JUS 5520 International Environmental Law

History and (some) International Environmental Law Principles (IEL)

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History of EL

– When does IEL emerge as a branch of PIL?
History

• Early Treaties
  – Convention to Protect Birds Useful to Agriculture (1902)
  – Treaty for the Preservation and Protection of Fur Seals (1911)
  – International Convention for the Protection of Whales (1931)

• Bilateral treaties
  • Bilateral fisheries conventions
History

• Background: NIEO (UNCTAD) 1970s
• UN Conference on Human Environment Stockholm Conference (1972)
  – 26 Principles
• World Commission on Environment and Development (1983)
  – Report (Brundtland Report) 1987
• UN Conference on Environment and Development (UNCED) Rio Conference 1992
UNCED 1992

• Non-binding documents
  – Rio Declaration on Environment and Development
  – Forest Principles
  – Agenda 21

• Binding documents
  – Convention on Biological Diversity (CBD)
  – United Framework Convention on Climate Change (UNFCCC)
History

• World Summit on Sustainable Development (Rio +10), Johannesburg, 2002
• UN Conference on Sustainable Development (Rio+20), Rio de Janeiro 2012
• Transforming our world: the 2030 Agenda for Sustainable Development, 2015, New York
  https://www.youtube.com/watch?v=3WODX8fyRHA
History

Goal 6. Ensure availability and sustainable management of water and sanitation for all

Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all

Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation

Goal 10. Reduce inequality within and among countries

Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable

Goal 12. Ensure sustainable consumption and production patterns

Goal 13. Take urgent action to combat climate change and its impacts

Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development
History

Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.
History

• Early Dispute
  – Trail Smelter Arbitration (1941) Canada v. US
History

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History

• Early Disputes
  – Trail Smelter Arbitration Us v. Canada (1941)
  “No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state or the person or properties therein when the case is of serious consequence and the injury is established by clear and convincing evidence.”
IEL Principles

• Sustainable Development
• Sovereignty over Natural Resources
• Prohibition of Transboundary Harm
• Common Heritage of Mankind
• Common Concern of Humankind
• Common but Differentiated Responsibilities
• Principles of Prevention
• Precautionary Principles
• Polluter Pays Principles
• Cooperation
IEL Principles

• What is a principle?
  – Norms of general application
  – do not prescribe an action
  – guidance for interpretation

• Is there any difference between IEL Principles as general principle of international law art. 38.(2) (C) Statute ICJ?
  – Discuss!
IEL Principles

• Where do we find IEL principles?
  – Tribunals’ awards
    • (PCA) Pakistan v. India: “Duty to cooperate with environmental sustainability in mind” [para 454]
  – Declarations (Rio Declaration)
  – Treaty law: guide the implementation of that treaty
    • Art. 3 UNFCCC, Art. 3 Paris Agreement
    • Art. 3 CBD
  – Customary international law (opinio juris+state practice)
Sustainable Development Principle

• “Development that meets the need of the present without compromising future generations to meet their own needs” (Brundtland Report, 1987)
Sustainable Development Principle

- Sustainable use
- Intragenerational equity or equitable use
- Intergenerational equity = future generation
- Principle of Integration
- Pillar Model [https://youtu.be/_5r4loXPyx8](https://youtu.be/_5r4loXPyx8)
SD& Integration

Sustainable development

Social

Environment

Economy
Sustainable Development Principle

What is its legal status?

• WTO Preamble
• Indian Green Tribunals Act (2010)
• Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons (1966)
  – «Environment represent the living space, the quality of life and the very health of human being, including generation unborn»
Sustainable Development Principle

“140. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitation inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment.

Owing to new scientific insight and to a growing awareness of the risk for mankind-for present and future generations-new norms and standards have been developed. […] This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

The Case Concerning Gabicikovo-Nagymaros Project (Hungary v. Slovakia) ICJ, 1997
Sovereignty over Natural Resources

• 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 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.”
Sovereignty over Natural Resources

• Principle 2 Rio Declaration on Environment and Development

  “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 areas beyond the limits of national jurisdiction.”
Sovereignty over Natural Resources

Early formulation

• UN Resolution 1803/XVII, 1962

“the right of peoples and nations to permanent sovereignty must be exercised in the interest of their national development and of the well-being of the people of the State concerned […] The exploration, development and disposition of such resources as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable […] inherent and overriding right of a state to control the exploitation and the use of its natural resources”
Soevereignty over Natural Resources

• Rights
  – To dispose freely of natural resource
  – To freely explore and exploit natural resources
  – To use natural resources for national development
  – To regulate foreign investment
Sovereignty over Natural Resources

• Duties under the Principles
  – Respect the right and interest of indigenous people
  – Fair treatment of foreign investors
  – Equitable sharing of transboundary natural resources
Prohibition of Transboundary Harm

- Trail Smelter Arbitration, US v. Canada (1941)

  “No state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state or the person or properties therein when the case is of serious consequence and the injury is established by clear and convincing evidence”
Prohibition of Transboundary Harm

• Trail Smelter Arbitration, US v. Canada (1941)
  • 3 Conditions:
    – The harm must result from human activities
    – Must cross national boundaries
    – Must be significant and substantial
Prohibition of Transboundary Harm
– Customary principles (opinio juris+state practise)

• “29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generation unborn. The existence of the general obligation of States to ensure that activates within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relation to the environment.”

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, Reports 1996
Common Heritage of Mankind

• Brainstorming
• Common?
  – Common resources
• Heritage?
  – What does this term bring to your mind?
Common Heritage of Mankind

heritage

Pronunciation: /ˈhɛritɪdʒ/ ❓

NOUN

[IN SINGULAR]

1 Property that is or may be inherited; an inheritance: ‘they had stolen his grandfather’s heritage’

+ More example sentences + Synonyms
Common Heritage of Mankind

• Examples:
  – Moon Treaty: Art 11. “the Moon and its natural resources are the common heritage of mankind”
  – UNCLOS: Art. 136 : The Area and its resources are the common heritage of mankind” Online: http://arcticcontroversy.weebly.com/unclos--clcs.html
  – Antarctic Treaty: preamble “in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or objet of international discord
Common Heritage of Mankind

JURIDICAL COMPONENTS:
- TERRITORIAL SEA BASELINE
- TERRITORIAL SEA (0-12 NM)
- CONTIGUOUS ZONE (12-24 NM)
- EXCLUSIVE ECONOMIC ZONE (12-200 NM)
- HIGH SEAS
- CONTINENTAL SHELF
- THE AREA
Common Heritage of Mankind

• At. 137 Legal Status of the Area and its resources
  – No state can exercise sovereignty or sovereign right over any part of the Area and its natural resources

• Art 140 UNCLOS Benefit of mankind
  – Activities in the Area shall[…]be carried out for the benefits of mankind as all whole […]
  – Equitable sharing of financial and other economic benefits
Common Heritage of Mankind

- Principles of international law which holds that defined areas should be transmit to future generational and to do so they should be protected form exploitation by individual nation-states and corporation
- Non-appropriation
- International management procedures
- Exclusively peaceful uses
Common Concern of Humankind

- Eg.
  - Preamble to UNFCCC/Paris Agreement: “Acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind
  - Preamble to CBD: Affirming that the conservation of biological diversity is a common concern of humankind”
Common Concern of Humankind

• Please Discuss!
• Common Concern of Humankind v. Common Heritage of Mankind
  – Questions:
    • Are they synonymous?
    • Are there any differences?
    • Do they imply different states’ behaviors?
Common Concern of Humankind

• Principle of global cooperation
  – Global cooperation among all actors of international community
  – Equitable sharing of burdens, rather than benefits of exploitation of common recourses
  – What about sovereignty right?
Challenges

Legal status:

- Common resource?
- Shared resource?
- Common heritage of mankind?
- Common concern of humankind?
Common but Differentiated Responsibilities (CBDR)

- NIEO: developed v. developing countries
- Eg.
  - Principle 7 Rio Declaration: “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 that their societies place on the global environment and of the technologies and financial resources they command.”
  - Art.3 UNFCCC: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. (CBDR/RC)”
Common but Differentiated Responsibilities (CBDR)

• Two elements:
  – Common responsibility of states for the protection of the environment
    • Cooperation among nation-states
  – Different responsibilities due to each states' contribution to a particular environmental problem; due to different social, economical situations.
    • Different obligations on states
      – Eg: less stringent obligations, grace period, technology transfer
CBDR/RC Evolution

• Paris Agreement
  – Art.2 (2): the Agreement will be implemented to reflect equity and the principle of common and differentiated responsibilities and respective capabilities, in light of different national circumstances.
  – Implication: no more binary differentiation between developed and developing countries.
  – New NIEO?
Prevention

• (Pulp Mills, 2010) (Argentina .v. Uruguay)
  – 101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of others” (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, ICJ, Reports 1949, p.22). A State is this obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has establish that this obligation “is now part of the corpus of international law relating to the environment”

Legality of the Threat or use of Nuclear weapons, advisory Opinion, ICJ, Reports 1996 (I) p.242, para.39I
Prevention

• (Pulp Mills, 2010)
  – “101. an obligation which entails [not only] the adoption of appropriate rules and measures […].”
  – Requirements
    • Risk of damage: before damage has actually occurred
    • Acknowledgement of the risk
    • Duty to act
    • Proportionality measures
  – States must exert its best possible efforts to minimize the risk
    • No obligation to avoid damage
Precautionary Principles

• Principle 15 Rio Declaration
  – “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 [alias damage]”
  – Requirements:
    • Action or policy
    • Risk of serious and irreversible damage
    • Even in absence of scientific evidence
    • Reverse burden of proof
Precautionary Principle

• Article 191 of the Treaty on the Functioning of the European Union:
  • 1. Union policy on the environment shall contribute to pursuit of the following objectives:
    - preserving, protecting and improving the quality of the environment,
    - protecting human health,
    - prudent and rational utilisation of natural resources,
    - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
  • 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
Precautionary Principle

Questions:
- What about its legal status?
- Could it amount to customary law?
Polluter Pays Principle

- Principle 16 Rio Declaration:
- “National authorities should endeavor 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 international trade and investment.”
Polluter Pay Principles

- Costs of pollution should be borne but the person responsible for causing the pollution
- Practical use
  - Carbon tax
  - CERs: certified emission reduction. Art.12 Kyoto Protocol
Cooperation

• UN Charter Art. 74: principle of good-neighborliness

• Principle 27 Rio Declaration
  – « States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development ».

• ICJ Gabčíkovo-Nagymaros Case (Hungary v. Slovakia): duty to cooperate
Conclusion

- Discussion on legal status of IEL is still ongoing
- Evolution into a commitment to co-operate according to a due diligence standard
- Evolution of CBDR/RC principle
- Changing in the balance between rights and responsibility and a second phase of NIEO?