

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.
4. Brief introduction to *the principle of sustainable development*, as a new, basic principle that runs through and influences the development of other principles

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 Nuclear Tests Case and others.

The extension to areas outside national jurisdiction.

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

- the threshold: “significant” damage only?
- what about uncertain effects?
- 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 exploitation ...”.

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

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

- The history of the concept.
- The strict legal meaning of the concept today.
- The discussion related to biodiversity: “Common heritage” vs. “state sovereignty”.
- From “common heritage” to “common concerns”.

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. Some applications.

4.3 Examples of specific instruments on information:

- 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
- the principle of environmental impact assessment

6. Sustainable development

6.1 A brief history of the idea of sustainability; 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.

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")

6.4 SD as a principle of international environmental 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")). The general meaning is complex, not clear.

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 must be accepted as principle which influences the development of international law, the interpretation and application of international law, and individual cases.

7. The principle of "Common but differentiated responsibilities"

Rio principle 7: "...cooperation, yes but ..."

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

Main aspects of the principle:

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

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 “Precautionary principle”/“precautionary approach”

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 The several understandings of the principle.

- a general obligation of prevention of environmental problems.
- an obligation of a strict environmental policy.
- a principle for treating risks and uncertainties/action without certain knowledge as to causes and effects (“in dubio pro natura”)
- a principle to shift the burden of proof (?).

“The bottom line”: A principle for *how to act in situations of uncertainties, lack of knowledge, risks.*

8.4 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...

8.5 Conclusion.

9. Environmental impact assessment.

- Rio Principle 17
- Transboundary EIA.

10 Summing up
