

PUBLIC INTERNATIONAL LAW

Academic course 2020-2021

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UNIT 8. International environmental protection

- I. GENERAL FEATURES

The environmental protection is one of the big challenges of the world. People, States and the International Community itself are concerned about the environment.

A) The world's environment

Despite the fact that there is not a legal definition about the concept of “environment”, the ICJ in its advisory opinion about the legality of the threats or use of nuclear weapons dated on July 6, 1996, stated that:

“The environment is not an abstraction but the space in which human beings live and on which the quality of their life and health depends, including that of future generations”

Elements to be taken into account in the concept of environment given by ICJ:

1. "space where human beings live";
2. new perspective: cares about its "quality" to sustain human life with dignity.
3. relationship between the protection of the environment within the framework of human rights.

1. A unique but fragmented world

The first law of ecology states that "everything is interconnected"

- Impacts on the environment can manifest their effects at great distances and are communicated from one sector to another (land, sea, atmosphere, nature).
- This ecologically unique world is segmented into numerous state spaces, subject to the independent action of each of its political holders, while other spaces on the planet are not subject to state sovereignty and are therefore "ownerless" territories (high seas, seabed and ocean floor areas, atmosphere, Antarctica, outer space)

2. Cross-border and global problems

International environmental problems have been manifested themselves at an early stage in relation to "transboundary pollution" = when the pollution emerges in one State and its effects are projected beyond that State to other States.

E.g. = Trail Smelter Case 1941; Torrey Canyon...

Global pollution. Different phenomenon that involves the IL because

- Everyone pollutes, although to a different extent
- We are all potentially victims

Examples: acid rain, ozone depletion, loss of biological diversity, climate change...

3. Conditioning factors of international cooperation

1. Scientific knowledge required for action

- Rio Declaration: Precautionary principle (NOT ACCEPTED AS A CONSUECUDINARY STANDARD)

2. Economic cost of measures to be taken

- Rio Dec.: p. of common but differentiated responsibilities

3. National policies of the States

B) HISTORICAL EVOLUTION: STOCKHOLM 1972, RIO DE JANEIRO 1992, JOHANNESBURG 2002

1) Stockholm Conference on the Human Environment, 1972

- Adoption of programmatic instruments (=non-binding)
 - 1972 Declaration of Principles
 - Environmental Action Plan
- Implications:
 - Creation of UNEP
 - Proliferation of programmatic and conventional instruments

2) Rio de Janeiro Conference on Environment and Development, 1992:

- Adoption of programmatic instruments:
 - Rio de Janeiro Declaration of Principles
 - Statement on forests (failure to negotiate a Treaty)
 - Program (or Agenda) 21

- Adoption of conventional instruments:
 - United Nations Framework Convention on Climate Change
 - Convention on Biological Diversity
- Implications. The Brundtland Report 1987 (sustainable development → inter + intra generational equity):
 - Review of environmental Treaties existing
 - Adoption of new environmental Treaties

3) World Summit on Sustainable Development (Johannesburg, 2002)

- Adoption of programmatic instruments:
 - Johannesburg Declaration on Sustainable Development.- links economic development, social development and environmental protection
 - Plan of Implementation of the World Summit on Sustainable Development.- designs specific actions in 10 priority themes
- Adoption of conventional instruments:
 - Absolute failure in negotiation Post-Kyoto Protocol (emission reductions that generate climate change)

II. FEATURES OF INTERNATIONAL ENVIRONMENTAL LAW

International environmental law appears as a legal system of flexible context, a feature that is manifested both in terms of the formation of its rules and the processes of enforcement.

A) The formation of international environmental law

1. Environmental treaties

The environmental treaties constitute the main element of the international normative in the matter.

The treaties constitute today the central piece of the international normative corpus on environmental matters because, as Paolillo has written:

"The treaties are shown, then, as the legal instrument that offers the best response to the need to develop environmental law, especially after having shown a considerable degree of flexibility, which makes them capable of adapting to the changing needs and perceptions of the environmental crisis".

International environmental agreements have some common features or characteristics that give them a certain originality.

- The first of these features is its configuration as a "treaty law", that is, as an agreement that establishes a common regulation for the achievement of a collective objective of the Parties, and not as a "treaty-contract" that establishes conflicting obligations of a synallagmatic nature between Parties that pursue different objectives.

- A second feature of environmental treaties is the trend towards institutionalization, that is, the implementation of institutional mechanisms for their enforcement. The vast majority of environmental conventions have established institutionalized enforcement bodies, most notably the "Conference of the Parties" (COP), a plenary body that meets periodically to adopt the necessary enforcement measures. This is generally accompanied by the existence of a Secretariat and, in some cases, the establishment of other institutional bodies responsible for functions of a diverse nature, generally of a scientific, legal or supervisory nature.

- The third characteristic feature of the environmental conventions is their tendency to divide the text into two separate blocks or bodies;
 1. On the one hand, the **substantive provisions** intended to maintain a certain permanence;
 2. On the other hand, the technical provisions generally called "annexes", which are usually subject to easier amendment or modification procedures.

In any case, it should be noted that the provisions of each convention and its annexes are also part of the text of the treaty and are **equally binding** for the Parties.

- A **fourth characteristic** element of environmental agreements is what can be called the continuity of the normative process, that is, **the technique consisting** in the elaboration of a **framework agreement** that will be completed by successive agreements that develop it, usually called "**protocols**".

The last characteristic of environmental agreements is the **relativization of established commitments**, which are **not** formulated in **absolute** terms but by reference to differentiated implementation schedules.

2. Customs and general principles

- Absence of specific customary rules.

The main reason that explains this situation derives, precisely, from the novelty of this sector of the system. The emergence of a customary rule requires the **existence of a continuous practice** over time; and, although it is true that this time can be relativized and shortened extraordinarily, when it is compensated by a powerful "conviction of obligatoriness", it **must be recognized that the youth of international environmental law** has reduced the possibilities of gestation of a well-formed cast of specific customary rules

3. Other regulatory procedures

Along with the traditional normative sources (treaties, customs, general principles) other innovative normative procedures have appeared that have acquired a great projection in international environmental law.

All these procedures have given rise to a great diversity of legal acts such as “action programs”, “codes of conduct”, “strategies”, “guidelines”, “programs and measures”... which are widely used in this sector of the international system.

For example: Rio Declaration 1992 —> Agenda 21 —> Eco-labelling, sustainability labelling...

B) Environmental enforcement and dispute resolution

1. Conventional application mechanisms

Most of the international conventions concerning environmental protection leave it to the Conference of the Parties to verify compliance with the commitments and to adopt the necessary measures for their facilitation, thus avoiding the emergence of disputes in this regard.

2. Environmental Dispute Resolution

The resolution of environmental disputes necessarily involves the application of the general principles of international law that govern this field: namely, the obligation of States to resolve their disputes exclusively by peaceful means and the freedom to choose the means of solution determined by common agreement.

III. THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

A) The principle of international cooperation for the protection of the environment

The most general of the principles of international environmental law is that which establishes the duty to protect the environment and postulates international cooperation to that end.

The general principle of cooperation is embodied in several more precise manifestations, such as the duty to promote the conclusion of treaties and other international instruments to this end, the duty to exchange information relevant for the protection of the environment and the duty to promptly notify and assist other States in emergency situations that may have harmful environmental consequences⁴

B) The principle of prevention of transboundary environmental damage

The principle of prevention of transboundary environmental damage derives from a basic rule of good neighbourliness.

The principle in question has an ancient and well known jurisprudential origins since it was formulated in the 1941 Trail Smelter case.

C) The principle of responsibility and repair of environmental damage

The general rules of international law concerning State responsibility and reparation for damage caused also apply in the environmental field, although their effective application in practice has found serious difficulties.

D) The principles of environmental impact assessment, precaution and “polluter pays”

The principle of environmental impact assessment is formulated in Principle 17 of the Rio Declaration, which states:

“An environmental impact assessment shall be undertaken, as a national instrument, in respect of any proposed activity that is likely to have a significant adverse impact on the environment and that is subject to a decision by a competent national authority”

The “polluter pays” principle is the one that brings us closest to the economic ground . The principle has been recognized in Principle 16 of the Rio Declaration on Environment and Development:

“National authorities should strive to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting trade or international investment”.

E) The principle of public participation

The principle of citizen participation is set out in the Rio Declaration, whose Principle 10 states that:

“The best way to address environmental issues is through the participation of all concerned citizens at the appropriate level. At the national level, everyone shall have appropriate access to information concerning the environment held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States should facilitate and encourage public awareness and participation by making information available to all. Effective access to judicial and administrative proceedings, including redress and remedy, should be provided”.

IV. ENVIRONMENT AND DEVELOPMENT: THE SUSTAINABLE DEVELOPMENT.

—>Source: World Commission on Environment and Development → 1987 Report "Our Common Future (Brundtland Report):

“Sustainable development” is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. It contains two fundamental concepts:

- The concept of "needs", in particular the essential needs of the poor, to which should be given preponderant priority;
- The idea of "limitations" imposed by the environment's ability to satisfy present and future needs".

- It means getting the Aristotelian idea of equity (treating equals and inequalities as the unequal) when contemplating:
 - Both the present: inter-generational equity
 - Like the Future: intra-generational equity (the rights of children's children of the children... that we have not yet had)
- It means going beyond the traditional ecological objective of “clean economy”
 - A "clean" economy is one that recycles what it produces to consume less natural resources
 - But the "clean" economy is not necessarily "sustainable": e.g. a bottle of the plastic of a water bottle means consuming 20 K. of natural resources
- It means overcoming two premises or myths of liberal capitalism:
 - The myth of the inexhaustibility of natural resources
 - The myth of the unlimited regenerative capacity of the MA with respect to damage caused

2) Rio Declaration 1992: makes it the "paradigm" of the economic and ecological policies of the States at the global, regional and local level:

