

International Environmental Law Course

Professor Hans Chr. Bugge

Principles of International Environmental Law

Introduction

1. What is a legal “principle”?
2. Two groups of principles here:
 - General principles of international law, as applied to environmental issues.
 - Principles of international environmental law in the strict sense.

The distinction is, however, not clear.

3. Brief introduction to the 1992 “*Rio Declaration on Environment and Development*” where many principles are expressed.

I. General principles of international law, as applied to environmental issues.

1. The principle of State sovereignty.

1.1. Introduction: State sovereignty: at the core of international law.

It implies both “territorial sovereignty” and “territorial integrity” The two aspects are reflected in Rio principle 2 (Stockholm principle 21):

“States have, in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and

the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

1.2 The principle of State sovereignty over natural resources

(“Permanent sovereignty over natural resources” – PSNR).

The core: States are, “in principle”, free to decide how to manage their natural resources and their environment; whether and to what extent they will protect the environment.

However: The sovereign right to exploit the natural resources is limited and conditioned by customary law, treaty law and other principles of international environmental law.

Today, the question may be discussed: *Is the State obliged by international customary law to protect its own environment?*

1.3 An important limitation: The principle not to harm the environment of other states or areas beyond the limits of national jurisdiction.

The starting point: The Trail Smelter Case.

The extension to areas outside national jurisdiction.

It has not been much invoked, why? The problem: What is its exact content? For example as regards:

- the threshold: “significant” damage only?
- the “due diligence” criterion
- the duty to control the activities on its territory
- the duty to inform and consult
- the balancing of interests between the states concerned
- strict liability for the harm done?

The “reciprocity problem”.

The principle seen in the light of regional and global environmental problems such as biodiversity depletion or climate change. It is not well adapted to these situations.

2. Principles for the management of a “shared natural resource” and “common property”

2.1 “Shared natural resource”:

A natural resource under the jurisdiction of several states: rivers, lakes...

The principles of “equitable utilization” and “transboundary cooperation” .

2.2 “Common property”:

A natural resource such as the ocean outside national jurisdiction (“the high seas) and its living resources.

The principle of balancing of interests: “... equitable (and sustainable) exploitation ...”,

The development of the Law of the Sea: increased coastal state jurisdiction.

3. The concept of “Common heritage of mankind”.

- The background and the strict legal meaning of the concept today.
- The discussion related to biodiversity: “Common heritage” vs. “state sovereignty”.
- From “common heritage” to “common concerns” (Biodiversity convention, Framework convention on climate change).

4. The obligation of States to cooperate, inform and consult.

4.1 See Rio declaration principles 7, 14, 18, 19 and 27.

4.2 The principle of cooperation as a general principle.

4.3 Examples of specific instruments on information obligation:

- 1986 Vienna convention on Early Notification of a Nuclear Accident (the “Tchernobyl convention”)
- 1991 Espoo convention on Environmental Impact Assessment in a Transboundary Context.

4.4 The principle of “Prior informed consent” (PIC).

Links to – and strengthens? - state sovereignty. Examples of application:

- 1989 Basel convention on the control of Transboundary movements of hazardous waste.
- 2000 Cartagena protocol to CBD on trade in “living modified organisms” (“Advanced Informed Agreement”).

II. International (and national) principles of environmental law

5. Introduction and overview.

The reasons behind the development of environmental law principles.

The “road” from “soft” to hard international law, and further to national policy and law.

The general questions of "principles of environmental law" as a source of international environmental law (IEL): What is the content of the principle? What is its legal status/role?
In general, a rather confusing picture...

Principles to be discussed here:

- sustainable development
- the principle of common but differentiated responsibilities
- the precautionary principle

6. Sustainable development

6.1 The idea of sustainability is not a new idea, but...

6.2 Introduction to the present principle of sustainable development.

For a long time: Environmental protection and poverty alleviation seen as separate and even contradictory goals.

The World Commission of Environment and Development (WCED) report 1987 ("The Brundtland Report"), puts SD in the centre of the environment/development and North/South discourses.

The fate of SD since 1987: an increasingly central theme in policy, research and industry discussions. Also in the legal?

6.3 What is the general "idea" of "sustainable development"?

The starting point: the definition in the Brundtland report:

"A development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

A synthesis of environmental protection and development/poverty alleviation; "two sides of the same coin".

- "*Intragenerational* and *intergenerational* justice".
- A *social* as well as an *environmental* objective or principle.
- "Economic, social and environmental sustainability"

WCED 7 "strategic imperatives":

- reviving growth
- changing the quality of growth
- meeting essential needs for jobs, food, energy, water, and sanitation
- ensuring a sustainable level of population
- conserving and enhancing the resource base
- reorienting technology and managing risk
- *merging environment and economics in decision-making* ("principle of integration")

6.3 The “principle of integration” as an important aspect of SD:

The reasoning behind the principle, applications and dilemmas.

Rio Principle 4:

“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

Treaty of the Functioning of the European Union FEU (Lisbon) article 11 (former art. 6).

“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.”

6.4 Some dilemmas, problems and criticism connected to SD.

6.5 The legal status of SD in international law.

The objective of SD is expressed in conventions (EU Treaty, Climate Change Convention, Biodiversity Convention) and other "hard law", as well as numerous pieces of "soft law" (Rio declaration) and policy papers of international organisations etc.

Also, increasingly found in national constitutions and legislation.

Used as a basic argument in international court decisions. (Danube Case (“Gabcikova Nagymaros”), Uruguay case (“Pulp Mills”), but ICJ hesitant to accept it as a general principle of law.

It has legal importance, but its precise content and role remains a matter for discussion.

All in all: Too vague and uncertain to be recognized as customary international law, but should be accepted as a “general principle of law” which influences the development of international law, the interpretation and application of international law, and the balancing and solution of individual cases.

7. The principle of “Common but differentiated responsibilities”

The problem and the reason for the principle: The North/South debate.

Rio principle 7:

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

Main aspects of the principle:

Explicit:

- Differences in obligations/environmental standards
- An obligation to transfer resources and technology

Implicit:

“Soft” formulations of hard law: “... as far as possible and as appropriate..”

The case of International Climate Change law.

Areas where the principle does not apply.

A problem for the further development of international law?

8. The Precautionary Principle

8.1 The root problems behind the principle,
as illustrated by the problems of the ozone layer and climate change.

8.2 The main understanding of the principle.

A principle for *how to act in situations of uncertainties, lack of knowledge, risks.*

8.3 Rio principle 15.

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

8.4 “Precautionary principle”/“precautionary approach” debate

8.5 Some aspects of the principle:

- Both a procedural and substantive principle
- The “offensive” (sword”) and “defensive” (shield”) meaning

8.5 Some applications of the principle in international law.

- Soft law instruments: Rio principle 15, CBD Preamble.
- Hard law: Framework Convention on Climate Change, art. 3 no 3.
- EC Treaty article 174.

But also many examples of non-application of the principle...

8.6 The precautionary principle and international trade law.

9. A human right to a good environment?

A right to a good environment is not explicitly laid down in any human rights treaties.

Highlights from the ongoing debate: “pros and cons”

The distinction between ”Substantive” and “procedural” rights.

A “greening” of (substantive) human rights? Some examples.

Procedural rights: The three pillars of the Aarhus convention:

- right to environmental information
- right to participation in environmental matters
- “access to justice”

10 Summing up

