

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

Enforcement: Dispute resolution

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
- Activities in the border area of Nicaragua (Costa Rica v. Nicaragua), demand 2010 and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), demand 2011 (accumulated 2014)

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