

# INTERNATIONAL ENVIRONMENTAL LAW

Academic course: 2022-2023



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VNIVERSITAT  
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ENVEU  
Jean Monnet Module  
Project No. 101085459



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

## **CONTENT**

1. Specific features of international environmental law
2. Formation of international environmental law
3. Fundamental principles of international environmental law

# 0. General considerations

- \* Environmental problems are complex and have multiple dimensions that require 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 the reverse order.
- Evolution of the international legal system: Since the emergence of international environmental law it must be recognized that it is a **particularly difficult sector** because of its novelty, which excludes the existence of a settled dogmatic, and because of its inherent complexity caused by many reasons: **scientific** dependence; incidence of **economic** and **political** elements; **borderline** character **with other sectors** of international law; interdisciplinary nature, etc.

# 1. The specific features of international environmental law

- Being one of the newest areas of international law means: broad, diversified and complex sets of regulations.
- As a specialised sector, it shares its main structural elements with international law.
- 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 of all the corpus means instructive 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 that is indifferent to the paths adopted for its development and application, but a law committed to the environmental cause.
- Administrative character.
- Instruments are plan/programme based on the principles of:
  - Non-regression
  - Progressivity

## B. Multidimensionality

- Multidimensional nature: integrating elements of a diverse nature (scientific, political, economic, social, cultural, and 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.
  - International environmental law responds to **political and ethical demands**.
  - International environmental law is also particularly dependent on the **interplay of scientific and technological elements**.
  - International environmental law is particularly dependent on the demands of the economy.

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## C. Participation of non-state actors

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- Although states and international governmental organisations are the main subjects of international environmental law, **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 regulations

- . The eminently functional character of international environmental law 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 to modulation at will.



## 2. The creation of international environmental law

### A. Formal sources

- The sources of international environmental law are the main sources of international law → Art. 38 ICJ (formal sources)
  - 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 recognised by civilised nations;*
    - d. *subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as a subsidiary means for the determination of rules of law.*
- Other sources of international law and international environmental law: unilateral acts of states/resolutions of IO.

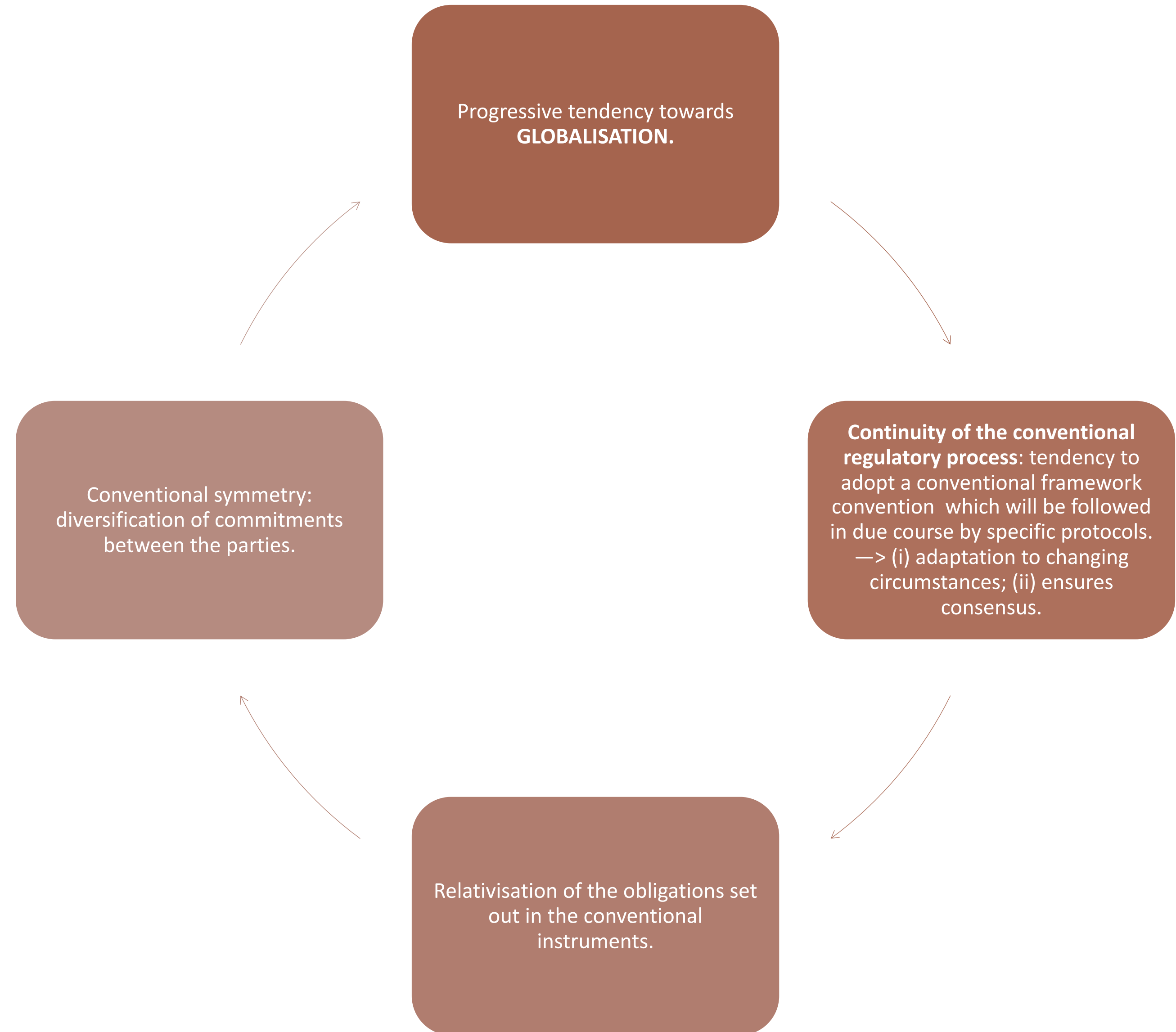
# A.1. Environmental treaties

- Essential pillar of normative structure of international environmental law: **treaties** and **conventions that are universal** and **regional** in scope.
- Predominance of the **conventional source**: weakness of conventional normative procedures, operational flexibility for states, and margin of discretion.
  - BUT: treaties are sectorial (nature, oceans and seas, atmosphere, etc.) and usually have a specific purpose (protection of seals, desertification, international trade in endangered species, etc.) 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 international environmental law 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, reluctance to accept reservations made by states to limit 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 Treaties regarding termination or suspension).
  - Erga-omnes vocation.
- 2. Tendency towards INSTITUTIONALISATION: need to take collective decisions to adjust the demands of each agreement to changing circumstances.
- 3. Tendency to divide provisions into two separate blocks or bodies: (i) **substantive** or **diplomatic** provisions (articles); and (ii) **adjective** part or **technical** provisions (annexes).
- 4. Complex.

# Evolution of conventional technique in international environmental law:



## A.2. International customary law

- International environmental law attracts 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 international environmental law.**
    - Suited to accommodate the necessities of international environmental law: 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 international environmental law: international practice in this field is already increasingly developed and 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 international environmental law (cooperation, etc.).
- Types:
  - Public law: procedural principle of equality between the parties; principle of relative authority of res judicata of court judgments; and the 'principle of implied powers'.
  - Private law: principle of good faith; principle of prohibition of abuse of rights; principle that no one may be a judge in his own case; and principle of liability.

# B. Other regulatory processes

## B.1. Declarations of conferences and resolutions of IOs

- Declarations of the main international conferences have had particular relevance in the conformation of international environmental law: Stockholm Declaration; Rio Declaration; consensus of states on the subject and principles that have shaped the formation of international environmental law.
- Resolutions of universal and regional international organisations 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. Role of judicial decisions and qualified teaching

- Auxiliary means

### C.1. Judicial decisions

- The work of judicial or arbitral tribunals has had a moderate development in international environmental law.
  - On 19 July 1993 the ICJ created a permanent Special Chamber for environmental matters (composed of seven judges) which was renewed several times by 2006 without having had the opportunity to hear any case in its 13 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 contributions by authors in the formation of new concepts and norms of international environmental law.



### 3. The fundamental principles of the international environmental law

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- 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 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 neighbourliness is well recognised in international case law. Unanimously recognised as part of international customary law.
- **International instruments:**
  - Stockholm Declaration: Principle 21.
  - 1992 Rio Declaration: Principle 2.
  - ICL Draft articles on prevention of transboundary harm from hazardous activities.
- **Practical application:** concepts of due diligence. Need to concretise 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 international environmental law.
- **International instruments:**
  - Stockholm Declaration: Principle 22.
  - 1992 Rio Declaration: Principle 13.
- **Contemporary international environmental law:**
  - Derivation towards national law.
  - Preference for mechanisms of civil liability.
  - Protective orientation of the victims.
  - Generic commitments to further development: inclusion in treaties.

# D. Environmental impact assessment

- This is a technique where a risk assessment procedure based on the preparation of an environmental impact study is required as a prerequisite for the authorisation 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

- Differs 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:**
  - 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 **'internalisation' 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.
  - 1992 Rio Declaration: Principle 16.
  - Other EU instruments.

# G. Public participation

- The principle is linked to the concept of 'environmental democracy' and 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.
  - EU Directive of 7 June 1990 on freedom of access to information on the environment.



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