

***STRENGTHENING CAPACITY FOR ENVIRONMENTAL AND CLIMATE
CHANGE LAW IN ASIA AND THE PACIFIC
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SESSION 11: INTERNATIONAL ENVIRONMENTAL LAW

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Learning Outcomes

Session Topic

- Appreciate the relationship between national and international environmental law, including the influence that IEL can have on national law and vice versa
- Understand the process and level of national implementation of relevant multinational environmental agreements
- Understand the relevance of international institutions

Teaching Methodology

- Understand the role of a guided research exercise
- Understand the role of moots

International Environmental Law's Influence on National Environmental Law

- The concept of **sustainable development**, which is a foundation for environmental law, derives its mandate from recognition in IEL.
- Important **principles of environmental law** emerged first from IEL and were then adopted by national law.
- A considerable amount of national environmental law is designed to **implement obligations arising under multilateral or regional environmental agreements**.
- Where **transboundary environmental impacts** arise from an activity or event, like smokestack emissions or an oil spill, national law will need to defer to IEL for possible legal solutions.

International Environmental Law and Public International Law

- For EL teachers to understand and explain IEL, they need to be familiar with core aspects of public international law, in particular sources and principles
- **Sources** from Article 38(1) of the Statute of the International Court of Justice:
 - International conventions
 - International custom
 - General principles of law
 - Judicial decisions and the teachings of publicists (academic writings)
- Most IEL comes from **international conventions** (multilateral, regional and bilateral) ratified since mid-20th century
 - Customary law can be recognized by the ICJ (e.g. *Trail Smelter* doctrine)

Understanding framework conventions

- Making of convention/treaty law



- Interpretation per Vienna Convention on the Law of Treaties
- Amendment as needed
 - Addition of protocols: e.g. Montreal Protocol to Vienna Convention on Protection of Ozone Layer
 - Addition of amendments: e.g. Kigali Amendment to Montreal Protocol

The Role of “Soft Law” in IEL

- Non-traditional sources (“**soft law**”) can include:
 - Non-binding acts of international organizations (e.g. United Nations General Assembly Resolutions)
 - Non-binding declarations and other texts (e.g. 1972 Stockholm Declaration , the 1992 Rio Declaration)
 - Special reports, e.g. Bruntland Commission & “sustainable development”
- Soft law measures often provide a pathway for the development of traditional “hard law” measures, in particular MEAs and Protocols
- It may also provide inspiration for incorporation of IEL concepts and principles in national legislation before their adoption in binding international agreements or recognition as international customary law

Key Concepts and Principles of IEL

Sustainable Development

Concept of sustainable development is now a foundation for all international and national environmental law and policy

Classic definition in the Brundtland Report, *Our Common Future, 1987*: “*Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”

Sustainable Development Goals (2015):

<https://sustainabledevelopment.un.org/sdgs>



Key Concepts and Principles of IL/IEL

- ▶ Well accepted **principles of international law**:
 - State right to sovereignty
 - State right to sustainable development
 - State duty to cooperate
 - State duty not to cause harm
 - State responsibility for its breaches of obligations

- ▶ Most common **IEL principles**:
 - State duty to avoid transboundary harm
 - Polluter pays
 - Precautionary principle
 - Common but differentiated responsibilities (CBDR)
 - Common heritage/concern of humankind
 - Inter-generational equity

Key Concepts and Principles of IEL

○ **Obligation not to cause transboundary harm**

- *Trail Smelter Arbitration* (1938, 1941)
- *1972 Stockholm Declaration*, 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.”

- *1992 Rio Declaration*, Principle 2
- *Gabčíkovo-Nagymaros Case* (1997)

Key Concepts and Principles of IEL

○ Polluter pays principle

- States should ensure that polluters or users of natural resources bear the full environmental costs of their activities
- Widely recognised in soft law, like *Rio Declaration*, Principle 16:
“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.”

Key Concepts and Principles of IEL

○ Precautionary principle

– *Rio Declaration*, 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.”

- *Narrowly* interpreted (to ensure scientific uncertainty is not used to postpone measures to protect environment)
- *Broadly* interpreted (to require those proposing a potentially environmentally damaging activity to prove that there will be no serious environmental harm)

Key Concepts and Principles of IEL

○ Common but differentiated responsibilities

- Common obligation to protect environment, but differing responsibilities to carry out this obligation
- Reflective of differing social, economic, and ecological situations
- *Rio Declaration, 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.”

- See also *1992 UN Framework Convention on Climate Change, Convention on Biological Diversity, Montreal Protocol, ...*

Key Concepts and Principles of IEL

- **Inter-generational equity**
 - Central to definition of sustainable development provided by *Our Common Future*
 - Found in a range of international environmental texts, for example:
 - 1972 Stockholm Declaration, Principles 1 & 2
 - 1992 Rio Declaration, Principle 3



Key questions when considering the relevance of IEL concepts and principles to national EL

- ❖ To what extent has the core concept of sustainable development been embedded in national environmental law?
- ❖ Can some of the key principles of international environmental law provide guidance for the development of, or be reflected in, national environmental legislation?
 - ❖ Polluter pays?
 - ❖ Precautionary principle?

Key international environment institutions

- **UN Environment** (www.unep.org)

“To be the leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimensions of sustainable development within the United Nations system and that serves as an authoritative advocate for the global environment.”
- **UN Development Program** (<http://www.undp.org>)

“On the ground in about 170 countries and territories, UNDP works to eradicate poverty while protecting the planet. We help countries develop strong policies, skills, partnerships and institutions so they can sustain their progress.”
- **UN General Assembly’s Open Working Group on Sustainable Development Goals** (<https://sustainabledevelopment.un.org/index.html>)
- **Secretariats of significant MEAs**

Key international environment institutions

- **Financial institutions**

- Global Environment Facility (GEF) (<http://www.thegef.org>)
- Green Climate Fund (GCF) (<https://www.greenclimate.fund/home>)
- World Bank (<http://www.worldbank.org/>)
- Regional Development Banks , e.g. Asian Development Bank (<http://www.adb.org/>)

- **Non-government organizations**

- International Union for Conservation of Nature (IUCN) (<http://www.iucn.org/>)
- and its World Commission on Environmental Law (WCEL) (https://www.iucn.org/about/union/commissions/cel/cel_about/)
- IUCN Academy of Environmental Law (www.iucnael.org)

Important multilateral environmental agreements

- ✓ Protection of biological diversity (UNCBD)
- ✓ Trade in wildlife (CITES)
- ✓ Shipping, dumping of hazardous wastes (Basel)
- ✓ Persistent organic pollutants (POPs)
- ✓ Climate change (UNFCCC, Kyoto Protocol, Paris Agreement)
- ✓ Ozone depletion (Vienna Convention and Montreal Protocol)
- ✓ Wetlands (Ramsar)
- ✓ World Heritage sites (UNESCO WHC)
- ✓ Land degradation/desertification (UNCCD)

International Environmental Dispute Resolution

- Dispute Resolution Clause in MEA (arbitration or ICJ)
- International Court of Justice
- Permanent Court of Arbitration (optional rules for natural resource/environmental disputes)
- International Tribunal for the Law of the Sea (chamber for marine environment disputes)



Implementation of MEAs in national law

- While some countries regard ratified international treaties as “self-executing,” many require legislative adoption so that the obligations arising from treaties are translated into national law .
- There can be significant delays between the signing and ratification of MEAs, and hence delay in implementation.

Teaching IEL: Mooting

- A useful teaching tool is a **moot court** exercise involving a dispute under an environmental treaty before the ICJ, an arbitration tribunal, the specific treaty tribunal, a national court, or a human rights tribunal.
- Students represent the complaining party, the respondent, and intervenors (including NGOs), and serve as judges.
- Skills taught include treaty interpretation; use of customary law, IEL principles; legal research; brief writing and oral advocacy; drafting of legal decisions.



Teaching IEL: Research Exercise

- An excellent way to teach IEL and its relationship to national law is a research exercise that requires students to determine when their country signed and ratified a particular treaty, whether the treaty entered into force, and how the treaty is being implemented through national legislation.
- The research assignment assigned to participants in Session 8 provides an example of an exercise that assists students to identify the linkages between IEL and national environmental law that can be conducted in either a domestic EL course or an IEL course.

