8 International Environmental Law: Sovereignty versus the Environment?

This chapter identifies and analyses emerging international norms which are relevant to nature conservation and environmental protection and which have a bearing on the scope and substance of permanent sovereignty over natural resources (PSNR). Section 1 briefly introduces the concept of international environmental law, while section 2 deals with the development of international environmental law and its codification. Section 3 reviews international case law as far as relevant to the concept of sovereignty and environmental preservation. Section 4 discusses twelve main principles of international environmental law as they emerge from various sources of international law. Finally, section 5 addresses the question whether contradictions and tensions exist between the concept of sovereignty, including PSNR, and international environmental law.

1. The Concept of International Environmental Law

International environmental law is a relatively young branch of international law. Since the 1970s, in particular, it has developed in response to a mounting concern for the state of the environment. However, this is not to say that before the 1970s environmentally-relevant law did not exist. As early as the nineteenth century, marine fisheries agreements[1] were concluded and treaties containing anti-polluting provisions and regulating fisheries in international rivers.[2] During the first decades of this century treaties relating to the protection of certain species of wildlife (migratory birds, fur seals) and flora and fauna in general were adopted[3] and, since the 1930s, anti-pollution treaties have been concluded.

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1 For example, the 1882 North Sea Fisheries Convention.

2 See Lammers (1984: 124–41). See also the pioneering article by Contini and Sand (1972).

3 For example, in 1900 a Convention on the Preservation of Wild Animals, Birds and Fish in Africa was signed in London, followed by, in 1902, a Convention for the Protection of Birds Useful to Agriculture (Paris), and in 1911 a Convention on the Preservation and Protection of Fur Seals (Washington).

Furthermore, legal arrangements came into being which are environmentally relevant even though inspired by other objectives. Examples are the provisions in the GATT 1947 dealing with the protection of animal or plant life and the conservation of natural resources, particularly Article XX, sub (b) and (g),[4] Article 130R of the 1991 Maastricht Treaty on the European Union and the preamble of the 1994 Agreement Establishing the new World Trade Organization which includes among its goals the 'optimal use of the world's resources in accordance with the objective of sustainable development'. Similarly, other Uruguay Round texts, for example the Agreement on Agriculture, make reference to the need to protect the environment.[5]

In addition to treaty law, several general principles of classical international law are relevant for States' rights and obligations with respect to nature conservation and environmental protection. First and foremost, the principle of *territorial sovereignty*. Although in earlier times States assumed 'full' and 'absolute' sovereignty to mean that they could freely use resources within their territories regardless of the impact this might have on neighbouring States (the so-called Harmon doctrine),[6] few would argue today that territorial sovereignty is an unlimited concept enabling a State to do whatever it likes. Of course, State sovereignty cannot be exercised in isolation because activities of one State often bear upon those of others and, consequently, upon their sovereign rights. As Oppenheim put it as early as 1912:

> a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State—for instance to stop or to divert the flow of a river which runs from its own into neighbouring territory.[7]

Thus the principle of territorial sovereignty finds its limitations where its exercise touches upon the territorial sovereignty and integrity of another State. Consequently, the scope for discretionary action arising from the principle of sovereignty is determined by such principles and adages as 'good neighbourliness' and *sic utere tuo ut alienum non laedas* (you should use your property in such a way as not to cause injury to your neighbour's) as well as by the principle of State responsibility for actions causing transboundary damage. It is not easy to trace the exact origin of such principles nor to determine their precise implications. Apart

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[4] Charnovitz (1991: 37–55), GATT Secretariat (1992), Petersmann (1993: 67), de Waart (1992: 93–98).

[5] The relevant texts are reproduced in 33 *ILM* (1994), pp. 1–52. For a critical analysis see Cameron (1993: 100–21).

[6] See Chapter 10, section 6.

[7] Oppenheim (1912: 243–44).

from references in the literature,[8] the strongest support for these principles and their implications can be found in international case law, as discussed in section 4 of this chapter.

In summary, international environmental law has roots in classical international law. Yet, it could be argued that international environmental law has emerged as a new branch of international law only recently, by reference to the increasing number of treaties which have resulted from the perceived need for a legal response to global environmental degradation.[9] Over-exploitation of natural resources, loss of biodiversity, desertification, (tropical) deforestation, pollution of international waters, threat of global warming, and ozone layer depletion are among the most pressing concerns.[10]

2. Codifying International Environmental Law

In recent decades international environmental law has evolved gradually, especially through the elaboration of various rules in specific treaties. This has partly been done through 'disaster law' and partly through more systematic regulation to prevent environmental damage by proper conservation of nature and natural resources. The first category includes measures taken in the aftermath of disasters involving, for example, oil tankers (Torrey Canyon, Amoco Cadiz, Sandoz, Exxon-Valdez), the dumping of toxic waste, salt discharges or nuclear explosions. A case in point is the accident at the Chernobyl nuclear power station in May 1986 which led to the speedy adoption, in September 1986, of two international agreements in the context of the International Atomic Energy Agency (IAEA) on early notification and international assistance following international nuclear accidents.[11]

Examples of more systematic regulation include: Part XII of the UN Convention on the Law of the Sea (1982) on Protection and Preservation of the Marine Environment; the Vienna Convention on the Protection of the Ozone Layer (1985) and its Montreal Protocol (1987, subsequently amended); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989);[12] the UN Framework Convention on Climate Change (1992); the Biodiversity Convention (1992); the environmental provisions in the Treaty of Maas-

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[8] See, for example, Pop (1980); Kirgis (1972) and Smith (1988).

[9] Major textbooks include Kiss and Shelton (1991); Birnie and Boyle (1992). See also Sands (1993).

[10] See World Commission on Environment and Development (1987).

[11] Text in 25 *ILM* (1986), p. 1370 and p. 1377.

[12] Amended in March 1994 to include a complete ban on export from 1998.

tricht on the EU (1991); the North American Free Trade Agreement (NAFTA, 1993); the UN Convention to Combat Desertification (1994); and the European Energy Charter Treaty (1994). In addition, various multilateral treaties have been concluded for the protection of environment and public health[13] and of fauna and flora[14] as well as numerous regional instruments[15] dealing with resource conservation, fisheries, maritime management, hazardous waste, etc.[16] This category of more systematic regulation has a particularly important bearing on the scope of State sovereignty over natural resources. By ratifying (or acceding to) a treaty a State accepts the obligations under it, for example as regards the protection of wetlands, forests, wildlife or biological resources.[17]

It is illustrative of the proliferation of international instruments in this field that UNEP's updated 1991 register of treaties in the field of the environment lists 152 treaties for the period 1921 to 1989, of which only 48 were concluded before 1970.[18] The recent, unprecedented rise in the number of these treaties[19] (from an average of 1 per year before 1970 to 5 per year since then), as well as that of the signatories, exemplifies the increasing willingness of States to accept international obligations to conserve nature and natural resources, both at an international level and within their boundaries. Yet, at the same time we have to note that law-making by treaty has been fragmentary rather than systematic.[20] Moreover, it is one thing to conclude a treaty, but more important are the number of ratifications and its actual implementation, both internationally and, if appropriate, at the domestic level.[21] Here we are confronted with a fundamental weakness of international law: it is a body of law not yet endowed with sophisticated monitoring and

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[13] The 1963 Partial Test Ban Treaty can also be considered as an important environmental and public health instrument.

[14] For example, the Convention on Wetlands (1971), the World Heritage Convention (UNESCO, 1972) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973).

[15] Examples are the 1968 (OAU) African Convention on the Conservation of Nature and Natural Resources, the 1978 Treaty for Amazonian Co-operation, the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources and the Protocol on Environmental Protection to the Antarctic Treaty (1991).

[16] A useful survey is contained in Sand (1992).

[17] See Chapter 10 for details.

[18] See *UNEP Doc.* GC.16/Inf.4, Nairobi, 1991.

[19] See Kiss and Shelton (1994).

[20] Goldie's criticism of the 'fire-brigade mentality' of negotiators in producing *ad hoc* agreements with limited general application seems to be still largely correct. Goldie (1972: 104).

[21] Wellens (1984) and Spector and Korula (1993).

controlling mechanisms, although in recent years considerable progress has been achieved in this regard in the environmental field.[22]

The UN International Law Commission is working on three environmentally-relevant instruments which concern State Responsibility, Non-Navigational Uses of International Watercourses, and International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. In 1992, the General Assembly called for a convention to combat desertification in countries experiencing serious drought and/or desertification, particularly in Africa.[23] The UN Convention to Combat Desertification, a fervent wish of African States, was opened for signature in Paris on 14 October 1994.[24]

Reference should be made to UNEP's ongoing efforts to develop international environmental law by the adoption of multilateral conventions (such as its role in drafting the 1985 Ozone Layer Convention in the 1989 Hazardous Wastes Convention, and the 1992 Biodiversity Convention) or regional conventions (for example, in the context of its Regional Seas Programme) and of 'softer' legal instruments such as guidelines or codes of conduct.[25] A major example of the latter is the 1978 UNEP Resolution embodying 'Draft Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States', as discussed in Chapter 4.

In addition to the work of UN organs, (inter-)regional institutions such as the OECD, EU and OAU have made important contributions to the field of environmental regulation, by adopting standards, guidelines and codes of conduct. Furthermore, various NGOs have submitted interesting proposals. Examples are: the Helsinki Rules on the Uses of the Waters of International Rivers (1966) and the Montreal Rules of International Law Applicable to Transfrontier Pollution (1982) of the ILA; the proposed Legal Principles for Environmental Protection and Sustainable Development by an Experts Group on Environmental Law established by the Brundtland Commission;[26] the IUCN proposals for a Draft Covenant on Environment and Development (fifth draft, 1994); the Business Charter for Sustainable Development of the International Chamber of Commerce (1990) and the Dec-

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[22] For an account, see Chapter 4 of Birnie and Boyle (1992).

[23] *UN Doc.* A/RES/47/188, 22 December 1992.

[24] Text in 22 *ILM* (1994), pp. 1309–82.

[25] See Burhenne (1993).

[26] Experts Group on Environmental Law of the World Commission on Environment and Development (1987).

laration of the Business Council for Sustainable Development (1992).[27] While such documents have no formal status, they can contribute to identifying the legal issues at stake and to indicating the direction for further evolution of 'international sustainable development law'.

3. Territorial Sovereignty in International Case Law: 'Bending before all International Obligations'?

Several decisions of international courts and tribunals can give a lead in interpreting the meaning and implications of territorial sovereignty as a principle of international environmental law, which gives rise to obligations as well as rights.

In *The Island of Palmas Case* (United States *v*. The Netherlands, award in 1928) the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, declared:

> Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory.[28]

In the *Trail Smelter Case* (United States *v*. Canada, awards in 1938 and 1941) the arbitral Tribunal decided that, first of all, Canada was required to take protective measures in order to reduce the air pollution in the Columbia River Valley caused by sulphur dioxide emitted by zinc and lead smelter plants in Canada, only seven miles from the Canadian-US border. Secondly, it held Canada liable for the damage caused to crops, trees, etc. in the state of Washington and fixed the amount of compensation to be paid. Finally, the Tribunal concluded more generally, in what no doubt constitutes its best-known paragraph:

> . . . under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[29]

The Tribunal reached this conclusion on air pollution, but it is also applicable to water pollution and is now widely considered to be part of general international

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[27] The Declaration was accompanied by a Report entitled 'Changing Course: A global business perspective on development and on the environment'.

[28] Island of Palmas Case, 2 *RIAA* (1949), pp. 829–90. See also Jessup (1928: 735–52) and Lagoni (1981: 223–24).

[29] Text as in Harris (1991: 245).

law. This prohibition of causing significant harm to others or to places outside the State's territory as well as the duty to take into account and protect the rights of other States has also been referred to and elaborated in other cases.

For example, in 1949, in the *Corfu Channel Case* (United Kingdom *v.* Albania) the International Court of Justice rendered a judgment, in fact in its very first case, on the responsibility of Albania for mines which exploded within Albanian waters which resulted in the loss of human life and damage to British naval vessels and on the question whether the United Kingdom had violated Albania's sovereignty. The Court came to the conclusion that the laying of the minefield in the waters in question could not have been accomplished without the knowledge of Albania. The Court held that the Corfu Channel is a strait used for international navigation and that previous authorization of a coastal State is not necessary for innocent passage. In view of the passage of foreign ships, the Court held therefore that it was Albania's obligation to notify, 'for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters' and to warn 'the approaching British warships of the imminent dangers to which the minefield exposed them'.[30] Since Albania failed to do so on the day of the incident, the Court held Albania responsible for the damage to the warships and the loss of life of the British sailors and determined the amount of compensation to be paid.[31] For our purposes it is relevant that the Court referred to:

> every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[32]

It is also relevant to refer to the *Lac Lanoux Case* (Spain *v.* France, award in 1957) on the utilization by France of the waters of Lake Lanoux in the Pyrenees for generating electricity. For this purpose, part of the water had to be diverted from its course through the transboundary Carol river to another river, the Ariège. According to Spain, this would affect the interests of Spanish users, but France claimed that it had ensured restoration of the original waterflow and had given guarantees so that the needs of Spanish users would be met. France and Spain were unable to resolve this issue by negotiation, and therefore submitted it to arbitration in 1956. This led to an interesting award dealing with the rights and duties under general international law of riparian States in relation to an interna-

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[30] *ICJ Reports 1949*, p. 22.

[31] However, the Court determined that the mine-sweeping operations of the British Navy in Albanian waters one month later 'violated the sovereignty of . . . Albania'. It is notable that the Court decided on this particular question unanimously, i.e. with the concurring vote of the British Judge McNair. This is one of the rare exceptions in the practice of the Court of a judge not supporting the position of his own Government. See Hussain (1984) for general information on this issue.

[32] *ICJ Reports 1949*, p. 22.

tional watercourse.[33] The Tribunal concluded that the works envisaged by France did not constitute infringements of the Spanish rights under the Treaty of Bayonne and its Additional Act of 1866, because France had taken adequate measures to prevent damage to Spain and Spanish users, and for other reasons. As to the question whether the prior consent of Spain would be necessary, the Tribunal was of the opinion that such an essential restriction on sovereignty could only follow from exceptional circumstances, such as regimes of joint ownership, co-imperium or condominium but not from the case in question:

> To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence.

According to the Tribunal, prior agreement would amount to 'admitting a "right of assent", a "right of veto", which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another'. However, France was under an obligation to provide information to and consult with Spain and to take Spanish interests into account in planning and carrying out the projected works. According to the Tribunal, France had sufficiently done so. While the Tribunal clearly emphasized the hard-core nature of the principle of territorial sovereignty, it also admitted that it must function within the realm of international law: 'Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations'.[34] From this award is derived in general international law, as Lammers puts it, 'a duty for the riparian States of an international watercourse to conduct in good faith consultations and negotiations designed to arrive through agreements at settlements of conflicts of interests.'[35] This duty has been referred to in subsequent cases, such as the *North Sea Continental Shelf Case* where the Court refers to the obligation to enter into 'meaningful negotiations'.[36]

Finally, reference may be made to the *Barcelona Traction* case (Belgium *v.* Spain) in which the Court pointed out that:

> . . . an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are

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[33] For an extensive review and discussion of this case, see Lammers (1984: 508–17); Laylin and Bianchi (1959: 30); and Gervais (1960: 372–434).

[34] 24 *ILR* (1957), p. 120.

[35] Lammers (1984: 517).

[36] *ICJ Reports 1969*, p. 3. See on negotiation in general de Waart (1973) and Merrills (1991: Chapter 2).

> the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[37]

This concept of the *obligatio erga omnes* could (in the future) be of relevance when global environmental problems are at issue, such as depletion of the ozone layer, the extinction of the world's biodiversity, the pollution of international waters, and the threat of climate change. The world's climate and biodiversity were identified as a 'common concern' of mankind in the 1992 Conventions on Climate Change and Biodiversity. These concepts, and the principle of the Common Heritage of Mankind as discussed in the previous chapter, point to the emergence of environmental duties to the international community as a whole.

Apart from *Nuclear Tests Cases* (1974) referred to below, a current case of relevance to this issue concerns the course of a river. On 23 October 1992, Hungary invited the then Czech and Slovak Federal Republic to accept the jurisdiction of the Court in a dispute concerning the projected diversion of the Danube (the Gabcikovo-Nagymaros Project). On 2 July 1993 Slovakia consented to the jurisdiction of the Court.[38] This case, if continued, may become of interest for the clarification and further development of international environmental law.[39] Such clarification may also be expected (if the Court concludes it has jurisdiction) in the advisory opinion submitted by WHO on the following question: 'In view of the health and environmental effects, would the use of nuclear weapons be a breach of . . . obligations under international law, including the WHO Constitution'.[40] On 15 December 1994, a deeply-divided UNGA decided to request the Court

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[37] *ICJ Reports 1970*, p. 32, para. 33. In the next paragraph the Court stated that such obligations may derive, for example, in contemporary international law, 'from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'. In such cases a State has obligations *vis-à-vis* the international community as a whole and every other State can hold it responsible and institute a so-called *actio popularis* in protection of the community's interest.

[38] For information on the Danube Dam Case, see 32 *ILM* (1993: 496–503).

[39] On 19 July 1993, the ICJ established a seven-member Chamber of the Court for Environmental Affairs, in view of 'the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction'. See *ICJ Communiqué* No. 93/20, 19 July 1993. See also Chapter 39.10 of the UNCED *Agenda 21* and the Statement by Sir Robert Jennings to the UNCED, reproduced in *ICJ Yearbook 1991–92*, No. 46, pp. 212–18.

[40] *ICJ Communiqué* No. 93/30 of 13 March 1993.

urgently to render its advisory opinion on a similar question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'.[41]

4. Principles of International Environmental Law and State Sovereignty

The main principles of international environmental law concerning nature conservation and environmental protection, emerging from treaty law,[42] international case law, 'soft law' instruments such as the Stockholm and Rio Declarations, and the literature are summarized below. Not every principle has the same scope or status in international law of course. Some are well established, while others are still emerging. Some entail first and foremost injunctions or prohibitions for States (and peoples) to act in a certain way in their own jurisdictions, while others primarily relate to obligations with respect to neighbours, 'international areas' or the global environment as such. The following twelve principles can be identified:[43]

Permanent sovereignty over natural resources

It is a well-established practice, accepted as law, that—within the limits stipulated by international law—every State (and under certain conditions a people) is free to manage and utilize the natural resources within its jurisdiction and to formulate and pursue its own environmental and developmental policies.[44]

However, States have to conserve and utilize their natural wealth and resources for the well-being of their peoples, as stipulated in paragraph 1 of the 1962 Declaration on Permanent Sovereignty and Article 1 of the Human Rights Covenants, and they have to take into account the interests of other States as well as those of present and future generations of humankind.[45]

Due care for the environment and precautionary action

The principles of 'due diligence' or 'due care' with respect to the environment and natural wealth and resources are among the first basic principles of environ-

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[41] A/RES/49/75 K, entitled 'Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons', 15 December 1994.

[42] See the relevant conventions listed in Appendix III.

[43] See Kiss and Shelton (1991: 96–113); Birnie and Boyle (1992: 89–127); Koester (1990: 17–18); Lammers (1984: 556–79); Wolfrum (1990); Adede (1992); Gündling (1992); Sand (1993); Schrijver (1993) and Chapter 4 of this study.

[44] See Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration, and Article 3 of the Biodiversity Convention. For a discussion, see Chapter 4.

[45] See, for example, Art. 30 of the CERDS and the Stockholm and Rio Declarations.

mental protection and preservation law. They take root in ancient and natural law as well as in religion (for example, in the Christian notion of 'stewardship'). Apart from constant monitoring, it may require an assessment of the environmental impact of plans envisaged. There is an increasing emphasis on the duty of States to take preventive measures to protect the environment.[46] The emergence of this 'precautionary' principle is reflected in multilateral treaty law, such as the GATT, the 1982 Law of the Sea Convention, the 1991 ECE Convention on Environmental Impact Assessment, the 1992 Climate Change and Biodiversity Conventions, the 1994 Convention to Combat Desertification and the 1994 European Energy Charter Treaty.[47] In its work on International Liability, the ILC stresses 'foreseeability' as an important factor in determining whether a State is liable or not.[48] The 'precautionary approach' is also incorporated in Principles 15 and 19 of the Rio Declaration. However, what the precautionary approach exactly entails and what its hard-core consequences are has not yet crystallized. This is small wonder since it touches deeply on the discretion of States with regard to policy. While it may be somewhat premature to label the precautionary principle as established in international law, it can without doubt be termed an emerging principle.[49]

Inter-generational equity

According to this 'emerging' principle coined by Weiss,[50] States must take into account the interests of both present and future generations. States are under an international prohibition to manage their natural environment in such a way as to conserve its capacity for sustainable use by future generations as well as to conserve their fauna and flora, including endangered wildlife species and wetlands of international importance. An intra-generational equity necessitating assistance by the industrialized States to developing States, forms—as Weiss argues—an inherent part of the fulfilment of our inter-generational obligations.[51]

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[46] Hey (1992) and Hohmann (1992b).

[47] See, for example, Art. XX(b) and (g) of the GATT, Arts 192, 204 and 206 of the 1982 Law of the Sea Convention, Art. 3.3 of the Climate Change Convention, Art. 6 of the Biodiversity Convention, Art. 4 of the Convention to Combat Desertification, and Art. 19.1 of the European Energy Charter Treaty.

[48] See Birnie and Boyle (1992: 96).

[49] Ibid., p. 98.

[50] See the impressive book by Weiss (1989) and also Chowdhury (1992).

[51] Weiss (1989: 97).

Good neighbourliness

Good neighbourliness gave rise, among other things, to the well-established principle that States may not use their territory and resources under their jurisdiction in such a way as to cause significant harm to the environment of other States (*sic utere tuo ut alienum non laedas*) and, more recently, to areas beyond national jurisdiction. It may not be easy to determine the exact scope of this obligation and its implications. Certainly not all instances of transboundary damage resulting from activities within a State's territory can be prevented or are unlawful. This clearly follows from the *Trail Smelter* and the *Lac Lanoux* awards mentioned above and other sources. There is an increasing trend to demand environmental impact assessment, within the context of national or regional arrangements.[52] Important criteria for determining what is permissible and what is prohibited might be: (a) the likelihood of significant harmful effects on the environment and on potential or current activities in another State; (b) the ratio between prevention costs and any damage; (c) the impact on other States' capacity to use their natural wealth and resources in a similar way; and (d) the health of the population of another State.[53]

Equitable utilization and apportionment

This principle is closely related to the previous one and implies, firstly, that States should utilize resources and the environment in such a way that other States can utilize them as well or at least obtain a reasonable and equitable share.[54] From this it follows, secondly, that States must co-ordinate and co-operate for the 'optimum use' (in international fisheries law also referred to as 'maximum sustainable yield') of resources and prevent appreciable transboundary damage. This principle is relevant to all forms of shared resources, including fresh water resources, land, fisheries resources and gas and oil deposits.[55] At the same time, its meaning in practice often raises serious controversy.[56]

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[52] See the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context, Espoo (Finland).

[53] See Principle 3 of the UNEP Draft Principles of Conduct on Shared Natural Resources and Articles 10–12 of the General Principles Concerning Natural Resources and Environmental Interferences as adopted by the Brundtland Commission's Expert Group on Environmental Law.

[54] See Lammers (1984: 364–71), Schachter (1977: 64–74) and Brundtland Experts Group's Legal Principle 9.

[55] See Art. 83.1 of the 1982 Law of the Sea Convention and Art. 11 of the 1994 Convention to Combat Desertification. See also the ICJ in Cont. Shelf Tunisia/Libya, *ICJ Rep. 1981*, p. 3 and ICJ in Cont. Shelf Libya/Malta. *ICJ Reports 1981*, p. 13.

[56] See Chapters 9 and 10.

Prior information, consultation and early warning

Whenever transboundary resources are at stake or activities within the territory of one State may seriously affect the environment in other States, or persons or property therein, States are under an obligation to inform and consult these other countries well in advance. In the event of a transboundary environmental disaster (such as a tanker accident, nuclear explosion or toxic discharge) or even less acute environmental problems, States are under an obligation to warn other States and to co-operate to contain and solve these problems.[57]

State responsibility and liability

States have a duty to abstain from measures of economic and environmental policy which are incompatible with their international obligations. Initially, this implied first and foremost a prohibition against causing significant environmental harm to other States.[58] In modern international law this prohibition extends to 'international areas' (high seas, deep sea-bed, outer space), which are beyond the limits of national jurisdiction. The emergence of obligations emanating from principles such as 'due diligence', 'inter-generational equity' and protection of the rights of indigenous peoples may in future also give rise to State responsibility for policies with respect to conservation of natural resources and wealth *within* a State's own territory. Since 1949 the topic of State responsibility has been on the agenda of the ILC, but the ILC has still not finalized the codification of international law with respect to State responsibility for wrongful international acts and for injurious consequences arising from acts not prohibited by international law. The question is when damage caused by a country to its own environment and to its natural resources and wealth or to those of a neighbouring State amounts to an international act which gives rise to liability and an obligation to make amends, financially or otherwise. In its Draft Article 19 on State Responsibility, the ILC included among international crimes: 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of

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[57] See IAEA Convention on Early Notification of a Nuclear Accident, Vienna 26 September 1986, which entered into force 27 October 1986, and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Vienna 26 September 1986, which entered into force 26 February 1987; UN Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992; the Nordic Convention on the Protection of the Environment, 5 October 1976; and also the ILC work on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.

[58] Under classical international law, the victim State had to meet rather restrictive standards before it could successfully invoke the responsibility of another State for transboundary harm. For example, the *Trail Smelter* arbitral Tribunal referred to 'clear and convincing evidence of significant harm'.

the seas.'[59] The 1992 Rio Declaration does not address the substance of this matter but—as did the 1972 Stockholm Conference (Principle 22)—merely calls for the further development of international law regarding liability and compensation for external environmental damage (Principle 13).

Termination of unlawful activities and the making of reparation

From the previous principle it follows that States are under an obligation to terminate activities which have been found to be unlawful or incompatible with their international obligations and make reparation for damage inflicted. In principle, reparation should be designed to restore previous conditions (*restitutio in integrum*) or, if this is not possible, to compensate, financially or *in natura*, for damage and injury inflicted. In environmental texts, the second aspect of this principle is also referred to as 'the polluter pays principle' or as 'the principle of compensation for the victims of environmental damage'.[60] However, the polluter pays principle ('PPP') is of a much wider scope since it also includes such concepts as internalization of environmental costs in prices of goods and services and the passing on by the State of the reparation costs to polluters, such as private parties.

Preservation of res communis and the common heritage of (hu)mankind

These principles relate first of all to areas beyond national jurisdiction, such as the high seas, the ocean floor, outer space and perhaps Antarctica.[61] Various conventions provide that these areas may not be used as waste dumping places and that their resources should be used in the interest of humankind as a whole.[62] In future, these principles may also gain relevance for the protection and conservation of the intrinsic value of nature and the environment and of what belongs to all of us, such as major ecological systems of our planet and biological diversity.

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[59] Art. 19.3, sub (d) of the Draft Articles on State Responsibility, *ILC Yearbook 1980*, Vol. II, Part Two, pp. 30–34 and *1985*, Vol. II, Part Two, pp. 24–25.

[60] See, for example, OECD Recommendations in 14 *ILM* (1975), p. 234 and 28 *ILM* (1989), p. 1320 and the recently concluded Council of Europe's Convention on civil liability for damage resulting from activities dangerous to the environment, Lugano, 1993. In these texts the PPP relates especially to the relationship between the public authorities of a State and polluters within that State. See also Principles 16 and 13 of the Rio Declaration.

[61] It is a controversial question whether the Antarctic continent and the Antarctic environment can be viewed as part of the *res communis* or the common heritage of humankind. Antarctica is still subject to territorial claims by seven States. However, these claims are 'frozen' under the 1959 Antarctic Treaty. The 1991 Protocol to the Antarctic Treaty on Environmental Protection has prohibited mineral exploitation for 50 years. See Pinto (1994a) and Lefeber (1990).

[62] See Art. 4 of the 1979 Moon Agreement and Art. 140 of the 1982 Law of the Sea Convention.

For example, the 1985 Ozone Layer Convention seeks to prevent such adverse effects as 'changes in climate which have significant deleterious effects on human health, or on the composition, resilience and productivity of natural and managed ecosystems or on materials useful to mankind'.[63] The third preambular paragraph of the 1992 Convention on Biological Diversity provides that conservation of biological diversity is 'a common concern of humankind'. Similarly, it is acknowledged 'that change in the earth's climate and its adverse effects are a common concern of humankind'.[64] Although this backsliding of the notion of 'heritage' to that of 'concern' is unfortunate, the reference to the interest of the international community as a whole in preserving the environment is maintained. In the *Nuclear Test Cases (Australia/New Zealand* v. *France*, 1974), Australia suggested that there is a general interest of all States, a right *erga omnes*, to seek the protection of important environmental rights, *in casu* the right of the international community that atmospheric testing does not take place.[65]

Duty to co-operate in solving transboundary environmental problems

The duty of States to co-operate is well-established, as exemplified by Chapter IX of the UN Charter and the 1970 Declaration on Principles of International Law. At the bilateral and regional level and sometimes at the global level,[66] international co-operation to solve transboundary environmental problems requires prior information, consultation and negotiation. From a North-South perspective there is a duty of industrialized countries to assist developing countries in protecting the global environment.[67] There is also the duty of industrialized countries to contribute to developing countries' efforts to pursue sustainable development. In both cases such assistance may entail financial aid, transfer of environmentally-sound technology and co-operation through international organizations. The establishment of the Global Environment Facility (GEF), a joint project of the World Bank, UNEP and UNDP, which recently entered its Phase II (1994–97), can be seen as the first major step in carrying out this obligation. Transfer of technology provisions are most notably included in the Montreal Protocol to the Ozone Layer Convention, the Climate Change Convention and the Biodiversity Convention.

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[63] Art. 1.15 of the Vienna Convention on the Protection of the Ozone Layer.

[64] Preamble of the 1992 Convention on Climate Change.

[65] See Memorial by Australia to the ICJ, reproduced in part in Dixon and McCorquodale (1991: 454-55).

[66] For example, the CFC and CO_2 problems.

[67] See, for example, the Vienna Convention on the Protection of the Ozone Layer, Vienna, 22 March 1985, which entered into force 22 September 1988; the 1987 Montreal Protocol and the 1990 London and 1992 Copenhagen amendments to this Protocol. See Koskenniemi (1992) and also the Climate Change and Biodiversity Conventions.

Common but differentiated obligations

As in other fields of international law, such as international trade and monetary law, international environmental instruments differentiate between industrialized and developing countries. An example is the Climate Change Convention,[68] the objective of which is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level which would prevent dangerous anthropogenic interference with the climate system and which commits industrialized countries to take measures with the aim of returning by the year 2000 to the 1990 emission level of greenhouse gases. The rationale for differentiation is twofold. Firstly, it is recognized that so far the bulk of global emissions of greenhouse gases have originated in industrialized countries and that they should thus bear the main burden of combating climate change. Secondly, developing countries need access to resources and technologies in order to be able to achieve sustainable development. All States are subject to a number of duties, including the duty to take precautionary measures with respect to climate change and the obligation to co-operate in preparing for adaptation to the impacts of climate change, and the duty to develop integrated plans for especially vulnerable areas and resources.[69] Article 4.7 of the Climate Convention provides that the extent to which developing countries will effectively implement their commitments under the Convention will depend on the provision of financial resources and technology by industrialized countries. It is recognized that social and economic development and poverty eradication are the first priorities of developing countries. The Convention identifies various subcategories of developing countries, nearly all of which are characterized by special geographical features (for example, small island or land-locked) or environmental features (such as low-lying coastal areas or fragile ecosystems), and designates special measures for them.

Peaceful settlement of environmental disputes

Most international environmental treaties embody provisions spelling out how disputes should be settled. The majority stipulate that the parties involved should first aim to resolve disputes through negotiation. If this is unsuccessful, most treaties provide for further arrangements which may involve the assistance of third parties. For example, Article 11 of the Vienna Convention on the Protection of the Ozone Layer provides for mediation and conciliation. Article 19 of the 1991 Madrid Protocol on Environmental Protection to the 1959 Antarctic Treaty includes the possibility of having resort to either an arbitral tribunal or the ICJ. Other treaties provide that the dispute will be submitted to either arbitration or the ICJ if

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[68] See Kuik, Peters and Schrijver (1994: 6–8).

[69] Arts. 3.3, 3.4 and 4.1 (e).

negotiations have proved unsuccessful.[70] However, in virtually all of these cases the dispute settlement clauses are optional.[71]

Chapter 39.10 of *Agenda 21* addresses modalities for avoidance and settlement of disputes in the field of sustainable development and recommends, where appropriate, recourse to the ICJ. The Court established an Environmental Affairs Chamber in 1993. However, since international organizations (other than UN specialized agencies in the context of advisory procedure), environmental associations and potentially affected individuals have no direct standing with the Court, the need for a new International Court for the Environment has recently been advocated by international environmental lawyers.[72]

5. Sovereignty versus the Environment?

During recent decades it has become clear that in the field of natural resources States in many respects have become interdependent, for example as a result of: the growing scarcity of resources; the allocation of resources to development; the conservation of biodiversity; and environmental preservation in general. In response, attempts have been made to protect the environment, both nationally and internationally. In 1987, the Brundtland Commission adopted the concept of 'sustainable development', in order to balance the competing claims of the preservation of the environment and those of the desire for development. The trends in international environmental law summarized in this chapter have given rise to the obligation of States not only to manage their natural wealth and resources in such a way as to avoid significant harm to (the 'sovereign' territory of) other States, but also to manage their natural wealth and resources properly for the sake of their own people, including future generations. In addition, these trends provide a framework for international co-operation required to protect the environment.

The Brundtland Commission observed that 'legal regimes are being rapidly outdistanced by the accelerating pace and scale of impacts on the environmental base of development'. It recommended accordingly: 'Human laws must be reformulated to keep human activities in harmony with the unchanging and universal

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[70] Examples include Art. 11 of the 1985 Ozone Layer Convention; Art. 20 of the 1989 Basel Convention; Art. 14 of the 1992 Climate Change Convention; and Art. 27 of the 1992 Biodiversity Convention.

[71] For an exception see Part XV of the 1982 Law of the Sea Convention, discussed in Chapter 7, section 6.

[72] See Rest (1994). See also the Draft Resolution of the International Committee on Environmental Law, in *EPL* 24 (1994: 204).

laws of nature'.[73] Similarly, the Rio Conference on Environment and Development called for the further development of international law in the field of sustainable development.[74] This would undoubtedly require a further evolution of present international law, which is mainly State-oriented and under which national resource regimes co-exist but barely interact, towards one which is humankind-oriented and under which environmental preservation and sustainable development are approached from a global perspective: in short an international law under which international co-operation will seek to ensure equitable sharing, management of the global commons and its preservation for future generations. Within this emerging international legal framework, national sovereignty over natural resources, as an important cornerstone of environmental rights and duties, may well continue to serve as a basic principle.

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[73] World Commission on Environment and Development (1987: 330).

[74] Principle 27 of the Rio Declaration on Environment and Development; see also *Agenda 21*, Chapter 39.

Appraisal of Part II

This Part reviewed some important developments in international law relevant to natural resource jurisdiction. In all three areas studied—investment regulation, control over marine resources and environmental protection—there have been significant efforts of developing countries to deepen and broaden permanent sovereignty over natural resources. They have deepened it by claiming as many rights as possible on the basis of the principle of PSNR, thereby 'nationalizing' resource management. These developing countries have also broadened the scope of PSNR by claiming exclusive rights over the natural resources of the sea in waters along their coast. However, it was noted in all three areas that earlier assertions of PSNR are now increasingly being complemented by a trend towards international co-operation and the formulation of obligations incumbent on States.

Assertions of economic sovereignty of host States now include recognition of obligations, for example to respect international law, to observe in good faith contractual and treaty obligations and to provide fair treatment to foreign investors, including appeal possibilities and recourse to international dispute settlement mechanisms in the case of a dispute. Simultaneously, home States are under an obligation to recognize the economic jurisdiction of host States over investors in their territories and not to interfere in their internal affairs. At various levels of investment regulation, an increasing trend towards pragmatism and co-operation can be discerned, as exemplified by multilateral and bilateral investment promotion and protection treaties.

To a considerable extent, claims to extended economic jurisdiction of coastal States over marine resources have been accepted and recognized in the modern law of the sea. The classic law of freedom of the high seas has been largely replaced by a law of appropriation and protection. However, coastal States have been made responsible for proper management of marine resources. Living resources should be utilized in an optimal manner and surpluses should, in principle, be shared with neighbouring land-locked or otherwise geographically-disadvantaged States. Non-living resources, such as those of the continental shelf, must be exploited so as to avoid damage to the marine environment and taking into account the interests of neighbouring countries in the case of transboundary natural resources. The principle of the CHM applies to the resources of the deep sea-bed beyond the limits of national jurisdiction and to geographically remote areas, such as the moon. This principle has obtained a firm status in international law and put a halt to the seaward rush of coastal States, albeit at a very late stage. Thus, the

law of freedom to use resources of the seas, which has all too often resulted in a 'first come, first served' advantage for industrialized nations, has also been replaced to a considerable extent by a new law of international co-operation and protection aimed at proper management of sea resources and preservation of the marine environment, while taking into account the interests of developing countries and humankind as a whole.

Territorial sovereignty, including PSNR, features as a main principle of nearly every branch of evolving international environmental law.[1] However, the days of 'absolute' or 'full' sovereignty in the sense of an unfettered freedom of action of States are long passed. Today, the principle of sovereignty over natural resources gives rise in international environmental law to both rights and duties of States. On the one hand, States have the right to pursue freely their own economic and environmental policies, including conservation and utilization of their natural wealth and the free disposal of their natural resources; on the other hand, obligations and responsibilities have emerged which confine the States' freedom of action. These two sides of the same coin are examined in detail in Part III. Here it may suffice to say that in important areas of modern international law relevant to natural resource jurisdiction, the trend towards 'nationalizing' resource management is being complemented by a duty to co-operate with other States and peoples.

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[1] Exceptions include the environmental regimes for the high seas, the deep sea-bed and Antarctica.