

INTERNATIONAL ENVIRONMENTAL LAW

Teaching materials

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Unit 2. International Environmental Law: Characters, Sources and Principles

CONTENT

1. The specific features of IEL
2. The formation of IEL
3. The fundamental principles of IEL

0. General considerations

- * Environmental problems: complex and have multiple dimensions that require for their solution effective actions at different levels: scientific, economic, political and legal.
 - The actions of States for the protection of the environment can hypothetically be placed in three different legal frameworks: (i) general international law; (ii) regional cooperation systems and (iii) the national law of each country. In practice, the **interaction between the legal systems involved** has so far taken place in descending order (international law, regional cooperation systems and national laws) and not in reverse order.
 - Evolution of the international legal system: Since the emergence of IEL it must be recognized that it is a **particularly difficult sector** not only because of its novelty, which excludes the existence of a settled dogmatic, but also because of its inherent complexity, which derives from multiple reasons: **scientific** dependence, incidence of **economic** and **political** elements, **borderline** character **with other sectors** of international law, interdisciplinary nature....

1. The specific features of IEL

- Being one of the newest areas of IL: broad, diversified and complex set of regulations.
- As a specialized sector, it shares with IL its main structural elements.
- Peculiarity of the object (the environment), particular characteristics:
 - Functionality
 - Multidimensionality
 - Participation of non-state actors
 - Wide presence of soft law norms.

A. Functionality

- * Markedly functional nature: **It is created to satisfy a peremptory objective** of the international community (to ensure that the development of human activities and the exploitation of the planet's natural resources is carried out in a context of respect for the human environment and the preservation of the ecological balance).
 - * Conditions all the corpus-codified law with a preventive orientation, aimed at protecting the legal good that constitutes its own object.
 - * The effective application of the provisions adopted in this field is to a certain extent subordinated to their usefulness. It is not therefore a neutral law, indifferent to the paths adopted for its development and application, but a law committed to the environmental cause.
 - * Administrative character.
 - * Instruments form of Plan/program based in the principles of:
 - * Non-regression
 - * Progressivity

B. Multidimensionality

- Multidimensional nature: integrating elements of a diverse nature (scientific, political, economic, social, cultural, ecological). Indivisible reality of the phenomenon it deals with, the global environment or human environment, which constitutes a multifaceted sphere in which values, elements and interests of different signs converge.
 - IEL responds to **political and ethical demands**.
 - IEL is also particularly dependent on the **interplay of scientific and technological elements**.
 - IEL is particularly dependent on the demands of the economy.

C. Participation of non-state actors

- Although States and international governmental organizations are the main subjects of IEL, **openness** to the participation of non-State actors in the processes of creation and enforcement.
- Examples: Rio Summit 1992.

D. Wide presence of soft law norms

- * The eminently functional character IEL contributes to giving its norms a flexible context, configuring a particularly fluid legal universe that often presents the characteristic profiles of what has come to be known as **soft law**.
 - * Rules still in gestation.
 - * Instruments with no binding legal force.
 - * Normative with mitigated commitments, susceptible of modulation at will.

2. The creation of IEL

A. Formal sources

- Sources of IEL: sources of IL. Art. 38 ICJ (formal sources of IL)
 - 1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
 - a. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (Conventional law)*
 - b. *international custom, as evidence of a general practice accepted as law; (General IL)*
 - c. *the general principles of law recognized by civilized nations;*
 - d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*
- Other sources of IL—IEL: unilateral acts of states/resolutions of IO.

A.1. Environmental treaties

- Essential pillar of normative structure of IEL: **treaties** and **conventions**, **universal** and **regional** scope.
- Predominance of the **conventional source**: weakness of the conventional normative procedure, operational flexibility for States and margin of discretion.
 - BUT: Sectorial (nature, oceans and seas, atmosphere ...) and, more often than not, have a very specific purpose (seals, desertification, international trade of endangered species...) with no general multilateral convention dealing with the various aspects of environmental protection as a whole.
 - Advantages: security and flexibility of the rules regarding conclusion, entry into force and application.
 - Disadvantages: fragmented and dispersed.

Features of IEL Conventions:

- 1. Generally conceived as “TREATY-LAW” (normative agreements establishing common regulations for the achievement of a collective objective of the Parties).
 - As a consequence, reluctant to accept reservations made by States to limit the obligations stipulated by the provisions of a treaty.
 - Generally, separation of general method to ensure compliance with the treaty (art. 60 Vienna Convention on the Law of the Treaties regarding termination or suspension).
 - Erga-omnes vocation.
- 2. Tendency towards INSTITUTIONALIZATION: need to take collective decisions to adjust the demands of each agreement to the changing circumstances.
- 3. Tendency to divide their provisions into two separate blocks or bodies: (i) **substantive** or **diplomatic** provisions (articles) and (ii) **adjective** part or **technical** provisions (annexes).
- 4. Complexity.

Evolution of conventional technique in IEL:

- Progressive tendency towards **GLOBALIZATION**.
- **Continuity of the conventional regulatory process:** tendency to adopt, at least, a Conventional framework convention. which will be followed in due course by the specific protocols. —> (i) adaptation to changing circumstances; (ii) ensures the consensus.
- Relativization of the obligations set out in the conventional instruments.
- Conventional symmetry: diversification of commitments between the Parties.

A.2. International customary law

- IEL particular debate and controversy given the inherent problematic nature of the unwritten sources and the peculiar characteristics of the sector under consideration:
 - **Scarcity of specific customary rules:** novelty of IEL.
 - Suited to accommodate the necessities of IEL: lacks the necessary flexibility to adapt to the diversity and evolution of situations and also lacks the capacity to react quickly.
 - Rules of customary nature: too generic (obligation to cooperate with other States for the protection of the common environment or the duties of information and consultation).
 - **Support for general principle of IEL:** international practice in this field is already increasingly developed, provides precedents that could support the formation of customary law principles.

A.3. General Principles of IL

- These principles belong to the common core of the law and are applicable *mutatis mutandis* to international law: they are therefore common rules of domestic law which can be applied by international courts.
- Not to be mistaken with specific principles of IEL (cooperation, etc...).
- Types:
 - Public law: the procedural principle of equality between the parties; the principle of the relative authority of res judicata of court judgments; the “principle of implied powers”.
 - Private law: the principle of good faith; the principle of prohibition of abuse of rights; the principle that no one may be a judge in his own case; principle of liability.

B. Other regulatory processes

B.1. Declarations of Conferences and Resolutions of IO's

- Declarations of the main international conferences have had particular relevance in the conformation of IEL: Stockholm Declaration, Rio Declaration... consensus of States on the subject and principles that have shaped the formation of IEL.
- The resolutions of universal and regional international organizations also contribute to the formation of environmental norms: GAUN, EU...

B.2. Normative acts adopted by the institutions of the Conventions (Treaty organs)

- Normative acts adopted by the institutional organs of application of multilateral environmental agreements: "decisions" with an executive vocation (usually not binding, but expressing general consensus).

C. The role of judicial decisions and qualified teaching

- Auxiliar means

C.1. Judicial decisions

- The work of judicial or arbitral tribunals has had a moderate development in IEL.
 - on 19 July 1993 the ICJ created a permanent Special Chamber for environmental matters (composed of seven judges) which was renewed several times until 2006 without having had the opportunity to hear any case in its thirteen years of life.
 - Other Tribunals: International Tribunal for the Law of the Sea (ITLOS) in Hamburg.
 - Tribunals at regional level: OAS; EU; ECHR.

C.2. The writing of publicists

- Significant contribution of authors and publicists to the formation of new concepts and norms of IEL.

3. The fundamental principles of IEL

- Principles:
 - International cooperation for the protection of the environment.
 - Prevention of transboundary environmental damage
 - Liability and reparation for environmental damage
 - Environmental impact assessment
 - Precautionary principle
 - “Polluter pays” principle (PPP)
 - Public participation

A. International cooperation for the protection of the environment

- Most general of the principles: duty of States to protect the environment and international cooperation to that end within a framework of common but differentiated responsibilities.
- International instruments:
 - Stockholm declaration: Principle 24.
 - The 1992 Rio Declaration: Principle 7.
- New paradigm of common but differentiated responsibilities according to different national capacities.
- Consequences of the principle:
 - duty to exchange relevant information due to protect the environment;
 - duty to notify other States promptly of natural disasters and other emergencies that may be harmful.

B. Prevention of transboundary environmental damage

- Basic rule of good neighborliness well recognized in international case law. Unanimously recognized as part of international customary law.
- International instruments:
 - Stockholm Declaration: Principle 21.
 - The 1992 Rio Declaration: Principle 2.
 - ICL Draft articles on prevention of transboundary harm from hazardous activities.
- Practical application: concepts of due diligence. Need to concretize the principle in more specific prescriptions:
 - Obligations of information, notification and consultation (Principle 19 of the Rio Declaration).

C. Liability and reparation for environmental damage

- General rule of responsibility of States in IL in the environmental sector: technical complexity of the subject and the political reluctance to apply it have slowed down the development of this principle in IEL.
- International instruments:
 - Stockholm Declaration: Principle 22.
 - 1992 Rio Declaration: Principle 13.
- Contemporary IEL:
 - Derivation towards national law.
 - Preference for mechanisms of civil liability.
 - protective orientation of the victims.
 - generic commitments of further development: inclusion in treaties.

D. Environmental impact assessment

- It is a technique where a risk assessment procedure based on the preparation of an environmental impact study is required as a prerequisite for the authorization of an action potentially hazardous to the environment by the competent authority.
- International instruments:
 - 1982 World Charter for Nature: Principle 11(c).
 - The 1992 Rio Declaration: Principle 17.
 - Others: EU 1985 Directive on the assessment of the effects of certain public and private projects on the environment.
 - UN Economic Commission for Europe: Convention on Environmental Impact Assessment in a Transboundary Context- Spoo (Finland) February 1991 (into force in 1997).
- International Case law - ICJ Cases:
 - [Gabcikvo Nagymaros judgment of 1997.](#)
 - [Pulp Mills on the River Uruguay \(Argentina v. Uruguay\)](#)

E. Precautionary principle

- Different from principle of prevention. Criterion that should guide the actions of States and other parties involved to avoid possible damage (even if there is no absolute scientific certainty) when there is a danger that the activities contemplated may cause serious or irreversible damage.
- International instruments:
 - The 1992 Rio Declaration: Principle 15.
 - International treaties after Rio: 1992 United Nations Framework Convention on Climate Change (Art. 3, 3); the Convention on Biological Diversity (Preamble, para. 9) and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (Art. 3, 1).
 - EU: TFUE article 191, 2 “the Union's policy on the environment shall be based, in particular, on the precautionary principle”.
- International Case law-ICJ Cases:
 - [Gabcikvo Nagymaros judgment of 1997.](#)

F. *“Polluter pays” principle (PPP)*

- Strictly speaking: ensure that the polluter bears the cost of pollution prevention and control measures, without receiving in principle any compensatory financial assistance. It is a principle of "**internalization**" of the costs of cleaning up the negative effects of pollution on the environment, which must be borne by the polluter.
- International instruments:
 - OECD recommendations.
 - The 1992 Rio Declaration: Principle 16.
 - Other EU instruments.

G. Public participation

- The principle is linked to the concept of "environmental democracy" and is embodied in three essential rights:
 - Access to information.
 - Participation in decision-making.
 - Access to environmental justice.
- International instruments:
 - OECD recommendations
 - 1982 World Charter for Nature
 - 1992 Rio Declaration: principle 10.
 - The EU Directive of June 7, 1990 on freedom of access to information on the environment.

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