guideline to practical principle 2: Protect and encourage customary use of biological resources that is sustainable, in accordance with traditional and cultural practices. Indeed, article 10 (c) of the Convention on Biological Diversity states: Each Contracting Party shall, as far as possible and as appropriate ... (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

Box 4.6: Checklist: Understanding the Nexus between State and Customary Law

- **What to do? Assessments:** If needed, assessments should be made to determine the degree to which customary law and tradition are prevalent in the field of state environmental law and if they could be effective in implementing that law. Increased understanding of customary law and traditions relating to access, use, management and conservation of natural resources and ecosystem services is the first step towards fruitful coexistence of varying normative frameworks within a context of legal pluralism. The risk that state law contributes to the marginalization of the poor—for instance, by not adequately recognizing customary tenure and access rights—should be minimized.
- **Involvement of stakeholders:** Participation of customary communities in the development of laws and policies should be increased. Canadian law, for example, requires consultation with aboriginal peoples in decision-making processes. They are not treated like other stakeholders, in that separate consultations are required with this group, as they have priority in the exploitation of resources.*
- **Decentralization:** Decentralization and devolution of management and decision-making authority over natural resources to local authorities and, further, to local communities should be considered. This action could contribute to bridging the gap between law and implementation and the gap between state law and customary law and practice.
- **Conflict resolution mechanisms:** In cases of conflict between customary law and state law—e.g. competing claims over access to resources and land—legitimate mechanisms and institutions to solve the disputes should be at hand.

* FAO Legal Paper No. 76, p 13.

Box 4.7: Kenya Water Act 2002 and Legal Pluralism

The Kenya Water Act of 2002 has been criticized by a Kenyan law scholar, Albert Mumma, for not adequately recognizing the existence of legal pluralism and for risking further marginalization of poor rural communities. Mumma argues that Kenya's rural poor have not been integrated into the private land tenure and other formal regimes upon which the water act is premised. Instead, they depend largely on land rights arising from customary practices. The act vests ownership of all water in the state. The right to use water requires a permit. Permits are generally issued to landowners, as section 34 of the act requires that a permit specify the particular portion of any land to which the permit is appurtenant. (There are three exceptions to the permit requirement, one of which relates to minor uses of water for domestic purposes.) This requirement leads Mumma to conclude the following:

This provision reinforces the predominance of landowners with regard to the use of water resources. It is premised on a land tenure system which prioritizes individual or corporate ownership of land over communal systems of access to land and land use which do not require documented title, such as exist in most parts of rural Kenya. The Act therefore marginalizes collectivities, such as poor rural community groups in the acquisition and exercise of the right to use water resources. This potentially could undermine the ability of poor rural communities in Kenya effectively to utilize water resources in economically productive activities such as irrigation and commercial livestock rearing. Given the pluralistic land tenure system prevailing in Kenya, this issue

will influence the effectiveness of the implementation of the new water law.

Source: Kenya's new water law: an analysis of the implications for the rural poor, paper presented by Albert Mumma at the International Workshop on African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, 26-28 January 2005, Johannesburg, South Africa.

5. Legal Empowerment of the Poor and Environmental Law

If the interests of the poor and vulnerable are not adequately considered in law, the gap between the rich and powerful and the poor and vulnerable tends to grow. Through legislation, the poor and vulnerable can be empowered to improve their lives and livelihoods. The Commission on the Legal Empowerment of the Poor concluded that legal empowerment is not about aid, but about helping poor people lift themselves out of poverty through policy and institutional reforms that expand their legal opportunities and protections.²⁷

Environmental law can contribute to the legal empowerment of the poor and thereby strengthen their position in society—for example, by opening up avenues for effective participation in environmental decision-making and management on matters that influence the poor and vulnerable. It can also serve to ensure the just and equitable distribution of limited resources. This perspective should therefore be taken into account when environmental laws are developed or reviewed. The approach of the Commission on the Legal Empowerment of the Poor, which deals with legal empowerment broadly and not specifically in the environmental sector, is briefly described in subsection 5.1. In addition, some specific examples are discussed that demonstrate where environmental law can make a contribution.

²⁷ The Commission on the Legal Empowerment of the Poor concluded its three-year mission with the release of its main report, *Making the Law Work for Everyone*, in June 2008 (*Making the Law Work for Everyone*, Volume I, Report of the Commission on Legal Empowerment of the Poor, 2008). The report, as well as further information about the commission and its work, can be found at www.undp.org/legalempowerment). The commission, which was hosted by the United Nations Development Programme in New York and brought together eminent policymakers and practitioners from around the world, was the first global initiative to focus specifically on the link between exclusion, poverty and law. The United Nations General Assembly took note of the report in a December 2008 resolution (A/RES/63/142), in which it recognized that empowerment of the poor is essential for the effective eradication of poverty and hunger. The General Assembly also reaffirmed that the rule of law at the national and international levels is essential for sustained economic growth, sustainable development and the eradication of poverty and hunger; and stressed the importance of sharing best national practices in the area of legal empowerment of the poor. It requested that the Secretary-General submit a report to the General Assembly at its 64th session on the legal empowerment of the poor, taking into account national experiences in this regard. It remains to be seen what next steps will be undertaken to follow up on the report at this level and what impacts it will have within the UN system and in the broader international community—and of course, at the national level, including for the poor.

5.1 Legal Empowerment of the Poor: The Four Pillars

Key Messages

- Generally, legal empowerment of the poor is a process aimed at strengthening the legal protections and opportunities of the poor in various sectors of society.
- The Commission on the Legal Empowerment of the Poor has developed a comprehensive framework for legal empowerment encompassing four pillars: access to justice and the rule of law, property rights, labour rights and business rights.

The legal empowerment of the poor has been described as a process of systemic change by which the poor and excluded become able to use the law, the legal system and legal services to protect and advance their rights and interests as citizens and economic actors.²⁸ By unlocking the civic and economic potential of the poor, this process aims to strengthen their legal protections and opportunities in various sectors of society.

The Commission on the Legal Empowerment of the Poor developed a comprehensive framework for legal empowerment encompassing four crucial “pillars”: access to justice and the rule of law, property rights, labour rights and business rights.²⁹ These four pillars “reinforce and rely on each other. In their convergence and through their synergy, legal empowerment can be achieved.”³⁰

The first pillar, **access to justice and the rule of law**, is fundamental, as it guarantees all other rights. Legal empowerment requires that the poor have access to a well-functioning justice system in order to protect their interests and enforce their rights. The second pillar, **property rights**, underscores the importance of a fully functional property system and of the ownership of property per se, alone or in association with others. “When the system fully functions, it becomes a vehicle for the inclusion of the poor in the formal economy, and a mechanism for their upward social mobility. When the entire system or a single component is dysfunctional, the poor are deprived of opportunity or discriminated against.”³¹ The third pillar concerns **labour rights**. The labour and human capital of the poor, which the commission calls “their greatest asset,” must be recognized in the same way as their property and physical assets in order to enhance protection and opportunities for poor workers. The fourth and last pillar deals with **business rights**: a set of rights related to the development of their own businesses should be applicable to the poor. These rights include access to basic financial services; the ability to enter into contracts and make deals; the ability to raise investment capital through shares, bonds or other

²⁸ Making the Law Work for Everyone, Report of the Commission on Legal Empowerment of the Poor, 2008, p 3.

²⁹ Making the Law Work for Everyone, Report of the Commission on Legal Empowerment of the Poor, 2008, p 5.

³⁰ Ibid, p 5.

³¹ Ibid, p 6.

means; and the ability to contain personal financial risk and to pass ownership from one generation to the next.

Various legal empowerment measures were identified by the commission under the respective pillars (see box 5.1).

Box 5.1: Legal Empowerment Measures under the Four Pillars Identified by the Commission on the Legal Empowerment of the Poor

1. Access to justice and rule of law pillar

- Ensure that everyone has the fundamental right to legal identity, and is registered at birth.
- Repeal or modify laws and regulations that are biased against the rights, interests and livelihoods of poor people.
- Facilitate the creation of state and civil society organizations and coalitions, including paralegals who work in the interest of the excluded.
- Establish a legitimate state monopoly on the means of coercion, through, for example, effective and impartial policing.
- Make the formal judicial system, land administration systems and relevant public institutions more accessible by recognizing and integrating customary and informal legal procedures with which the poor are already familiar.
- Encourage courts to give due consideration to the interests of the poor.
- Support mechanisms for alternative dispute resolution.
- Foster and institutionalize access to legal services so that the poor will know about laws and be able to take advantage of them.
- Support concrete measures for the legal empowerment of women, minorities, refugees and internally displaced persons, and indigenous peoples.

2. Property rights pillar

- Promote efficient governance of individual and collective property in order to integrate the informal economy into the formal economy and ensure it remains easily accessible to all citizens.
- Ensure that all property recognized in each nation is legally enforceable by law and that all owners have access to the same rights and standards.
- Create a functioning market for the exchange of assets that is accessible, transparent and accountable.
- Broaden the availability of property rights, including tenure security, through social and other public policies such as access to housing, low-interest loans and the distribution of state land.
- Promote an inclusive property rights system that will automatically recognize real and immovable property bought by men as the co-property of their wives or common-law partners.

3. Labour rights pillar

- Respect, promote and realize freedom of association so that the identity, voice and representation of the working poor can be strengthened in the social and political dialogue about reform and its design.
- Improve the quality of labour regulation and the functioning of labour market institutions, thereby creating synergy between the protection and productivity of the poor.
- Ensure effective enforcement of a minimum package of labour rights for workers and enterprises in the informal economy that upholds and goes beyond the Declaration of Fundamental Principles and Rights at Work.
- Increase access to employment opportunities in the growing and more inclusive market economy.
- Expand social protection for poor workers in the event of economic shocks and structural changes.
- Promote measures that guarantee access to medical care, health insurance and pensions.
- Ensure that legal empowerment drives gender equality, thus meeting the commitments under International Labour Organization standards that actively promote the elimination of discrimination and equality of opportunity for, and treatment of, women, who have emerged as a major force in poverty reduction in poor communities.

4. Business rights pillar

- Guarantee basic business rights including the right to vend, to have a workspace, and to have access to necessary infrastructure and services (shelter, electricity, water, sanitation).
- Strengthen effective economic governance that makes it easy and affordable to set up and operate a business, to access markets and to exit a business if necessary.
- Expand the definition of 'legal person' to include legal liability companies that allow owners to separate their business and personal assets, thus enabling prudent risk taking.
- Promote inclusive financial services that offer entrepreneurs in the developing world what many of their counterparts elsewhere take for granted—savings, credit, insurance, pensions and other tools for risk management.
- Expand access to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets and help them comply with regulations and requirements, and that support backward and forward linkages between larger and smaller firms.

5.2 How Environmental Law Can Contribute to the Legal Empowerment of the Poor

Key Messages

- Environmental law can make important contributions to the legal empowerment of the poor under all four pillars in the framework developed by the Commission on the Legal Empowerment of the Poor.
- In a poverty-environment context, it makes sense to make efforts to maximize this contribution in situations of legal review or reform.

Action Points

- Consider the perspective of the legal empowerment of the poor alongside environmental perspectives in legislative assessment and reform of environmental laws to determine if laws can be developed to further contribute to the legal empowerment of the poor (and therefore ultimately poverty to reduction).
- Use the four-pillar framework as a basis for analysis and as a tool in identifying legal empowerment measures.

Access to Justice and the Rule of Law

A legitimate and strong legal and institutional framework for environmental management is essential to the rule of law in the environmental sector. A key component is institutional capacity, including at the judiciary level, to ensure adequate compliance and enforcement of environmental law. Many developing countries (as well as developed countries) face challenges in this area. Reforms with a view to strengthen countries' capacity in this regard consequently make a contribution to advance the rule of law generally.

Recognition of customary law and tradition in state environmental law was discussed in subsection 4.5 on legal pluralism. Such recognition—for example, of tenure and access rights—enhances the security of those rights. Moreover, it is a legal empowerment measure that enables the integration of the customary and informal legal procedures with which the poor are already familiar into the formal legal system.

Access to justice in the environmental sector is often considered in conjunction with access to environmental information and public participation in environmental matters.³²

³² For instance, Principle 10 of the 1992 Rio Declaration, which concerns access and participation, states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their

Access to information is a prerequisite for effective public participation in environmental decision-making. It is also a means for making environmental governance transparent as well as a means for minimizing corruption, which tends to work for the benefit of the rich and to the detriment of the poor and marginalized. Effective **public participation** generally allows all stakeholders, including the poor, to bring their opinions, concerns and expertise to bear in the decision-making process. It improves the quality and legitimacy of decisions, and it enhances transparency and accountability in the process. Access to justice is necessary to permit affected parties to gain redress and to assist in the implementation and enforcement of laws related to the environment. Effective access to justice is also essential for enforcing the rights to access to information and public participation in case of violations or neglect of these rights.

Box 5.2: Selected Legal Instruments

The most detailed international legally binding instrument relating to these issues is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) developed under the United Nations Economic Commission for Europe. The convention can serve as a source of information for legislative assessment and reform for countries outside Europe as well.

The United Nations Environment Programme's Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters were adopted by governments in February 2010. These guidelines, which are further discussed in chapter 6 and are reprinted in annex X of this primer, aim to assist countries in further developing their national legislation in this area.* To grant access and participation rights to the poor, and to citizens in general, in environmental matters is a key legal empowerment measure in the environmental field.

*The guidelines were adopted by decision SS.XI/4 at the eleventh special session of the UNEP Governing Council/Global Ministerial Environment Forum, February 2010, held in Bali, Indonesia.

Property Rights

Under the property rights pillar, tenure issues are key. **Land tenure** is about security of ownership and access to land. Tenure to other natural resources such as water and biodiversity is also relevant and is intrinsically linked to land tenure.

Depending on cultural context and legal tradition, land tenure systems can vary greatly from jurisdiction to jurisdiction. In many developing countries, a mix of formal and informal tenure rights exists.³³ Rules of tenure define how property rights to land are to

communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

³³ Formal property rights may be regarded as those that are explicitly acknowledged by the state and that may be protected using legal means. Informal property rights are those that lack official recognition and protection.

be allocated within societies. They define how access is granted to rights to use, control and transfer land, as well as associated responsibilities and restraints. Put simply, land tenure systems determine who can use what resources for how long and under what conditions.³⁴

Secure land tenure is important for development. It has been shown that where efficient and equitable land tenure reform has been undertaken, development has been much faster with a much higher level of food security, health and welfare.³⁵ Land tenure is also closely linked to environmental conditions. For example, insecure land tenure is linked to poor land use, which in turn leads to environmental degradation. A sufficiently strong incentive for long-term sustainable land use does not exist if tenure is insecure.

Land law, general environmental laws and sectoral law related to natural resources could be reviewed, with secure tenure for the poor to these resources an objective of reform. In addition to the benefits mentioned above, such reform is in itself a legal empowerment measure. One important component of such review could be to consider formally recognizing traditional land use and community ownership. Recognition of traditional access and use of other resources such as wildlife, fisheries, forests, other biodiversity and water should also be considered.

While major interventions such as land reform and land redistribution programmes fall outside the purview of this primer, it should be underscored that processes of land reform provide an excellent opportunity to ensure that resulting legislation recognizes and supports tenure and access rights that contribute to better environmental management for poverty reduction.

Benefit sharing and protection of traditional knowledge related to biodiversity is closely linked to property rights. Thus, another opportunity to legally empower the poor arises when environmental law addresses these issues.

Labour Rights

Legislation relating to the use and handling of chemicals and other hazardous substances plays an important role in protecting human health and the environment. Indeed, the contribution of environmental law to legally empower the poor under the labour rights pillar primarily concerns protecting the work environment and workers from chemicals and other harmful substances. Many poor workers put in long hours for low earnings under harsh and dangerous conditions. The poor can benefit from the right to know principle with regard to chemicals and hazardous materials which is derived from Principle 10 of the Rio Declaration (“appropriate access to information concerning the environment that is held by public authorities including information on hazardous materials”).

³⁴ *Land Tenure and Rural Development*, FAO Land Tenure Studies 3, 2002, p 7.

³⁵ *Ibid*, p 5.

All citizens, including poor farmers and workers, have the right to know the risks associated with the items they handle on a daily basis so they can assess the risk and decide if they are willing to take this risk when producing, handling, buying, using, distributing or disposing of chemicals and hazardous materials. Workers and the public at large have the right to know about chemicals in the products they use and the particular ways that dangerous chemical substances and products have to be handled. To promote such awareness, the law can require “danger labelling”—specific precautions relating to the packaging, storage, sale and handling of these materials. The law can also require substitution for chemicals/products less hazardous to human health and to the environment in cases where alternatives exist. Further, the law should allocate clear responsibility and authority to government agencies to enforce such rules.

Business Rights

Environmentally related laws can also make a contribution to the business rights pillar. Business opportunities could, for example, arise out of sustainable environmental management, such as in the tourism sector. Local communities can be involved in environmental management and benefit from it, if appropriate, also by running businesses. Such business opportunities should be officially recognized, legitimate and facilitated under the relevant legal frameworks.

The emerging field of **payment for ecosystem services** can provide business opportunities for the poor.³⁶ Such schemes offer economic incentives to foster efficient and sustainable use of ecosystem services. They are not primarily designed to reduce poverty, but they can be designed in such a way as to enable the poor to earn money by restoring and conserving ecosystems—for instance, maintaining watershed services and capturing carbon by planting trees. The establishment of such schemes would of course require recognition of those participating/delivering/selling in/to it, including secure land tenure as discussed above, as well as access to markets and so on.

There are several other examples at both large and small scales where business and job opportunities can be created as a consequence of environmental regulation. For example, **waste treatment and waste recycling laws** may give rise to small businesses in this area. **Energy and climate law** can similarly give rise to business opportunities, for example, by requiring the production of biofuels (where small-scale farming can be an option) and through Clean Development Mechanism projects (e.g. carbon sinks, afforestation and reforestation). A Clean Development Mechanism law could be designed with business opportunities for the poor in mind.

³⁶ For an introduction to this concept, see *Payment for Ecosystem Services: Getting Started, A Primer*, Forest Trend, The Katoomba Group and United Nations Environment Programme, 2008.

II. LAW FOR SUSTAINABLE USE AND MANAGEMENT OF NATURAL RESOURCES

6. Cross-Cutting Legal Components for Sustainable Management and Use of Natural Resources

Key Message

- There are some key generic legislative building blocks that cut across sectors with regard to the sustainable use and management of natural resources that should form part of the legal framework(s) governing the respective resources.

Action Points

- Use the proposed building blocks to assess relevant laws regulating the management and use of natural resources. Such an analysis may help to determine if further legislative development is necessary and if so, in which specific area(s).
- Undertake further studies to determine if legislative reform is necessary to enhance the laws' contribution to sustainable use and management.
- Use the UNEP guidelines (included as annex X) as a basis for assessing the legal framework with regard to access to justice and public participation involving the environment. The guidelines are also an important source to draw on if legislative reform and development are needed.

Common features exist in good practice legislation for the sustainable use and management of natural resources. This chapter looks at these common features, identifying them as the key components that should typically form part of the legal framework governing most, if not all, natural resources that should be managed and used sustainably.

The components can be found in different laws and at different levels in the norm hierarchy. For instance, in some countries, key sustainability principles concerning natural resources may be enshrined in the constitution; in others, such principles are contained in the environmental framework law and/or sectoral laws (e.g. water act; biodiversity act). Some countries may have a special environmental impact assessment (EIA) law, while others have incorporated EIA requirements in framework and/or sectoral laws. But regardless of where these components are found in the legal framework, they should be relevant to and applicable in the management and use of all natural resources.

The key components can serve as markers to look for when assessing a country's legal framework and as indicators of its suitability to promote environmental sustainability and sustainable development in various sectors. They can, for example, be used to analyze the environmental legal framework in the preliminary assessment phase of the programmatic approach to poverty-environment mainstreaming.

6.1 Key Components

Manifestation in Law of Key Sustainability Principles

Some key principles should be manifested in law (constitution or statute) to guide interpretation and implementation of laws and regulations relating to natural resource management. These principles include sustainable development, the precautionary principle, the principle of avoided harm/preventive action, the principle of an ecosystem approach and the polluter pays principle.

Clarity in the Institutional Set-up and Inter-Institutional Coordination

The law should clarify the mandate and functions of all public authorities directly involved in the management of the natural resource in question. Their mandates should be specified, and cooperation and coordination between them should be clarified. The law should also clarify coordination with other government agencies and public bodies.

Adequate Planning

Sustainable use and management of natural resources require adequate planning. The law should, among other things, stipulate which national, regional or local plans are required; which procedures should be used; which topics from among a wide range of environmental, social and economic issues should be covered by the planning process; and at which intervals planning should occur. The law should also make clear which institutions are responsible for planning. Further, the legal effect of plans should be clear. The planning process should be transparent and open to public participation. A prerequisite for effective planning is that sufficient knowledge about the status of the resource be at hand. If not, it will hardly be possible to make adequate management decisions. Planning should be based on the precautionary principle.

Control of Resource Use through Permits, Licenses and Concessions

Key tools in the control of natural resource use are permits, licenses and concessions. Without control of resource use, it is difficult to manage the resource sustainably. A permit, license or concession grants the right to use water, to hunt, to fish and to harvest forest products. The authority granting such a right can specify the conditions with which the right's holder must comply. The law should identify the uses that require a permit, identify the permitting authority and its powers, specify the application requirements, describe the application process and so on.

Public Participation and Access to Information and Access to Justice in Environmental Matters

Access to information, public participation in decision-making and access to justice in environmental matters are important for many reasons and have multiple benefits. These factors contribute to transparency, good governance and accountability. They enhance the quality and legitimacy of decisions and contribute to the legal empowerment of the poor. Public participation should be ensured at the central as well as at the regional and local levels and should involve all relevant stakeholders, including rural communities. Public participation requires access to relevant information in order to be effective. The public should also have access to justice in cases where a request for information has been wrongfully denied or rights to public participation neglected. The public should be able to challenge acts and omissions by private persons or public authorities that may contravene laws relating to the environment.

The principles of access to information, public participation and access to justice in environmental matters gained universal support at the 1992 UN Conference on Environment and Development and are enshrined in Rio Principle 10. Since then, the principles have increasingly been transformed into law at the national and international levels. Nonetheless, many countries still lack adequate legislation in this regard.

Decentralization and Devolution of Management and Decision-Making Authority

Decentralization and devolution bring management, decision-making and accountability closer to both the natural resources and the people who depend on and interact with them. The likelihood for better-informed and legitimate management decisions is increased, and effective public participation is made easier. Authority can also be devolved to local communities. The involvement of local people and the creation of a significant stake in the management of natural resources can significantly help achieve sustainable management. Without such involvement, any efforts of officials to protect natural resources and ensure sustainable management can be futile. Decentralization and devolution to local communities include taking into account local traditions and customary law and providing for equitable distribution of benefits to communities. To have a stake in management is an incentive for local people to comply with the law and to promote compliance by others.

Box 6.1: Checklist of Key Cross-Cutting Legal Components

- Manifestation in law of key sustainability principles
- Clarity in the institutional set-up and inter-institutional coordination
- Adequate planning
- Control of resource use through permits, licenses and concessions
- Public participation and access to information and access to justice in environmental matters
- Decentralization and devolution of management and decision-making authority

6.2 Tools

Environmental Impact Assessment

An EIA is a procedure carried out to assess the potential environmental impact of proposed development activities and to identify proposals for the prevention or reduction of negative impacts from such activities. Impact assessment is an integral part of the preventive approach to environmental protection and thus to sustainable development. Legislation should define when an EIA is required; e.g. through identification of activities with a significant environmental impact. Activities to be assessed may include activities/developments that directly use natural resources, such as logging and installations for hydroelectric power production; and activities/developments whose link to the use and status of a natural resource is indirect, such as industrial development and manufacturing activities whose effluents affect water quality and fisheries. An EIA should be an integral part of the process for granting (or denying) permits, licenses and concessions for such activities. Based on the EIA and other relevant background material, the permitting/licensing authority can grant (or dismiss) applications for permits/licenses/concessions and decide which precautionary measures and conditions should apply with regard to the activity. This determination should be supplemented by the right of the appropriate authorities to require an EIA in other cases where it is deemed necessary. Legislation should establish the procedures for developing the EIA, including participation by stakeholders and the public (including local communities and the poor), and define the contents of the environmental impact statement.

An EIA should be carried out at the earliest possible stage of the planning, design and decision-making process for the proposed development activity.

Given the poor's reliance on natural resources and ecosystem services, EIAs should contain an assessment of the impacts of proposed development activities on the poor and their livelihoods. Such a social impact assessment should include the potential impacts on recognized customary rights of access to and use of natural resources.

Strategic Environmental Assessment

Where an EIA is a process for assessing the environmental impacts of specific projects and development activities, a strategic environmental assessment (SEA) is a system of incorporating environmental considerations into policies, plans and programmes while analyzing questions regarding the reasons for, locations of and forms of development. An SEA has evolved largely as an extension of a project-level EIA. It enhances the prospects for achieving sustainable natural resource use and environmental sustainability. In fact, the potential of environmental gain is high given the levels within the decision-making hierarchy at which it occurs. National legislation should therefore require that an SEA be an integral part of the development of policies, plans and programmes that influence the use and management of natural resources and the broader environment. As with an EIA,

legislation should, among other things, specify the contents of the SEA, including an element of social impact assessment, and the procedure for developing it; it should also specify opportunities for public participation.

Resource Conservation and Protection

An essential component of laws for sustainable use and management of natural resources is provisions allowing for protection of the resource. Such provisions include the possibility to limit or prohibit resource use/exploitations under certain conditions or during certain times of the year. They could also entail the possibility of establishing protecting areas where limited or no resource use is allowed. Another option is to restrict or prohibit the hunting or use of certain species.

7. Sectoral Law for Sustainable Use and Management of Natural Resources: A Closer Look at Some Sectors

Key Message

- The items covered below are central to the legislation contributing to the sustainable use and management of the respective natural resource. Together with the key building blocks highlighted in the previous chapter, they give a more complete picture of the law for sustainable use and management in the sectors discussed.

Action Points

- The information provided here should be used in conducting in-depth reviews aimed at assessing the strengths and weaknesses of existing sectoral natural resource laws to support sustainable use and management of the respective resource. These assessments should identify areas (1) where there is room for further legislative development and (2) where more detailed assessment is needed to understand the suitability of the legal framework to sustainability objectives.
- The publications cited referenced in this section should be referred to by legal professionals in conducting detailed analyses of laws and in drafting proposals for legislative reforms.

This chapter highlights sector-specific issues that need to be addressed in laws pertaining to the sustainable use and management of natural resources. It also puts some of the building blocks from chapter 6 in a sector-specific context. The two chapters together thus provide a more complete understanding of the laws pertaining to the sustainable use and management of the natural resources described here.

The information provided in this chapter could be used when conducting in-depth reviews of sectoral natural resource law—for example, when assessing the legal framework’s suitability to support policy objectives related to sustainable use and management of natural resources. Such reviews should identify the strengths and weaknesses of existing laws in some detail. They can also be used in developing and costing policy measures, as described in chapter 2.

The text identifies and summarizes the most important principles and legal building blocks in the respective sectors. It does not attempt to provide the in-depth guidance needed by legal professionals in conducting detailed analyses of laws and drafting proposals for legislative reforms. For that purpose, professionals should refer to the publications cited throughout the chapter, notably those by the various UN agencies and the World Bank.

7.1 Freshwater

Given its multidisciplinary nature, provisions guiding the use, management, development and protection of water can be found in a number of laws and regulations.³⁷ It can be difficult to achieve the holistic and integrated water management that is key to the resource's sustainability if provisions are scattered. It is therefore preferable to treat all aspects of water use and protection in a single piece of legislation to the extent possible. The greater the integration of law, the greater the facilitation of holistic management. In this way, policymakers, water managers and other stakeholders have one legal instrument on which they can rely for guidance.

Major Trends

In recent years, there have been some clear trends in national water legislation. They include the incorporation of sustainable development into water legislation, an increased emphasis on conservation of water resources, increased attention to integrated water resources management (IWRM) and enhanced public ownership of water. This last reflects an aim of ensuring that responsibility for sustainable and equitable management of water resources rests with governments.³⁸ Of these trends, the latter two are particularly noteworthy and require further explication.

Integrated water resources management. IWRM aims to ensure the coordinated development and management of water, land and related resources in order to maximize economic and social welfare without compromising the sustainability of vital environmental systems.³⁹ IWRM maintains that the natural hydrological cycle should be the basis for management—i.e. that all water should be treated as a single environmental resource and that the catchments/river basins are the appropriate unit for management. IWRM also implies that water should be allocated within a coherent public policy framework and that ecological limits to water use should be recognized and the environment treated as a user in its own right.

³⁷ This subsection draws on *Regulatory Frameworks for Water Resources Management*; Law, Justice, and Development Series, World Bank, 2006 and the *UNEP Guidebook for Policy and Legislative Development on Conservation and Sustainable Use of Freshwater Resources*, UNEP, 2005.

³⁸ *Guidebook for Policy and Legislative Development on Conservation and Sustainable Use of Freshwater Resources*, UNEP, 2005, p 7-8 and *Regulatory Frameworks for Water Resources Management, A Comparative Study*, World Bank, 2006.

³⁹ Global Water Partnership, Technical Advisory Committee, *Integrated Water Resources Management*, TAC Background Papers, No. 4.

- **Ownership of water resources.** The current thinking is that water resources, both surface and groundwater, should be owned, controlled, regulated, and allocated by the state. This is based on the public property status of water and the superior user right of the government. It is also based on vesting in the state a public trust over water on behalf of the entire population, whereby the government becomes the public custodian over water resources.⁴⁰

Key Principles

The water law could contain some key principles to guide interpretation and implementation, such as a reference to sustainable development. Three other well-known precepts to include are the precautionary approach, the principle of avoided harm and the polluter pays principle.

Legislation could also stipulate how water use should be prioritized in case of competing uses. Some jurisdictions have explicitly recognized the environment as a water user, for example, by introducing the concept of a “reserve,” signifying that a certain amount of water should always be available for the environment in order to maintain ecosystem functions. This signifies an expansion in protection to include water ecosystems and not only water per se.

Planning

Sustainable and efficient water use requires good planning. Water legislation could therefore stipulate which type of plans authorities need to develop, the geographical unit for planning and the issues that should be addressed (e.g. goals, classification of waters, measures to prevent water pollution and other water source quality deterioration, responses to water emergencies, management of transboundary waters). Legislation could also outline the process for planning, including possibilities for public participation.

Regulation of Water Use

Without control over water quantity and quality, water cannot be managed properly and its sustainability will be at risk. In most statutes, there is a requirement for a permit or license to be issued before a person can use water or construct water infrastructure/waterworks. These permits and licenses grant a water right. By exempting traditional and domestic uses from the permit requirement, the legislation could acknowledge such user rights within the formal legal system, which is an important pro-poor measure. Although the details differ widely among permit systems, they generally contain provisions on the following topics:⁴¹

- The uses requiring a permit (exempting traditional/communal use)

⁴⁰ *Regulatory Frameworks for Water Resources Management*; Law, Justice, and Development Series, World Bank, 2006, p 143–144.

⁴¹ *Guidebook for Policy and Legislative Development on Conservation and Sustainable Use of Freshwater Resources*, UNEP, 2005, p 44.

- The permitting authority and its powers
- application requirements
- The application review process
- The rights and obligations of a permit holder
- The permit's duration and conditions for renewal
- The legal consequences for failure to obtain a permit and for violation of a permit's requirements
- The process for obtaining review of a permitting authority's decisions

Protection of Water Resources and Ecosystems

To achieve sustainable water use and sustainable delivery of freshwater ecosystem services, it is important to protect water resources. Many of the issues mentioned above—including the key principles, application of IWRM and a permit system—contribute to this. More specifically, protection includes the following, each of which should be addressed in the water law:

- Prevention and mitigation of point source pollution and diffuse pollution
- Regulation of discharge of wastewater and other waste
- Regulation of land use
- Adoption of water quality standards and of detailed procedures for their enforcement⁴²

Transboundary Water

Both surface water and aquifers are to a large extent transboundary. About 40 percent of the world's population lives in transboundary river basins; these cover nearly 50 percent of the Earth's total land surface and account for approximately 60 percent of global freshwater flow. There is thus a strong impetus for international cooperation to arrive at a common understanding between states of how transboundary waters should be used and managed. Yet transboundary cooperation and governance over water remains weak. Notably, 158 of the world's 263 international river basins lack any type of cooperative framework. Of those with such frameworks, most continue to lack the tools necessary to

⁴² *Regulatory Frameworks for Water Resources Management, A Comparative Study*, World Bank, 2006, p 149.

promote long-term integrated transboundary freshwater governance.⁴³ Cooperation over water resources tends to be politically sensitive. Nevertheless, the relevant water management authority could, if appropriate, be authorized by law to deal with the transboundary dimension of water use and management. In cases where international agreements over water exist, legislation should mandate relevant authorities to implement the international obligations.

Box 7.1: Fifteen Lessons Learned on Legislative Approaches to Freshwater Management, Use and Protection

1. Manage freshwater for sustainable development. Sustainable development entails taking care in managing freshwater resources to ensure that efforts to raise living standards do not compromise the sustainability of those resources and associated ecosystems over time. Economic development that degrades the resource base on which it directly or indirectly depends will be short-term development only, of benefit at most to present generations, but not to those in the future. The biosphere is remarkably resilient, but there are limits on its ability to absorb the effects of human activities. This is as true of freshwater systems as of other elements of the biosphere. Degradation of freshwater will threaten the livelihoods of many, but especially the poor.

2. Manage freshwater in a holistic manner: an ecosystem approach. Water legislation should provide for a holistic (i.e. catchment or drainage basin as the basis for management; inclusion of both land and water resources) ecosystem approach to the management of water, sanitation and human settlements to ensure that efforts to raise standards of living and protect the environment will be sustainable over time.

3. Ideally, treat all matters concerning freshwater in a single, integrated water law. Sustainable development and holistic water management require an integrated approach to the stewardship of freshwater resources. Following such an approach in a coherent manner may be difficult if relevant laws are contained in scattered statutes.

4. Conserve water through rational urban development policies. To meet demands for water that must be transported over long distances, as when large population areas are located in arid areas, usually results in losses of water through evaporation and seepage. It also often works to the serious detriment of ecosystems. This sort of situation should be anticipated and avoided whenever possible.

5. Make conservation and protection of freshwater resources a theme in water legislation. Statutory requirements concerning conservation and protection of freshwater resources should not be confined to one section or chapter of water legislations. Preservation and sustainable use should be addressed pervasively, so that gains in one sector are not cancelled out by losses in another.

6. Build in ways to collaborate with stakeholders. A participatory approach should be used in the management of freshwater resources. Drafters should build into their codes opportunities for meaningful collaboration between water planners and managers, and interested public and private sector stakeholders. This brings information to water managers and fosters a sense of legitimacy in planning and management processes and

⁴³Atlas of International Freshwater Agreements, UNEP, 2002; International Water Governance: Conservation of Freshwater Ecosystems Vol. 1 International Agreements Compilation and Analysis, IUCN Environmental Policy and Law Paper No. 55, 2004.

ownership of the result they produce.

7. Recognize that integration is an ongoing process. As circumstances change, water managers will have to develop new responses. To ensure they can respond appropriately as their understanding improves, water planning legislation should require monitoring and adaptive management through periodic reviews. Water use legislation should build into the permitting process regular reporting requirements and regular review and renewal periods. Water permitting authorities should have the power to review a permitted use at any time if either circumstances or understanding changes substantially.

8. Include impact assessment in project approval processes. To ensure that the possible impacts of proposed water projects are assessed prior to their approval and implementation, water legislation should either (1) contain a separate provision requiring those proposing the project to conduct an assessment of their possible impacts, or (2) if there is a separate and generally applicable law on impact assessment, require that the proponent of the project activity conduct an assessment in accordance with that law. The legislation could then provide that the results of the assessment would be taken into account in the approval process.

9. Do not treat groundwater and surface water separately. While there are differences between surface and groundwater that make some provisions applicable only to one water body and not the other, water codes should treat surface and groundwater as parts of a unified planning and permit system. This is especially important for aquifers that are hydrologically connected with surface watercourses.

10. Include all but *de minimis* domestic uses or customary uses in a permit system. Ultimately, truly integrated water resources planning requires the inclusion of the broadest range of water uses possible within the planning and permit system. Customary or *de minimis* uses may appropriately be exempted from the planning and permit system as long as the volume and types of use remain *de minimis*. But where the impacts are or are likely to be significant, the legislature needs to bring such uses into the planning and permit system.

11. Do not separate water quantity planning from water quality planning. Planning for water quality and water quantity should be done by the same ministry or agency. Some jurisdictions assign water quantity planning to agencies that specialize in the construction of waterworks, and water quality planning to agencies that specialize in environmental enforcement. Such a division arbitrarily separates water quantity and quality, and can create unnecessary duplication of efforts or regulatory inefficiencies. In addition, it reinforces tendencies to relegate water quality to a secondary status, considered almost as an afterthought to proposals for large waterworks projects that otherwise build up their own momentum.

12. Do not fragment planning, permitting and enforcement authority. Integration of these powers can best assure the most efficient use of regulatory resources, the easiest sharing of information developed from the different regulatory activities, and the minimization of inter-agency rivalries.

13. Keep public water regulators from being public water suppliers. Water planning, permitting and enforcement ministries should not also be water suppliers. Where a public agency is both regulating water uses and is itself a regulated user, potential conflicts of interest abound. To ensure that proposed waterworks projects are consistent with water plans and meet economic, environmental, and social criteria, there needs to

be an “arm’s-length” relationship between the regulating ministry and the regulated public water supply agency.

14. Water planners should not confine themselves to conventional “forecasting” tools when thinking about the future. Too often, statutes mandate that planners make traditional forecasts of future demand. Such forecasts may mislead decision-makers. Legislators should give planners the freedom to choose from a variety of planning tools.

15. Consider efficiency improvements. Consideration of efficient water use should be given greater prominence in water planning and permitting. Water planners and managers should identify the proper mix of incentives, subsidies, public waterworks, mandates or market forces that are most appropriate for their country to increase efficiency.

Source: UNEP *Guidebook for Policy and Legislative Development on Conservation and Sustainable Use of Freshwater Resources*, UNEP, 2005, pp. 89–92.

7.2 Forests

This subsection summarizes some key issues that are essential to promote sustainable use and management of forests and its resources; for more information, see the World Bank publication *Forest Law and Sustainable Development*, which provides an in-depth description of a wide range of issues that modern forest laws could/should address.⁴⁴

Forest Tenure

As with land tenure in general, clear, secure and long-term tenure inducement is an incentive for responsible and sustainable use of forests. The fundamental role of clear and secure tenure thus cannot be overestimated and should be the objective in all jurisdictions. Issues involving forest tenure can, however, be quite complex.

Forest tenure can be grouped into three categories of ownership: (1) state, (2) private and (3) customary/community. An issue that deserves particular attention in many developing countries is the relationship between customary/community tenure and the tenure regime under the national legal framework. Increased attention has been devoted to this issue in recent years with a view to recognizing and strengthening the rights of local communities over the forest areas on which they depend. However, in most countries, the interaction between customary and state law remains highly problematic. The number of countries where customary tenure is well established within the national legal framework is limited. As a consequence, many countries have dual and overlapping systems of customary and statutory tenure, which promotes disputes between competing claimants to the same land. This in turn undermines the security of both customary and statutory tenure, and ultimately the goal of sustainable management and use of forests.

⁴⁴ This section draws upon p 29 – 38 in *Forest Law and Sustainable Development*, World Bank, 2007; Law, Justice and Development Series

Specifying Objectives

It is important to establish overall objectives for forest management—e.g. sustainable use and sustainable use and development. This specification is a way to acknowledge international norms and to direct the relevant authorities and other stakeholders down the desirable path. See, for instance, the examples from national legislation in Mozambique, Peru and Indonesia.

Examples of National Legislation

Mozambique, Forest and Wildlife Act (1999)

Preamble. The economic, social, cultural and scientific importance of forest and wildlife resources to the Mozambican society justifies the establishment of adequate legislation capable of promoting sustainable utilization of these resources. The legislation should also encouraging initiatives that will guarantee the protection and conservation of forest and wildlife resources for improvement of the Mozambican citizens' quality of life.

Article 2 Scope. The present law establishes the basic principles and norms for the protection, conservation and sustainable utilization of forest and wildlife resources under an integrated management framework, for the economic and social development of the country.

Article 4 Objectives. The objectives to be followed in terms of this law are the protection, conservation, development and rational utilization of forest and wildlife resources for the economic, social and ecological benefit of present and future generations of Mozambicans.

Peru, Ley Forestal y de Fauna Silvestre [translate]

Artículo 1 – Objeto. La presente Ley tiene por objeto normar, regular y supervisar **el uso sostenible y la conservación de los recursos forestales y de fauna silvestre del país**, compatibilizando su aprovechamiento con la valorización progresiva de los servicios ambientales del bosque, en armonía con el interés social, económico y ambiental de la Nación, de acuerdo con lo establecido en los artículos 66° y 67° de la Constitución Política del Perú, en el Decreto Legislativo N° 613, Código del Medio Ambiente y los Recursos Naturales, en la Ley N° 26821, Ley Orgánica para el Aprovechamiento Sostenible de los Recursos Naturales y los Convenios Internacionales vigentes para el Estado Peruano.

Indonesia, The Act on Forestry Affairs

Principles and Purposes, Article 2. Forestry undertakings are based on the principles of benefits and sustainability, democracy, justice, togetherness, transparency and integratedness.

Article 3. Forestry undertakings are intended for the maximum just and sustainable prosperity of the people by means of...optimizing various forest functions, encompassing the functions of conservation, protection and production in order to acquire environmental, social, cultural and economic benefits in a balanced and sustainable manner...

Note: Legislation and translations available at <http://faolex.fao.org/faolex/>.

Regulation of Forest Management and Planning

Regulation of forest management involves a wide array of issues, and these vary depending on whether the forests are public or private. An important part of planning is to classify forests into different categories of use and protection, e.g. through establishing plantations, wildlife reserves, ecotourism areas, research units, etc. Many recent laws have strengthened public participation in forest planning and management by providing for access to information and documents, public notice at various stages, opportunities for the public to comment and holding of public meetings. Another trend has been to move towards more transparent and responsible allocation, pricing and monitoring of forest concessions and licenses. All of these measures contribute to sustainable management of forests through having improved planning, participation, decision-making and accountability.

Examples of the legal issues related to planning are specifying the main objective (see above), power to classify forests, geographic scale of planning, temporal scope of planning, plan content, process of planning and legal effect of the plan. While all of these are important, a particularly key component is the planning process.

A planning process that supports sustainable use and management requires much more than consideration of timber yields. The law may require economic and social analyses. It may give special weight to the impact on neighbouring populations, especially traditional inhabitants. Increasingly, laws call for environmental values to be recognized in management plans, or they require a separate EIA either as precedent for the plan or before decision pursuant to the plan.⁴⁵ The law may also require that the links between forests, soil and water conservation be addressed as well as biodiversity issues and the links to climate change (depending on scale of plan).

The planning process sets the stage for future management and is the point at which fundamental management decisions are made. It is therefore essential to bring in expertise, knowledge and views from interests outside the forest sector at this stage. The law may therefore require various forms of public participation throughout the process.

Controlling Use through Licenses and Concessions

Another area where the law should play an important role is to define under which conditions and to whom forest concessions and licenses can be granted to harvest the resources in public forests. For private forests, the law can define general forest planning, management and use obligations (in case they are not similar for public and private forests) and specify notification or permit procedures that have to be complied with before timber harvests (or other major management measures). Such procedures, which can involve EIA requirements, allow the relevant authorities to ensure compliance with substantive requirements.

⁴⁵ World Bank p 45.

Decentralization and Devolution

Two relatively recent trends in forest governance are decentralization and devolution. **Decentralization** occurs when the power of a central government is granted to a local government/public authority. **Devolution** involves enhancing the rights of local private entities. In the forest sector, these trends represent efforts to move forest management and decision-making closer to the forests themselves and to the people who depend on them and interact with them regularly.⁴⁶ They “stem from a common conviction that almost everywhere forest administration and ownership have suffered from over-centralization. The result of this is that forestry authorities often lack the capacity to implement laws and programs effectively, and local actors feel disengaged from, if not antagonistic to, forest governance structures.”⁴⁷ The involvement of local actors is important for effective implementation and enforcement of the law.

By bringing decision-making closer to the people, decentralization enhances the possibility for effective public participation. Another argument for decentralization is that land-use regulation is typically a local responsibility.⁴⁸ The basic arguments for devolution can vary. One is a conviction that local management leads to more effective conservation, protection and afforestation. Another is that it is intended to help enhance local livelihoods. Sustainable involvement by local people in forest management requires that they see clear benefits to their livelihoods from the involvement, otherwise they have little incentive to participate. All forest areas, however, are not suitable to a community-based management approach; this is case, , for example, with particularly sensitive ecosystems and habitats.

Box 7.2: Reducing Emissions from Deforestation and Forest Degradation (REDD)

REDD projects aim to create an incentive for developing countries to protect, better manage and wisely use their forest resources, thus contributing to the global fight against climate change. It is based on the effort to create a financial value for the carbon stored in standing forests. REDD initiatives can also lead to other benefits, such as conservation of biodiversity and watersheds and other ecosystem services and increased livelihood opportunities.

The design and delivery of REDD projects raises a wide range of legal issues, including the following:

- How to legally define requirements for monitoring, reporting and verifying carbon emissions
- Ensuring effective functioning of the market where the generated emissions reduction credits will be bought and sold
- The principles and rules guiding the sharing of benefits (revenues) among local communities, intermediaries (if any) and the government

So far, the legal framework necessary to effectively support successful REDD initiatives

⁴⁶ World Bank p 83.

⁴⁷ Ibid, p 83.

⁴⁸ World Bank, p 86

has not been at the centre of attention. Various activities are under way in this regard, however, within the UN-REDD Programme.* Also, the IUCN recently published *Legal Frameworks for REDD, Design and Implementation at the National Level* in which key substantive guiding principles are summarized.**

*The UN-REDD Programme is a cooperative effort of the Food and Agriculture Organization of the United Nations, the United Nations Development Programme and the United Nations Environment Programme. Through its nine initial country programme activities in Africa, Asia and Latin America, the programme supports the capacity of national governments to prepare and implement national REDD strategies with the active involvement of all stakeholders, including indigenous peoples and other forest-dependent communities. For further information, see www.un-redd.org.

** Costenbader, John (Ed.) 2009. *Legal Frameworks for REDD. Design and Implementation at the National Level*. IUCN, Gland, Switzerland. Available at <http://data.iucn.org/dbtw-wpd/edocs/EPLP-077.pdf>.

7.3 Land and Land-Use Planning

How land is used is fundamental to all sustainable natural resource management, including to aquatic and marine resources. Almost all human activities take place on land. Consequently, land-use law is an overarching concept and encompasses the full range of laws and regulations that influence or affect the development and conservation of the land. It is thus not possible to identify a single land-use act that would cover all land uses influencing sustainability.

Relevant legislation includes, for example, land-use planning acts, forestry laws, wildlife laws, mining laws, infrastructure development laws (addressing airports, harbours, roads, railways, hydropower, etc.), laws regulating agriculture and livestock rearing, laws regulating dumping and disposal of waste, and general environmental laws stipulating permit requirements for activities deemed hazardous for the environment. Another category of law is law related to protected areas. The justifications for protecting areas can be to preserve natural and cultural heritage, for recreation, to conserve biodiversity and to contribute to sustainable use and management of biodiversity. The law can provide for different categories of protected areas subject to different levels of protection. In this context, marine spatial planning is on the increase, including the designation of marine protected areas. The degree to which sustainability is achieved in these sectors obviously influences the overall sustainability of land use.

The importance of a comprehensive land-use planning system to achieve sustainable development is clear. Guidelines from the Food and Agriculture Organization of the United Nations (FAO) define land-use planning as a systematic assessment of land and water potential, alternatives for land use and economic and social conditions in order to select and adopt the best land-use options.⁴⁹ The purpose of land-use planning is to select and put into practice those uses that will best meet the needs of the people while safeguarding resources for the future. The FAO guidelines define sustainable land use as land use that “meets the needs of the present while, at the same time, conserving resources for future generations. This requires a combination of production and conservation: the production of the goods needed by people now, combined with the

⁴⁹ Available at <http://www.fao.org/docrep/T0715E/t0715e00.htm>

conservation of the natural resources on which that production depends so as to ensure continued production in the future.” Some key features of sustainable land-use planning are highlighted below.

Define Key Principles for Land Use

The key principles governing land use should be articulated in law—e.g. that land shall be used for the purposes for which the areas are best suited in view of their nature and situation and of existing needs and that land should be managed sustainably.

Example: Basic Provisions Concerning Management of Land and Water Areas, Swedish Environmental Code, Chapter 3

Section 1. Land and water areas shall be used for the purposes for which the areas are best suited in view of their nature and situation and of existing needs. Priority shall be given to use that promotes good management from the point of view of public interest.

Section 2. Large land and water areas that are not, or are only to a small extent, affected by development projects or other environmental intrusion shall, to the extent possible, be protected against measures that may significantly affect their character.

Section 3. Land and water areas that are particularly vulnerable from an ecological point of view shall, to the extent possible, be protected against measures that may damage the natural environment.

Section 4. Agriculture and forestry are of national importance. Agricultural land that is suitable for cultivation may only be used for development or building purposes if this is necessary in order to safeguard significant national interests where this need cannot be met satisfactorily from the point of view of public interest by using other land. Forest land that is of importance for forestry shall, to the extent possible, be protected against measures that may be prejudicial to rational forestry.

Section 8. Land and water areas that are particularly suitable as sites for facilities for industrial production, energy production, energy distribution, communications, water supply or waste treatment shall, to the extent possible, be protected against measures that may be prejudicial to the establishment or use of such sites. Areas that are of national interest on account of [such] facilities... shall be protected against measures that may be prejudicial to the establishment or use of such sites.

Section 10. Where any of the areas mentioned in sections 5 to 8 are of national interest for incompatible purposes, priority shall be given to the purpose or purposes that are most likely to promote sustainable management of land, water and the physical environment in general.

Note: Available at www.regeringen.se/sb/d/2023/a/22847.

Planning at Different Levels

Legislation should specify the types of land-use plans that should be made at the various levels of decision-making (e.g. national, regional and local). These plans correspond to the levels of government at which decisions about land are made. Different kinds of

decisions are made at each level, which influences the type of plan and method of planning required. At each level, there is need for a land-use strategy, policies that indicate planning priorities, projects that tackle these priorities and operational planning to get the work done. At each successive level of planning, the degree of detail needed increases (see box 7.3).

Box 7.3: Contents of Land-Use Plans at Different Levels

National Level

At the national level, planning is concerned with national goals and the allocation of resources. In many cases, national land-use planning does not involve the actual allocation of land for different uses, but the establishment of priorities for district-level projects. A national land-use plan may cover:

- land-use policy: balancing the competing demands for land among different sectors of the economy food production, export crops, tourism, wildlife conservation, housing and public amenities, roads, industry;
- national development plans and budget: project identification and the allocation of resources for development;
- coordination of sectoral agencies involved in land use;
- legislation on such subjects as land tenure, forest clearance and water rights.

National goals are complex while policy decisions, legislation and fiscal measures affect many people and wide areas. Decision-makers cannot possibly be specialists in all facets of land use, so the planners' responsibility is to present the relevant information in terms that the decision-makers can both comprehend and act on.

District Level

District level refers not necessarily to administrative districts but also to land areas that fall between national and local levels. Development projects are often at this level, where planning first comes to grips with the diversity of the land and its suitability to meet project goals. When planning is initiated nationally, national priorities have to be translated into local plans. Conflicts between national and local interests will have to be resolved. The kinds of issues tackled at this stage include:

- the siting of developments such as new settlements, forest plantations and irrigation schemes;
- the need for improved infrastructure such as water supply, roads and marketing facilities;
- the development of management guidelines for improved kinds of land use on each type of land.

Local Level

The local planning unit may be the village, a group of villages or a small water catchment. At this level, it is easiest to fit the plan to the people, making use of local people's knowledge and contributions. Where planning is initiated at the district level, the programme of work to implement changes in land use or management has to be carried out locally. Alternatively, this may be the first level of planning, with its priorities drawn up by the local people. Local-level planning is about getting things done on particular areas

of land - what shall be done where and when, and who will be responsible.

Source: FAO Guidelines on Land Use Planning.

The appropriate public authorities responsible for land-use planning at the various levels should be identified and their roles defined. The steps in the planning process should be specified by law, including environmental, economic and social analysis.

Subject Land-Use Plans to Strategic Environmental Assessment and Economic and Social Assessment

Planning legislation should establish that proposed land-use plans with significant environmental impacts for specified areas at the national, regional or local level should be subjected to an assessment so as to assess and integrate environmental considerations into the plans with a view to promoting sustainable land use and development. Alternative land uses should also be subjected to an economic analysis to assess benefits and costs for each alternative as well as a social analysis of impacts on the population (see box 7.4). Particular attention should be given to effects on women, ethnic minorities and the poorest sections of the community.

Box 7.4: Analysis of the Economic Value of Wetlands in the Context of Changed Land Use

Wetlands provide many benefits to people, and the total economic value of unconverted wetlands is often greater than converted wetlands. There are many examples of the economic value of intact wetlands exceeding that of converted or otherwise altered wetlands.

- Areas of intact mangroves in Thailand have a total net present economic value—calculated based on the economic contribution of both marketed products such as fish and non-marketed services such as protection from storm damage and carbon sequestration—of at least \$1,000 per hectare (and possibly as high as \$36,000 per hectare) compared with about \$200 per hectare when converted to shrimp farms.
- In Canada, areas of intact freshwater marshes have a total economic value of about \$5,800 per hectare compared with \$2,400 when drained marshes are used for agriculture.

This does not mean that the conversion of wetlands is never economically justified, but it does illustrate the fact that many of the economic and social benefits of wetlands are frequently not taken into account by decision-makers.

Source: Ecosystems and Human Well-Being: Wetlands and Water Synthesis. Millennium Ecosystem Assessment, World Resources Institute, Washington, DC. 2005. p 3)

Public Participation in the Planning Process

Land-use planning should be transparent and provide for effective public participation at all levels. These objectives should be promoted in land-use planning law.

7.4 Wildlife and Biodiversity

International law has long regulated wildlife management and consequently exerted an influence on national law. Initially, this was done through the protection of species and habitats; more comprehensive approaches are now taken. Some of the relevant international legal instruments in this regard are the following:

- The 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna
- The 1979 Convention on the Conservation of Migratory Species
- The 1971 Ramsar Convention on Wetlands and the 1992 Convention on Biological Diversity

In addition to these global instruments, there are several relevant regional wildlife-related treaties and agreements.

The trend in national legislation has successively broadened its scope from narrow command and control to a more comprehensive approach based on broader concepts such as conservation and sustainable use of biodiversity.

Example of Comprehensive Approach: Ugandan Wildlife Act

2. Purposes of the Act:

(1) The purposes of this Act are to promote the conservation of wildlife throughout Uganda so that the abundance and diversity of their species are maintained at optimum levels commensurate with other forms of land use, in order to support sustainable utilization of wildlife for the benefit of the people of Uganda; the enhancement of economic and social benefits from wildlife management by establishing wildlife use rights and the promoting of tourism;

In *Principles for Developing Sustainable Wildlife Management Laws*, the FAO sets out 28 principles for the design of sustainable wildlife management laws together with the legal options to that could be used to make each principle operational; these are summarized below.⁵⁰

Management Planning

Planning, an essential condition for sustainable wildlife management, requires that information on the status of wildlife resources, their habitats, their interactions and their

⁵⁰ *Principles for Developing Sustainable Wildlife Management Laws*, FAO Legal Papers Online, No 75, December 2008, by Elisa Morgera and James Wingard.

economic, social and environmental values is gathered, regularly updated and used to fulfil the aims and objectives of wildlife protection and sustainable use. Management planning should be based on the most reliable scientific information and take a precautionary approach. It should be fair and transparent, and should take into account social, cultural, religious, economic and ecological considerations. The legal framework should set out the basic dynamics of the process: its objectives and components, the logical sequence of steps in the process, the need for regular updating and its legal consequences. The legal framework needs to embed flexibility to permit adaptive management.

- **Establish a system for information gathering and monitoring.** The basis for effective wildlife management planning based on an ecosystem approach is accurate and updated information on wildlife resources, their status and their use, environmental and socio-economic impacts, and their interactions with their habitats and with local communities. Wildlife laws need to assign relevant responsibilities and establish the basic elements of the information system feeding into wildlife management planning.
- **Require management planning as a prerequisite to formal management.** Management planning should be tailored to the capacities of the agencies and communities involved; it should avoid legislative overreaching. The plan should be developed in a participatory and interdisciplinary way. The wildlife law should specify what information must be included for the plan to be adequate, require updating and clarify the legal implications of the plan (who should comply with them, which legal tools should be in line with the plan, etc.). In case of inadequacy (or non-existence) of a plan, the law should grant a court or other authority the power to stay any agency action for the area.
- **Share management responsibilities between central and local authorities and with local communities.** Some management responsibilities should be decentralized and/or delegated to local government entities in light of their vicinity to the resource and to the users: “the closer the management is to the ecosystem, the greater the responsibility, ownership, accountability, participation and use of local knowledge.”⁵¹ Management of natural resources is strongest when both local communities and responsible government agencies are involved. However, local communities, which often are best positioned to affect local management, may lack fundamental capacities; they should thus be supported by the government. If shared management is desirable, the various roles and balance of power need to be defined.

Example of Shared Authority: Ugandan Wildlife Act

To achieve shared management and involvement of local communities in management the Ugandan Wildlife Act authorizes the Wildlife Authority to, among other things, “to develop, implement and monitor collaborative arrangements for the management of wildlife” and “to establish policies and procedures for the sustainable utilization of wildlife

⁵¹ CBD Decision VII/11, Annex, principle 2.

by and for the benefit of the communities living in proximity to wildlife” (Ugandan Wildlife Act, section 5).

- **Provide for international cooperation where multinational decision-making and coordination are needed.** Cooperative efforts between countries are needed to determine how resources—e.g. species migrating between neighbouring countries—will be jointly managed and sustainably used.

Conservation

Sustainable use cannot be achieved without effective conservation measures. Wildlife law can use various tools to this end. Sustainable use contributes to conservation because the benefits derived from such use provide an incentive to conserve the resource.

- **Take a species-based approach.** Species-based approaches have long been accepted as an appropriate method for wildlife conservation. The law could, among other things, require the responsible authority to develop species-based management plans that investigate not only status, trade and habitat, but all uses and processes that may affect the conservation status of the species in question. The law should provide regulatory direction for listing and delisting species and criteria on how conservation of a listed species will occur.
- **Take an area-based approach.** Area-based protection is a critical component of habitat protection and therefore useful for wildlife conservation. Legislation could include a mandate to create a protected area system that includes areas identified as critical wildlife habitat.
- **Involve local stakeholders in wildlife conservation.** Without the involvement of local people and the creation of a significant stake in the management of wildlife resource for them, the efforts of officials to protect and ensure the sustainable use of wildlife will often be futile. The legal options include involving local stakeholders, including indigenous and local communities, in the management of any natural resource and providing those involved with equitable compensation for their efforts, taking into account monetary and non-monetary benefits. Local communities should be allowed to continue traditional use of certain resources in protected areas if compatible with conservation objectives. Limitation to traditional use for wildlife conservation purposes should be compensated.

Examples of Shared Benefits

Ugandan Wildlife Act

Section 69. Administration of the fund.

The board shall, subject to section 22(3), pay 20 percent of the park entry fees collected from a wildlife protected area to the local government of the area surrounding the wildlife protected area from which the fees were collected.

Mozambique, Forest and Wildlife Act (1999)

Article 35, Fees

1. Fees shall be paid to the State for the access to and utilisation of forest and wildlife resources, as well as for contemplative tourism in national parks and reserves.
2. A Ministerial Council decree shall fix the values of fees referred to in the previous section, as well as fees for the issue of permits, transit permits, certificates and other such authorisations.
3. Local communities utilising forest and wildlife resources for subsistence in their respective areas shall be exempt from paying any fees.
4. Besides the fees charged for forest and wildlife exploitation, a surtax will be charged for the respective forest and wildlife restocking.
5. A decree will determine percentages of revenue collected from forest and wildlife exploitation to be handed over to the local communities resident in the areas being exploited.
6. It is within the powers of the Ministerial Council to review the fees periodically.

- **Protect wildlife from harmful processes and negative impacts of other land uses.** Wildlife should be protected from activities that may have an indirect negative affect, such as industrial development, construction, tourism and mining. Competing land uses such as forestry and agriculture may also affect wildlife. Wildlife laws should provide tools for the detection and mitigation of these impacts. Legal options include EIA requirements requesting the assessment of processes and activities that may be harmful to wildlife. Further, the possible negative impacts on wildlife by competing land uses should be taken into account (links with legislation regulating forestry, agriculture, mining and tourism, for example).

Example: EIA Requirement

Ugandan Wildlife Act

Section 15. Environmental impact assessment.

- (1) Any developer desiring to undertake any project which may have a significant effect on any wildlife species or community shall undertake an environmental impact assessment in accordance with the National Environment Act.
- (2) The authority shall perform all the functions required of a lead agency for purposes of an environmental impact assessment under the National Environment Act, and any regulations made under the National Environment Act, unless the authority is the developer.

Sustainable Use

The law plays a fundamental role in regulating different uses of wildlife. There are several specific legal tools that can be used to ensure sustainable use by regulating

hunting; the recreational, traditional/subsistence and scientific use of wildlife; and trade. These tools include administrative instruments (quotas, licences, permits and concessions), contractual arrangements (agreements) and general provisions regulating quantity, time and methods for specific uses.

- **Define and regulate different types of wildlife use and of hunting.** Different uses of wildlife and hunting (consumption and non-consumption) should be defined and linked to specific management regimes. An appropriate government agency should establish limits and controls for each type of hunting (i.e. subsistence/cultural, recreational, scientific). The law should ensure that non-consumption uses (i.e. eco-tourism, game ranching and breeding) do not negatively affect biodiversity or the environment.
- **Accurately identify game and non-game species.** International best practice dictates that hunting legislation should specifically identify not only what can be hunted, but also what cannot. Both common and scientific names of species should be used. Generic categories such as “ducks and geese” should be avoided, since these may include both non-threatened and threatened species.
- **Provide for an adaptive, science-based determination of hunting quotas.** A typical tool for achieving sustainable hunting is to set up well-structured, flexible and science-based (as opposed to demand-driven) systems for setting limits on the quantity of animals to be harvested. To ensure that such limitations are understood and respected by users, quota-setting systems should be transparent and participatory.
- **Establish procedural mechanisms for flexible and adaptive hunting seasons.** Legislation should permit hunting seasons to be reviewed and adjusted periodically (annually) in light of assessments of the impact on wildlife population levels and the ability of the management regime to meet defined population management goals.
- **Clearly define hunting areas.** Regulations should specify the areas that are open to hunting and those that are closed to it. Closed areas are typically selected for their importance as breeding grounds or migratory routes, as well as for safety concerns for local communities. Private land owners’ consent should be required to include their land in a hunting area.
- **Regulate hunting methods.** Hunting laws typically prohibit various techniques that are likely to result in higher harvest levels (automatic weapons, pursuing animals by vehicle, destroying nests or dens, use of pits, triggered guns, fishing nets, chemicals, explosives or other indiscriminate techniques). Size limits could also be used to avoid taking animals that are too young; these limits are often applied in fishing regulations (see subsection 7.5).
- **Ensure transparent and effective allocation of hunting rights.** Wildlife laws should clearly recognize property rights over wildlife resources. Based on this, the allocation of responsibility for damage caused by wildlife to third parties’ property, as well as responsibility for the sustainable management of resources, can be made. Hunting

rights over wildlife should be regulated. Several instruments can be used to allocate these rights. Permits and licences are used to allocate the right to hunt certain species. Concessions are used for longer-term rights over a certain area and the wildlife resources there. The process for allocation of hunting rights should be transparent based on certain guarantees, linked to management planning and quota setting, and should provide some degree of security for the right holder. Further, the law should clearly specify the rights and obligations of wildlife users, as well as causes for suspension, termination or renewal of permits/licenses/concessions.

- **Involve local communities in the sustainable use of wildlife.** Without the involvement of local people and the creation of a significant stake in the management of wildlife resources for them, the efforts of officials to protect and ensure sustainable use of wildlife will often be futile. Therefore, the needs of the local communities that live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of benefits from the use of those resources. The legal options include decentralizing and delegating rights, responsibility and accountability to the local communities that use and/or manage biological resources; , ensuring that an equitable share of benefits remains with the local communities; providing assistance to local communities dependent on the resource in case of reduced harvest levels; and protecting and encouraging sustainable customary use of wildlife.
- **Provide for the regulation of both national and international wildlife trade.** Both international and national wildlife trade must be regulated to maximize enforcement potential and ensure that neither trade type undermines conservation efforts. Most national wildlife laws focus on actual hunting and do not regulate the subsequent use, possession or sale of an animal; this is a significant management gap.

Implementation and Law Enforcement

Lack of enforcement is a key reason various resource management initiatives fail. The following principles can help improve the implementation and enforcement of wildlife legislation by focusing not only on a repressive approach, but also on an incentive-based one.

- **Provide incentives for complying with the law.** Laws and regulations that distort markets can contribute to habitat degradation or otherwise generate perverse incentives that undermine conservation and sustainable use of wildlife/biodiversity. Such incentives should be identified, removed or mitigated. Other legal options include integrating economic valuation studies of wildlife resources in decision-making, and considering them in land-use or habitat conversion trade-offs. Economic incentives (tax exemptions, lower loan interest rates, certifications for accessing new markets) can be provided to resource managers, users or local communities that use either environmentally friendly techniques or that demonstrate more efficient, ethical and humane use of wildlife resources reducing the collateral damage to biodiversity. Incentives can also be provided for individuals who help authorities prevent and detect wildlife law violations.

- **Return financial resources to improved wildlife management.** Management and conservation of natural resources incur costs. If these costs are not adequately covered, management will decline, and the amount and value of the natural resource may also decline. It is necessary to ensure that some of the benefits from use flow to the local natural resource management authorities so that essential management to sustain the resources is maintained. The costs for wildlife management can be covered either through direct payments in the form of license, permit, or other fees; or through indirect payments, typically in the form of taxes for particular types of uses. Both wildlife and budgeting laws are important in this regard.
- **Strike a balance between service provision and law enforcement mechanisms.** A fixed focus on enforcement and the failure of public authorities to provide a recognizable service to resource users make management more difficult. The rights and duties of public officers in charge of wildlife law enforcement should be clearly defined in legislation. The law should also identify the types of services public officers should provide to wildlife users and the repercussions for failing to provide such services. Sanctions for violations of wildlife law should be severe enough to act as a deterrent, but not so severe or out of proportion to the nature of the offence that violations go unpunished with courts and other enforcement bodies reluctant to apply the penalty at all.
- **Provide tools to aid in monitoring of harvests and trade.** The most commonly used and accepted tools for monitoring harvests and trade beyond licensing are tagging and self-reporting. Tagging means that the license or permit purchased by the hunter must be dated when an animal is harvested in a manner that cannot be changed and immediately “attached” to the animal as a tag. Self-reporting requires that hunters note harvest values on a form and produce this form to inspectors on request.

7.5 Marine Fisheries

Since ancient times, fishing has been a source of food, employment and economic activity. For too long, the richness of marine resources were taken for granted, and considered indefinite and inexhaustible. This resulted in an open access regime: anyone could fish in an unregulated manner. Today, fish stocks are increasingly in decline, largely due to overfishing; some stocks have collapsed, and there are no signs of recovery. Fish stocks must be managed and protected to ensure sustainable fisheries. Over 90 percent of commercially important fish stocks are found within a given country’s exclusive economic zone (EEZ), in which that country has jurisdiction over the resource. Many countries have recently begun to regulate domestic fishing or to consider stringent control over fishing.⁵²

The FAO Code of Conduct for Responsible Fisheries identifies principles for sustainable fisheries management and provides extensive guidance for incorporating them into legislation and policy. Trends in laws regulating sustainable fisheries, which are

⁵² Law and sustainable development since Rio, Legal trends in agriculture and natural resource management, FAO Legislative Studies No 73, 2002.

described in a chapter titled, “Law and Sustainable Development since Rio, Legal Trends in Agriculture and Natural Resource Management,⁵³ include transitioning from open access to limited access, the use of property rights, shifting from development to sustainable utilization, improved enforcement, requiring fisheries management planning, increased participation, and devolution of functions and legislative implementation of international fisheries instruments. Another resource, IUCN’s *Towards Sustainable Fisheries Law, A Comparative Analysis*, provides a “legal clinic” for diagnosing problems in existing fisheries management systems and developing proposals for reform.⁵⁴ It also suggests 12 rules on good practice in fisheries management that should be reflected in law.⁵⁵ These two documents share many key findings and recommendations; the following provides a summary set of highlights.

- **Ensure national regard for the rules of international law.** International law, promulgated through such instruments as the 1982 United Nations Convention on the Law of the Sea and its related 1995 Fish Stocks Agreement,⁵⁶ sets out numerous rules relevant to fisheries management. Among others, these establish a coastal state’s obligation to ensure that the maintenance of the living resources in its EEZ is not endangered by overexploitation; its duty to maintain or restore populations of target species at sustainable levels; the determination of catch limits for stocks actually or potentially affected by exploitation; the responsibility to adopt a precautionary approach to the conservation, management and exploitation of living marine resources; and the obligation to cooperate regarding the conservation and management of species not exclusively occurring within the coastal state’s EEZ. These international rules deserve full and coherent implementation at the national level.
- **Fisheries legislation should be well defined, conclusive and comprehensive.** Such laws are more likely to inspire compliance because they are understandable and relevant and “thus enhance the willingness to comply.”⁵⁷ The legislation should begin with a statement of goals and principles to guide decision-making bodies in exercising their discretionary powers. The principles incorporated should include sustainable use of fishery resources,⁵⁸ the precautionary principle and the principle of ecosystem protection. The law should establish clear boundaries between different branches of government and elaborate on the legal relationships between government and the

⁵³ *Code of Conduct for Responsible Fisheries*, Food and Agriculture Organization of the United Nations, Rome, 2005. Available at <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM..>

⁵⁴ Winter, Gerd (Ed). 2009. *Towards Sustainable Fisheries Law. A Comparative Analysis*. IUCN, Gland, Switzerland.

⁵⁵ *Ibid*, p 321.

⁵⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

⁵⁷ Winter, p 324.

⁵⁸ “There are two options for a definition of sustainability: a weaker one which requires the balancing of ecological, economic and social interests, and a stronger one, which in principle allows for balancing, but which sets a clear upper limit if the reproduction of living organisms is endangered. Many national fisheries laws that include the principle of sustainability do not define it. (..) [E]ffective fisheries management requires the strong version.” Winter, p 324-325.

individual. It should also establish fisheries licensing requirements, specifying their aim and the criteria for obtaining/revoking them, and so on.

- **Clearly delimit and integrate the competencies of competing administrative bodies.** The effectiveness of fisheries management depends on the structures and functions of the administrative bodies in charge of subordinate rule-making, decisions in individual cases, and monitoring and surveillance (enforcement). This includes, among other things, determining which issues are of a political nature and should therefore be decided by a political body versus those that are of a technical nature whose decision should be based on scientific information by independent non-political bodies. The following are examples of the former type of issues: subsidies, reserving fisheries in the EEZ for the national fleet (or not), excluding industrial fishing from certain areas, and limiting the landing of catch to a country's own ports. Regulations directly related to the protection of fish reproduction, such as determination of the total allowable catch and restrictions of effort and gear, arguably pertain to the latter category. Another relevant concern in this regard is striking the appropriate balance between the mandates and powers of central versus decentralized levels of government.
- **Support small-scale fisheries (distributional justice).** Small-scale fisheries could have priority over industrial fisheries in certain areas due to their importance to the livelihood of local communities. For instance, small-scale fisheries could be freed from licensing/authorization requirements. Many states have prohibited industrial fishing in in-shore areas and reserved the coastal zones for local communities. Subsidizing small-scale fisheries is another measure that could be considered, e.g. by providing favourable small credit lines.
- **Establish independent research on stocks and ecosystems, separate stock assessments and decision-making from management, and provide for socio-legal research to support decision-making.** Knowledge about stocks and ecosystems is crucial for adequate fisheries management. Systematic scientific research is therefore indispensable. This includes direct observation (e.g. representative sampling) and catch monitoring through the maintenance and inspection of accurate and up-to-date records (logbooks, landing records, on-board observers, etc.). Legislation can play a key role in regulating catch monitoring. The independence of research and stock assessments should be guaranteed. Social and/or economic scientific study is also relevant to inform management decisions.
- **Link subsidies to maximum sustainable yield; consider setting a charge on fish catch if resources are scarce.** Coastal states with underexploited resources have often attempted to build up a national fishing fleet to exploit the territorial seas in their EEZ. Many states have enacted subsidy schemes to support the build-up of a national fleet. If a state sets up a subsidy programme, it must be aware of the concomitant risk of overfishing. Subsidy programs should therefore be tied to capacity limitation. Further, it is recommended that where stocks are scarce, the fishing industry should pay royalties. Very few states have introduced royalty payments for fishing rights. "As fish became scarcer and their economic value increased, the free allocation of exploitation

rights equals a privatization of public value free of charge. (...) [T]his hidden subsidy disguises the scarcity of the product, making it cheaper than it should be – so cheap that fish are even used for fish meal for the production of allegedly higher-value goods such as pork and farmed fish.”⁵⁹

- **Set the total allowable catch, prohibit unselective fishing techniques, and restrict fishing efforts according to fish stock potential.** Fisheries management instruments can be categorized as either catch limitation or effort control. The instruments of **catch limitation** include the following:

- ✓ Determination of total allowable catch, based on best scientific knowledge, the precautionary principle and the ecosystem principle
- ✓ Allocation and tradability of individual catch quota
- ✓ Designation of nature protection areas and areas for recovery and special management of fisheries (marine protected areas)
- ✓ Regulation of fishing techniques (avoiding the infliction of unnecessary pain on animals, selectivity of the catch in relation to undersized and non-targeted fish, prevention of destructive effects on the seabed, avoiding the killing of seabirds)
- ✓ Setting minimum catch and landing sizes (to allow juveniles to grow until they have spawned, thus improving reproduction rates and population size)
- ✓ Restrictions on fishing periods and areas (to protect mating and spawning grounds)

Restrictions on **fishery effort** include regulation of the following:

- ✓ Number of vessels
 - ✓ Loading capacity and engine power of vessels
 - ✓ Fishing gear allowed on board
 - ✓ Days spent at sea
- **Involve stakeholders in management.** Various organizational structures can be applied for involving stakeholders in fishery management; these include self-management, co-management and participatory management. States in which indigenous coastal communities exist should consider granting them **self-management**, while supervising the exercise of these powers. **Co-management** involves decision-making bodies which are part of a state administration: stakeholders and state representatives decide together on matters of policy and law. **Participatory management** assumes that decision-making power is in the hands of state-based bureaucracies, and the public/stakeholders are invited to participate in the process—

⁵⁹ Winter, p 331.

e.g. by providing comments and participating in hearings. Such participation requires access to information.

- **Combine self-regulation with public control; ensure the legal protection of individual and third-party rights.** Self-regulation by fishermen can be achieved by requiring that catches, landings and purchases be recorded in logbooks and elsewhere. To make enforcement effective, administrative bodies must be given adequate powers to carry out their duties. They must be authorized by law to enter vessels and facilities, to inspect premises, and to ask for and receive information. Further, if inspectors find violations of the law, they should have the authority to order rectification and to execute such an order (e.g. by seizing bycatch or illegal gear). In cases where the law has been violated, administrative or criminal sanctions must be available. Rights provided by fisheries legislation must be enforceable in a court of law. As the preservation of stocks and ecosystems is typically of a public nature, non-governmental organizations should be given rights of standing to enforce fisheries law, e.g. by demanding that authorities enforce protective provisions.

8. Way Forward

Environmental law is an important tool for achieving policy objectives related to poverty-environment mainstreaming, and the policies put in place to promote the sustainable use and management of natural resources must be underpinned by a sound legal framework. Certain limitations may decrease the potential and usefulness of legal interventions to support poverty-environment objectives. Consequently, such interventions must be assessed, among other things, in light of the strength of the rule of law in a given country and any limitations in terms of outreach and effectiveness that might result therefrom. Customary law and traditions can, in some cases, be built on to enhance the implementation and enforcement of state environmental law, but they can also work to the detriment of the legitimate intentions of state law. It is important to identify both opportunities for synergies and areas of potential conflict.

It is important to be aware of the structure of a country's environmental law framework and the legislative approaches used when assessing its conduciveness to achieve poverty reduction objectives and sustainable use and management of natural resources. Relevant provisions are rarely limited to a single statute in modern environmental law frameworks, but rather can be found at various levels, ranging from international law and constitutions to regulations and bylaws.

Environmental law has a role to play in the broader agenda of the legal empowerment of the poor. If the interests of the poor are not adequately considered in law, the gap between the rich and powerful and the poor and vulnerable will grow. The law can empower the power and vulnerable to improve their lives and livelihoods and lift them out of poverty. The primer provides examples of environmental law that can make contributions to the four legal empowerment pillars developed by the Commission on the Legal Empowerment of the Poor—e.g. by strengthening the rule of law in the environmental sector, recognizing customary law and tradition in formal state law and providing broad access to justice in environmental matters; securing the poor's tenure to land, and access to and use of other natural resources; protecting the work environment by regulating the use of chemicals and hazardous substances; and creating business opportunities in the wake of environmental regulation. Understanding that environmental law has a role to play in the empowerment of the poor is the first step in maximizing its contribution in this regard.

This primer has been designed to empower poverty-environment mainstreaming professionals to engage in an informed dialogue with legal professionals. As experiences and lessons learned on poverty-environment mainstreaming accumulate, including from the use of environmental law in mainstreaming, UNDP and UNEP plan to update this primer to keep information and guidance current.

Abbreviations and Acronyms

EEZ	exclusive economic zone
EIA	environmental impact assessment
FAO	Food and Agriculture Organization of the United Nations
IWRM	integrated water resources management
MDG	Millennium Development Goal
MEA	multilateral environmental agreement
PEI	Poverty-Environment Initiative

Annex X: UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters

The purpose of these voluntary guidelines is to provide general guidance, if so requested, to States, primarily developing countries, on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. In doing so, the guidelines seek to assist such countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters.

The guidelines should not be perceived as recommendations to amend national legislation or practice in cases where existing legislation or practice provides for broader access to information, more extensive public participation or wider access to justice in environmental matters than follows from these guidelines.

X.1 Access to Information

Guideline 1. Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

Guideline 2. Environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Guideline 3. States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Guideline 4. States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Guideline 5. States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

Guideline 6. In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public⁶⁰ to take measures to prevent such harm is disseminated immediately.

Guideline 7. States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

X.2 Public Participation

Guideline 8. States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned should be informed of their opportunities to participate at an early stage in the decision-making process.

Guideline 9. States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Guideline 10. States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Guideline 11. States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 12. States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

Guideline 13. States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Guideline 14. States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

X.3 Access to Justice

Guideline 15. States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, in part or in full, inadequately answered or ignored, or in any other way not handled in accordance

⁶⁰ “The public” may be defined as one or more natural or legal persons and their associations, organizations or groups.

with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Guideline 16. States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Guideline 17. States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Guideline 18. States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.

Guideline 19. States should provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Guideline 20. States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Guideline 21. States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 22. States should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.

Guideline 23. States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Guideline 24. States should ensure that decisions relating to the environment taken by a court of law, other independent and impartial or administrative body, are publicly available, as appropriate and in accordance with national law.

Guideline 25. States should promote appropriate capacity-building programmes, on a regular basis, in environmental law for judicial officers, other legal professionals and other relevant stakeholders.

Guideline 26. States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.