International environmental law (1)

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International environmental lawmaking: sources of international environmental law

Sources:
- Treaties
- Customary law
- General principles
- States unilateral acts
- Soft law
- Subsidiary role:
  - Judicial decisions
  - Doctrine
International environmental law

Principles

• *sic utere tuo ut alienum non laedas*: Obligation not to cause environmental harm

• Principle of intergenerational equity: Preservation of the environmental capital that States hold in trust for future generations and ensure that it is transmitted in conditions equivalent to those in which it was received.

• Principle of common but differentiated responsibilities: Developed countries have a heavier responsibility in view of their particular contribution to the degradation of the environment.

• Precautionary principle (and principle of preventive action)
International environmental law Principles

- Public participation, access to information, access to justice
- Polluter Pays Principle
- Prior Informed Consent
- Environmental Impact Assessment
Customary law and environmental law

• Elements:
  ✓ State’s practice
  ✓ Opinio iuris
  ✓ Proving customary law

• International customary rules (environment protection):
  ✓ sic utere tuo ut alienum non laedas (Obligation not to cause environmental harm)
  ✓ Prevention of transboundary pollution
  ✓ Co-operation on environmental issues
International treaties: steps

- Pre-negotiation
- Negotiations
- Adoption and signature
- Ratification and accession
- Reservations
- Entry into force
- Withdrawal
- Amendment
International treaties: features

- Umbrella / framework treaties
- Institutionalization of mechanisms
- Different groups of provisions
  - Permanent provisions
  - Technical provisions
- Trends towards globalization
- Relative commitments
- Conventional asymmetry
  - Common but differentiated responsibilities
  - Financial and technical asymmetry
International treaties: administration

• Conference of the Parties
• Secretariats
• Subsidiary bodies and committees
International treaties: weakness

• Gaps in international policy forums
• Incoherent decision-making structures
• Limitations in access and participation
• Weak support for the existing institutions and oversight mechanisms
• Lack of meaningful coordination
• Unbalanced approaches to the three pillars of sustainable development
Compliance and implementation

- Conditions for effectiveness of institutional process:
  - High level of governmental concern
  - Contractual environment in which agreements can be made and kept
  - Political and administrative capacity in national governments
Compliance and implementation

• How can international law contribute?:
  ✓ Identifying problems for collective answer
  ✓ Setting more appropriate agendas
  ✓ Elaborating more comprehensive and specific international policies
  ✓ Promoting national policy responses
Compliance and implementation

- Developing countries’ perspective: asymmetrical process
  - **agenda-setting** (determining which issues are given priority at the international level)
  - **forum-shopping** (moving from UN to Bretton Woods Institutions)
  - **non-implementation of inconvenient agreements** (e.g. the New International Economic Order)
  - **manipulation of the rules of procedure** (moving from majority voting to double majority and consensus)
  - **regional negotiations of potentially global issues** (e.g. negotiations of the Multilateral Agreement on Investments)
  - **marginalisation of South-friendly UN organisations** (e.g. UNEP, UNCTAD) till they change their practices
Compliance and implementation

• Compliance system:
  ✓ Actors, rules and procedures related to the behavior that is the substantive target of the treaty’s provisions (who gets regulated and how)
  ✓ Actors, rules and procedures to collect, analyze, evaluate and disseminate information about level on national compliance (compliance information system: self-reporting, independent monitoring, publication)
Compliance and implementation

- Additional means for improving implementation and compliance:
  - National capacity-building (administrative, enforcement, judicial resources)
  - Positive compliance measures
    - Financial co-operation
    - Technology transfer
    - Different implementation schedules and obligations
Compliance and implementation

• Non-compliance system:
  ✓ Free-standing non-compliance procedure administered by a special institutional mechanism
  ✓ Main characteristics:
    ✓ pro-futuro
    ✓ Non-controversial
    ✓ Non-judicial
    ✓ Non-binding
  ✓ Enforcement measures:
    ✓ Membership sanctions
    ✓ Trade measures
Enforcement: Dispute resolution

- Measures between parties:
  - Consultations and negotiations

- Non-binding third party measures:
  - Good-offices
  - Mediation
  - Fact-finding
  - Conciliation

- Binding third party measures:
  - Arbitral process
  - Judicial process
Sustainable development and protection of the environment as a totally secondary issue:

- North Sea Continental Shelf (FRG v. Denmark and the Netherlands) 1969
- Nuclear Essays (Australia and New Zealand v. France) 1970
- Fisheries (UK and FRG v. Iceland) 1973
- Advisory opinion on the legality of nuclear weapons, 1985
- Phosphate lands in Nauru (Nauru v. Australia) 1992
- Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) 1997
Enforcement: Dispute resolution

Sustainable development and protection of the environment as a central issue:

- Pulp mills in the River Uruguay (Argentina v. Uruguay) 2010: sustainable development, sustainable management
- Whaling in the Antarctic (Australia v. Japan) 2014: sustainable exploitation of whale stocks
- Aerial spraying of herbicides (Ecuador v. Colombia) introduced 2008, withdrawal
Enforcement: International State’s liability

- International liability for the violation of international law
  - Wrongful act
  - Attribution to the State

- International liability in the absence of a wrongful act (objective liability):
  - Evidence of damage
  - Evidence of facts
  - Evidence of causation link
Enforcement: International State’s liability

- Convention on international liability for damage caused by space objects (1972)
- Convention on Civil Liability for thermonuclear energy (1960)
- Convention on Civil Liability for Nuclear Damage (1963)
- Convention on Civil liability for damage caused by hydrocarbons (1969) + protocols
Enforcement: International State’s liability

- Regime of strict liability - 'liability without fault'
- Regime of civil liability of shipowners and so on: direct action against the insurance company for the liability of the owner / operator of the activity
- Limited to a certain amount (maximum ceilings)
Enforcement: International State’s liability

- Consequences for international liability:
  - Cessation of wrongful act/legal activity
  - Reparation:
    - Restoration of damaged environment
    - Compensation for environmental damages
  - International sanctions:
    - International crime (*ius cogens*)
    - Collective action