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***STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN THE ASIA-PACIFIC : DEVELOPING ENVIRONMENTAL LAW CHAMPIONS***

**Chiang Mai, Thailand 16-23 June 2017**

**SESSION 11: INTERNATIONAL  
ENVIRONMENTAL LAW**

Presented by Professor Natasha Affolder



# Outline

1. Introduction to International Environmental Law & why it matters for teaching domestic environmental law
2. Environmental Mooting as a teaching tool
3. Research Exercise on multi-lateral agreements (MEAs)



# 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

# Why International Environmental Law Matters

- 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 11)

## IEL as “public 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- 20<sup>th</sup> 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 organizations (e.g., United Nations General Assembly Resolutions)
  - Non-binding declarations and other texts (e.g., *1972 Stockholm Declaration*, the *1992 Rio Declaration* and the *Copenhagen Declaration 2009*)
- 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 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 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



## The Significance of a Legal Concept of Sustainability

E.g. *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”) provides that WTO Members’ relations in the field of trade and economic endeavors should be conducted in a way that “[allows] for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at difference levels of economic development”.



# 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

## 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 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 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

- **UN environment** (see [www.unep.org](http://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) in preliminary materials.



# 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**

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- and its World Commission on Environmental Law (WCEL) – see

- [https://www.iucn.org/about/union/commissions/cel/cel\\_about/](https://www.iucn.org/about/union/commissions/cel/cel_about/)

- [www.iucnael.org](http://www.iucnael.org)

# Important multilateral environmental agreements (MEAs)

- 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
  - Antarctica
  - Wetlands and World Heritage sites
  - Land degradation (desertification)
- **Major gaps include marine conservation, marine pollution from land-based sources, forests and soils.**

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

- Some countries (e.g., USA) regard international treaties, once ratified, as “self-executing,” but may require prior approval by legislature (e.g., Senate resolution)
- Many others treat ratification as solely an executive action (e.g., Australia), but require legislation to be adopted in order for ratification to occur (so that the obligations arising from treaties are translated by the legislation into national law)
- In both contexts, there can be significant delays between the signing and ratification of MEAs
- For situation in Thailand, see separate presentation to follow this one.

# 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 international tribunal for the law of the sea, a national court, or a human rights tribunal
- Students represent the complaining party, the respondent, and intervenors (including NGOs) and serve as a panel of judges.
- Skills taught: treaty interpretation; use of customary international law, IEL principles, legal research, brief-writing, oral advocacy, drafting of legal decisions



# Teaching IEL: Research Exercise

- Implementation of IEL occurs through national legislation
- An excellent vehicle for teaching 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 is in force, and how the treaty is implemented through national legislation
- 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: to follow**

