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ADB

STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN THE ASIA-PACIFIC : DEVELOPING ENVIRONMENTAL LAW CHAMPIONS
Manila, June 1-5 2015

SESSION 10: INTERNATIONAL ENVIRONMENTAL LAW

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Outline

1. Introduction to International Environmental Law
2. Substantive and procedural rights in environmental law
3. Environmental Mooting as a teaching tool
4. Research Exercise on multi-lateral agreements (MEAs)



LEARNING OUTCOMES

Session Topic 10A

- Understand the relationship between international law and international environmental law
- 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
- Understand substantive and procedural aspects of environmental rights

Teaching Methodology

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

INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW

- The Need for EL teachers to understand IEL
- Emergence of IEL as a significant component of international law
- Key concepts and principles of IEL
- Key international environment institutions
- Important multilateral environmental agreements (MEAs)
- Process for, and level of, implementation of MEAs in national law (research assignment)

The Need for EL Teachers to Understand IEL

- To teach environmental law effectively, it is essential to appreciate the influence of IEL on national environmental law in several ways;
 - First, the concept of **sustainable development** (which provides a foundation for environmental law) derives its mandate from its recognition in IEL;
 - Second, important **principles of environmental law** have emerged at first instance as part of IEL and subsequently have been adopted and applied in national law (e.g., the precautionary principle);
 - Third, a considerable amount of national environmental law in many countries is designed to **implement obligations arising under multilateral or regional environmental agreements**;
 - Finally, where **trans-boundary environmental impacts** arise from an activity or event (e.g., forest fires or an oil spill), national law will need to defer to IEL for possible legal solutions (see Session 18)

Emergence of IEL as a significant component of international law

- For EL teachers to understand and explain IEL, they need to be familiar with core aspects of international law, in particular its various sources;
- The sources of international law are both traditional and non-traditional and IEL has given rise to substantial developments in both contexts;
- Article 38(1) of the *Statute of the International Court of Justice* defines four **traditional sources**:
 - International conventions;
 - International custom;
 - General principles of law;
 - Judicial decisions and the teachings of publicists (academic writings)
- IEL has emerged in the form of a very large number of **international conventions** (multilateral, regional and bilateral) since mid- 20th century
- It has been supplemented from time to time by the recognition by the ICJ of **customary law** re the environment (see e.g. *Trail Smelter* doctrine)

Emergence of IEL (cont.)

- Non-traditional sources (“**soft law**”) have also been a particularly common element of evolving IEL, and can include:
 - Non-binding acts of international organisations (e.g., United Nations General Assembly Resolutions)
 - Non-binding declarations and other texts (e.g., *1972 Stockholm Declaration*, the *1992 Rio Declaration* and the *Bali Accord*)
- Soft law measures often provide a pathway for the development of traditional measures, in particular MEAs or Protocols thereto;
- They may also provide inspiration for the incorporation of environmental law concepts and principles in national legislation prior to their adoption in traditional, binding international agreements (see, e.g., the recognition of the **precautionary principle** in national legislation or by domestic courts) or recognition ultimately as international custom

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.”
- discussed in *Gabčíkovo-Nagymaros Case [1997] ICJ Reports 7*:
“The need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”
- Some principles associated with sustainable development:
 - have become part of international customary law
 - have been adopted in international environmental conventions
 - have been incorporated in national environmental legislation

Key International Environmental Law Principles

- Permanent sovereignty over natural resources and a concomitant obligation to prevent trans-boundary harm
- Prevention principle
- Precautionary principle
- Principle of inter-generational equity
- Polluter-pays principle
- Principle of common but differentiated responsibility

Key International Environmental Law Principles

Principle of State Responsibility: Obligation not to cause trans-boundary harm:

- *Trail Smelter Arbitration* (1938 and 1941) 3 RIAA 1911
- *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. “

- *See also 1992 Rio Declaration*, Principle 2
- *Gabčíkovo-Nagymaros Case* [1997] ICJ Reports 7

Key International Environmental Law Principles

Principle of prevention of environmental harm

- Obligation requiring the prevention of damage to the environment and to reduce, limit or control activities which might cause or risk such damage
- Applies to any harm, not only trans-boundary,;
- But lacks recognition as customary law and has possibly been absorbed into the precautionary principle (see A Trouborst (2009) 2 *Erasmus LR* 106, available online as a PDF)

Key International Environmental Law Principles

Precautionary principle

- *Rio Declaration, 1992, 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.”

- *Narrow* interpretation (to ensure scientific uncertainty not used to postpone measures to protect environment)
- *Broad* interpretation (to require those proposing a potentially environmentally damaging activity to prove that there will be no serious environmental harm – i.e., a preventive approach)

Key International Environmental Law Principles

- **Principle of 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 International Environmental Law Principles

- **Polluter pays principle**

- States should ensure that those polluters or users of natural resources bear the full environmental costs of their activities

- widely recognised in soft law agreements, e.g., Rio Declaration, Principle 16:

“National authorities should endeavour 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 International Environmental Law Principles

- **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
 - *1992 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* (discussed in Session 7)

Key International Environmental Law Principles

- **Relevance of core concepts and principles to national environmental law - some questions to consider:**
 - To what extent has the core concept of sustainable development been embedded in national environmental law?
 - Is the concept of Sustainable Development, in its promotion of a balancing of economic, environmental and social considerations, capable of ensuring that humanity lives within the planet's ecological limits?
 - Can some of the key principles of international environmental law provide guidance for the development of, or be reflected in, national environmental legislation?

Key international environment institutions

- **UNEP** (see www.unep.org) - defines its mandate as :
"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 General Assembly's Open Working Group on Sustainable Development Goals** replaced former UN Sustainable Development Commission after Rio +20 (2012)
(see <https://sustainabledevelopment.un.org/index.html>)
- **Secretariats of significant MEAs**

For details re online access to MEAs, see List of Online Resources in Environmental Law (compiled by the IUCN Academy of Environmental Law, March 2015) in course folder

Key international environment institutions

- **Financial institutions**

- Global Environment Facility (GEF) (see <http://www.thegef.org>)
- World Bank (<http://www.worldbank.org/>)
- Regional Development Banks , e.g., Asian Development Bank (see <http://www.adb.org/>)

- **Non-government organisations**

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

See further: Session 17

Important multilateral environmental agreements (MEAs)

- See further: “Internet access to international law sources (prepared by APCEL, University of Singapore)) – in course materials
- MEAs deal with topics such as:
 - Protection of biological diversity
 - Trade in wildlife
 - Whaling
 - Marine pollution (shipping, dumping of wastes)
 - Trade in Wastes
 - Climate change
 - Ozone depletion
 - Antarctic
 - Wetlands and World Heritage sites
 - Land degradation
- Major gaps include marine conservation, marine pollution from land-based sources, forests and soil. Any others?

Process for, and level of, implementation of MEAs in national law

- Whilst some countries regard international treaties, once ratified, as “self-executing” (e.g., USA), many require legislation to be adopted in order for the obligations arising from treaties to be translated into national law
- In both contexts, there can be significant delays between the signing and ratification of MEAs
- The research assignment allocated to participants provides an example of an exercise that can be conducted in either a domestic EL course or an IEL course that assists students to identify the linkages between IEL and national environmental law

See homework exercise on MEAs: next session

2. Human Rights and the Environment*

- Introduction – Human Rights are inherent in being humans. Environmental degradation violates human rights
- Sources of Rights
 1. 1972 Stockholm Conference on the Human Environment
 2. General Assembly Resolution No. 45/94
 3. Various country's Constitutional and Legislative provisions on environmental rights
 4. Tribunals
 5. Human Rights Treaties

* See Shelton, D. Human Rights and the Environment: Substantive Rights, 2011.



Human Rights and the Environment

Substantive Rights

- Environmental protection is essential to the enjoyment of the rights to life, health, healthful and balanced ecology and family life
- Separate from but interdependent with the procedural rights in Environmental Law

Procedural Rights

- Right to information
- Right to participation
- Right to access justice
- Procedural matters to ensure that decision-making has the informed input of those potentially affected by policies and projects and for them to have redress for grievances or resulting harm



The Human Rights Treaties: Global

See PDFs

- The Universal Declaration of Human Rights 1948
- The Covenant on Economic, Social and Cultural Rights 1966
- The Covenant on Civil and Political Rights 1966
- UN Convention on the Rights of the Child



The Human Rights Treaties: Regional

- European Convention on Human Rights and Fundamental Freedoms 1950
- American Convention on Human Rights 1969
- San Salvador Protocol to the American Convention on Human Rights 1988
- African Charter on Human and Peoples' Rights 1981
- ASEAN Declaration on Human Rights 2012
- Proposed Pacific Charter



ASEAN Human Rights Declaration 2012

28. Every person has the right to an adequate standard of living for himself or herself and his or her family including:

- a. **The right to adequate and affordable food**, freedom from hunger and access to safe and nutritious food;
- b. The right to clothing;
- c. The right to adequate and affordable housing;
- d. The right to medical care and necessary social services;
- e. **The right to safe drinking water and sanitation**;
- f. **The right to a safe, clean and sustainable environment.**



Ch 5: Asian and Pacific Region

OXFORD

Environmental Law Dimensions of Human Rights



Edited by
Ben Boer

Environmental Law Dimensions of Human Rights

Edited by Ben Boer

Collected Courses of the Academy of European Law

- Broad-ranging themes assist understanding of the complex relationships between human rights and environmental law
- Gives an account of recent developments in Europe, Latin America, and the Asia-Pacific region
- Examines future directions for the development of a human right to a quality environment

Buriganga River Bed, Dhaka, Bangladesh



170477362

Buriganga River Bed, Dhaka, Bangladesh



Substantive Environmental Rights and National Law

- More than 120 Constitutions in the world guarantee a right to clean and healthy environment
- Philippine Constitution provides that “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” (Art II, section 16)
- *Interpreted by the Oposa Ruling as a duty not to destroy the environment*



Procedural Rights under the Philippine Constitution

- Article III, Bill of Rights
- Article III, section 7 – right to access information of public concern
- Section 11 – Free access to the courts and quasi judicial bodies and adequate legal assistance
- Art XIII, section 16 - Section 16. The right of the people and their organizations to effective and reasonable participation at all levels of



Right to Participation

- social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.



Rules of Procedure for Environmental Cases

Rights-based

_ Contains Provisions to protect eco-defenders and offenders from Strategic Lawsuits Against Public Participation (SLAPP)



3. Mooting as a Teaching Methodology

- Another methodology for enhancing student learning in environmental law is mooting, which involves mock court proceedings in which students present arguments on points of law
- There are international mooting competitions in which IEL provides a suitable context for setting moot problems
 - Gilbert Jessup moot mpetition : <https://www.ilsa.org/jessuphome>
 - Stetson International Environmental Law Mooting Competition : see <http://www.stetson.edu/law/international/iemcc/>
 - Academy (IUCNAEL) is interested in establishing a moot competition in association with its Annual Colloquium (to be discussed at Jakarta Colloquium, September 2015) – see <http://iucnael2015.fh.atmajaya.ac.id/>

Mooting as a Teaching Methodology

- Also national moot competitions e.g., in USA, environmental law moot competitions use legal issues arising under national environmental legislation: see e., Pace National Moot Competition (details at <http://www.law.pace.edu/jeffrey-g-miller-pace-national-environmental-law-moot-court-competition>)
- Law Schools also frequently run their own, internal moot competitions with course credit for students who participate
- Chinese Environmental Law Moot:
- See [clips of Beijing moot 2014](#)

Question

Do any of your law schools use mooting as a teaching tool?

What value does mooting have as a teaching tool?

