Subject: **Law**

Production of Courseware
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Paper : **Environmental Law**

Module : **Introduction to International Environmental Law**

QUADRANT-I (A) – PERSONAL DETAILS

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QUADRANT-I (B) – DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	Environmental Law
Module Name/Title	Introduction to International Environmental Law
Module Id	ENLAW/1
Pre-requisites	General principles of international law
Objectives	To study the evolution and expansion of international environmental law
Keywords	International environmental law, sources, MEAs, North-South debate

1. Introduction

It is now widely recognised that the planet is facing a range of environmental challenges, which can only be addressed through international co-operation. Developments in science and technology have enhanced the possibility of understanding the environmental implications of various naturally occurring events as well as human activities. The last few decades have witnessed an exponential increase in multilateral environmental agreements covering a wide range of issues such as ozone depletion, climate change, loss of biodiversity, toxic and hazardous products and wastes, pollution of rivers and depletion of freshwater resources.

International environmental law is a comparatively new branch of international law. It has expanded dramatically over the years particularly since the United Nations Conference on the Human Environment, 1972. The development of international environmental law has produced mixed results. While some treaty regimes have been effective in producing the desired results (e.g. Vienna Convention on Protection of the Ozone Layer, 1985), some other regimes are struggling to produce results (e.g. United Nations Framework Convention on Climate Change, 1992).

This unit provides an overview of the development of international environmental law and briefly introduces its sources and important underlying principles. An in-depth analysis of the substantive aspects of international environmental law is not an objective of this unit. This unit explains the sources of international environmental law and narrates the development of international environmental law in its historical context. It also highlights the expansion of international environmental law and the role played by important international conferences on the environment in this process. This unit also highlights the North-South debate in the international environmental law regime.

2. Learning Outcomes

After reading this unit, students will have an understanding of the origin, evolution and expansion of international environmental law. By the end of this unit, students will be able to identify and critically analyse international environmental law instruments.

3. Early Legal Developments

Early legal developments in the field of the environment were limited in nature and scope. Legal initiatives mostly focused on specific issues such as regulation of whaling, fisheries, watercourses and birds (e.g. Convention between France and Great Britain Relating to Fisheries, 1867 and Convention for the Regulation of Whaling, 1931).

In the 1930s, the transboundary consequences of air pollution were acknowledged in arbitral proceedings leading to the award of the arbitral tribunal in the *Trail Smelter* case. The *Trail Smelter case* (Canada v. US) (1941) laid down the rule of international law on state responsibility in the context of transboundary pollution (and for transboundary effects on environment in general). It was held that:

> 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 consequences and the injury is established by clear and convincing evidences.

This principle was concretised subsequently through case laws (e.g. *Corfu Channel case* (UK v Albania) (1949) ICJ Reports 4). A number of treaties and declarations have also incorporated this principle. For example, Article 194 of the United Nations Convention on the Law of the Sea, 1982 and

Principle 21 of the Declaration of United Nations Conference on the Human Environment, 1972 reflect this principle. The *Trail Smelter case* is a landmark case because it influenced the subsequent development of international environmental law significantly. The case together with the treaties adopted and organisations established in the late 19th century and the early 20th century are believed to have provided the basis of international environmental law.

4. Sources of International Environmental Law

Article 38(1) of the Statute of the International Court of Justice provides that treaties, customs and general principles of law recognised by civilised nations are the major sources of international law. Judicial decisions and teachings of the most highly qualified publicists are recognised as subsidiary sources. While treaties and customary law are important sources of international environmental law, the legal regime for the protection of the environment also includes a range of legally non-binding instruments generally known as ósoft lawô, which includes declarations and guidelines.

4.1. *Treaties*

Treaties are the most frequently used source of international environmental law. The last few decades, particularly the 1980s and the 1990s, have witnessed a proliferation of multilateral environmental agreements (MEAs). Between the Stockholm Conference, 1972 and the Rio Conference, 1992, several treaties were concluded covering a range of issues such as regulation of trade in endangered species (Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES)), marine pollution (International Convention for the Prevention of Pollution from Ships, 1973), ozone protection (Vienna Convention on Protection of the Ozone Layer, 1985) and transboundary movement of hazardous waste (Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989). More than 100 MEAs were concluded between 1972 and 1992. Environmental catastrophes such as the Amoco Cadiz oil spill (1978), the Chernobyl nuclear accident (1986) and the Exxon Valdez oil spill (1989) also triggered the rapid development of international environmental law.

Even though the number of MEAs has grown significantly, this development was criticised mainly because of their ambiguous and indeterminate legal substance and non-compliance by state parties. The proliferation of MEAs has also made coordination between different treaty regimes a difficult task. Consequently, in recent years, the focus has shifted towards stronger emphasis on treaty coordination, effectiveness, and compliance as opposed to the adoption of new treaties.

The treaty making process in international environmental law has also witnessed the introduction of novel ideas, most importantly, the Convention-Protocol approach, which envisages a framework convention with broad principles. Concrete obligations and actions will be laid down in subsequent agreements known as protocols. For example, general principles pertaining to the protection of biodiversity are laid down under the Convention on Biological Diversity, 1992. However, concrete rights and duties have been laid down in subsequent protocols on different issues such as biosafety (Cartagena Protocol on Biosafety, 2000) and benefit sharing (Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 2010). The climate change regime is another example with the United Nations Framework Convention on Climate Change, 1992 as the framework convention and the Kyoto Protocol, 1997 as a subsequent agreement with concrete rights and duties.

This method is progressive on various grounds. The idea of a framework convention without concrete rights and duties helps to bring more countries on the table. The cooperation, which begins with the framework convention, in theory, would nurture cooperation and trust among parties and would help to

develop a strong and effective legal mechanism subsequently. This flexible mechanism also gives an opportunity to respond to new issues according to evolving scientific evidence.

4.2. *Custom*

Custom is also an important source of international environmental law. An important advantage of customary international law norms is that they can inform the development of treaties or be codified into a treaty as was the case of the United Nations Convention on the Non-Navigational Uses of International Watercourses, 1997.

Courts and tribunals at the international level have recognised and used customary norms on various occasions. For example, the International Court of Justice recognised the principle of reasonable and equitable utilization as a customary norm in the context of the use and conservation of international watercourses in the *Gabcikovo-Nagymaros case* (Hungary v. Slovakia) (1997) ICJ Reports 7). In the *Pulp Mills case* (Argentina v. Uruguay) (2010) ICJ Reports 14), the International Court of Justice has recognised transboundary environmental impact assessment as a requirement of customary or general international law.

Nevertheless, identification of international customary norms is not an easy task. Given the fact that environmental issues are evolving, it is a challenge to ascertain the two essential components of international custom ï state practice and *opinio juris*. While the former denotes the actual practice followed by states, the later denotes the part whether the states have considered it as their legal obligation to follow such practice. It is extremely difficult to ascertain the state practice of over 190 countries. Further, there is a lack of clarity as to how to ascertain these components. While the traditional method suggests that more weightage ought to be given to actual state practice, the modern approach relies heavily on documents such as declarations or the work of international organisations such as the International Law Commission.

4.3. *General principles of law*

General principles of law recognised by civilized nations are important in the context of development and expansion of international environmental law. It is to be noted that the reference to ócivilized nationsô in Article 38(1) of the statute of the International Court of Justice is now regarded as outdated. This term refers to the colonial practice of classifying nations as civilized, uncivilized and barbarians adopted by the Europeans and probably the term was carried forward to the ICJ statute from its predecessor, that is, the Statute of the Permanent Court of International Justice, 1920.

International courts and tribunals have relied on general principles of national law in a number of cases. However, its use in the field of environmental law has been marginal. The *Trail Smelter Arbitration* (*US* v. *Canada*, 1941) is one classic example of an environment related case where in the general principle of national law was used. The tribunal in the *Trail Smelter* case relied on decisions of the United States Supreme Court on cases concerning air pollution and water pollution between states of the Union in arriving at its finding that óno state has the right to use or permit to the use of its territory in such a manner as to cause injury by fumes in or to the territory of anotherô. General principles are of great significance in the context of principles highlighted in various soft law instruments. For example, principles such as the precautionary principle, polluter pays principle, sustainable development and common but differentiated responsibility in declarations adopted at different conferences on environment (e.g. Rio Declaration, 1992) have influenced interpretation, application and development of treaties. General principles may also influence the development or concretisation of customary norms.

4.4. *Judicial decisions and teachings of the most highly qualified publicists*

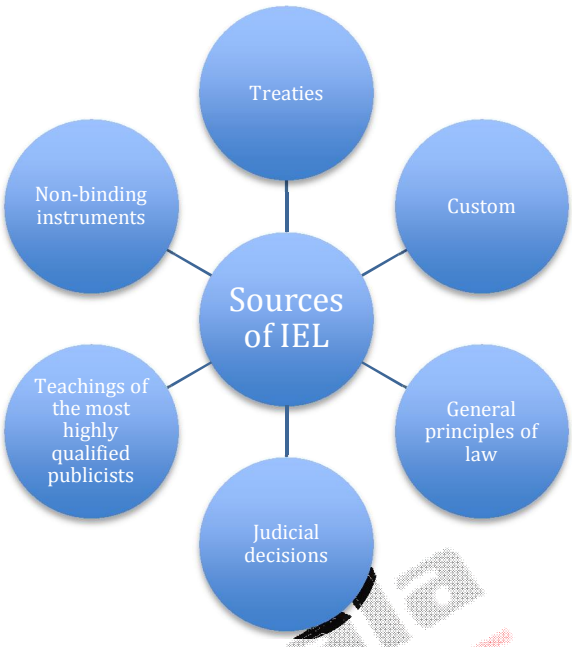
Judicial decisions and teachings of the most highly qualified publicists are regarded as ósubsidiary means for the determination of rules of lawô under the ICJ Statute. They are subsidiary when compared other three sources described above. Generally international law does not recognise precedential value of decision of international courts and tribunals. Therefore, judicial decisions cannot be treated as a formal source of law. Article 59 of the ICJ Statute explicitly provides that decisions of the Court has no precedential value. ICJ's decisions bind only the parties to the dispute. However, in practice, decision of international courts and tribunals strongly influence subsequent decision. For example, the ICJ in the *Gabcikovo-Nagymaros* (*Hungary* v. *Slovakia*, ICJ, 1997) case relied on explicitly its advisory opinion in the *Legality of Nuclear Weapons* case (1995).

In addition to judicial decisions, teachings of the most highly qualified publicists are another ósubsidiaryô source of international law. One critical issue in this regard is the reference in Article 38(1)(d) of the ICJ Statute to the terms ómost highly qualifiedô. It is problematic to ascertain who are the ómost highly qualified publicistsô in the field of international law.

The teachings of the most highly qualified publicists are a rarely used source of international law by international courts and tribunals. A 2012 study by Michael Peil observes that the ICJ óhas explicitly cited to publicists in only 22 of its 139 Judgments and Advisory Opinionsô (file:///C:/Users/ASIM/Desktop/SSRN-id2115529.pdf). Among these cases, the ICJ has referred to the work of the International Law Commission mostly rather than individual writers. For example, in the *Gabcikovo-Nagymaros* (*Hungary* v. *Slovakia*, ICJ, 1997), the ICJ heavily relied on the work of the International Law Commission on state responsibility to determine whether Hungary's action in stopping the work of a dam as agreed under a treaty by citing environmental reasons is justified under international law and therefore does not result in liability under international law.

4.5. *Non-binding instruments*

Non-binding instruments have also been very influential in the development of international environmental law. Even though they are technically not ólawô, soft law has played a significant role in international environmental law. First, some of the most influential developments that have shaped international environmental law have been the result of non-binding instruments such as the Stockholm Declaration, 1972 and the Rio Declaration, 1992. Second, soft law instruments have played a crucial role in concretising some of the key principles of international environmental law such as state responsibility for transboundary harm. Third, soft laws form a starting point for the development of hard law. Several environmental soft law instruments have played a crucial role in the development of legally binding treaties. For example, the Helsinki Rules on the Uses of the Waters of International Rivers, 1966 adopted by the International Law Association formed the basis of a treaty subsequently adopted on international watercourses - the UN Convention on the Non-Navigational Uses of International Watercourses, 1997.



5. Important Environmental Law Conferences

This part describes the contributions by key international conferences on environment to the development of international environmental law.

5.1. *Stockholm Conference, 1972*

The early 1960s saw the emergence of environmentalism based on scientific evidence of environmental degradation. This led to the realisation that national measures are not sufficient to protect the environment. Pressure was put on the international community to formulate a strategy for the protection of the global environment. The United Nations responded to this pressure by convening the United Nations Conference on the Human Environment, 1972 (Stockholm Conference).

The results of the Stockholm Conference were a non-binding Stockholm Declaration and an Action Plan consisting of 109 recommendations. The Stockholm Declaration laid the foundation for the future development of international environmental law. Some of the important provisions in this regard are Principle 11 (implicit sustainable development), Principle 21 (state responsibility for transboundary harm), and Principle 22 and 24 (liability rules). The Stockholm Conference also led to the establishment of the United Nations Environment Programme (UNEP) in 1972. It was the first institution within the UN system to have environmental protection as its main task and it played and continues to play a significant role in the international environmental law making process.

The second document adopted at Stockholm - the Action Plan - contains 109 recommendations adopted by consensus. The Action Plan identifies specific actions to address environmental issues and divides them into three categories: a global environmental assessment program (Earthwatch); environmental management activities; and international measures to support the national and international actions of assessment and management.

An important achievement of the Stockholm Conference was that environmental protection became a mandate of the UN, even though environmental protection was not originally and explicitly mentioned in the UN Charter.

5.2. *Rio Conference, 1992*

The second major global conference on the environment - United Nations Conference on Environment and Development (UNCED or the Rio Conference) - took place in Rio de Janeiro in 1992. More than 30,000 participants from 176 countries were present at the Rio Conference.

The Rio Conference produced five documents setting out the international agenda for sustainable development for the twenty-first century. They are:

1. Rio Declaration on Environment and Development, a non-legally binding document containing key principles to guide international action;
2. Agenda 21, an ambitious plan of measures and actions to concretely promote sustainable development;
3. United Nations Framework Convention on Climate Change;
4. Convention on Biological Diversity; and
5. Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Rio Forest Principles).

In addition to the abovementioned direct outcomes, the issue of desertification was highlighted by state parties during the Rio Conference and this eventually led to the adoption of the United Nations Convention to Combat Desertification in 1994. Further, the concerns of people living in the island countries were highlighted and this led to the Global Conference on the Sustainable Development of Small Island Developing States in 1994. A programme of action to assist the environmentally and economically vulnerable countries was also adopted by the Conference.

The Rio Conference is a landmark in terms of participation of representatives of states and non-governmental organisations. More than 700 NGOs participated in the Conference, which constituted a decisive moment from the participation perspective. This is a significant shift from the traditional practice where the international law making process was the exclusive domain of sovereign states. It also triggered a ópradigm shiftô from international environmental law to the international law of sustainable development because a large number of developmental issues got merged with environmental debates.

The Rio Conference also led to the establishment of the UN Commission on Sustainable Development (CSD) to ensure effective follow-up of the UNCED. The High Level Political Forum on Sustainable Development has replaced CSD in 2013.

5.3. *World Summit on Sustainable Development (WSSD), 2002*

The United Nations General Assembly Resolution 55/199 convened the World Summit on Sustainable Development (WSSD or the Summit) in Johannesburg in 2002. The purpose of the Summit was to conduct a 10-year review of Agenda 21 and to ensure a balance between the three reinforcing components of sustainable development - economic development, social development and environmental protection. WSSD marks a major advancement from the Rio Conference in terms of participation. Around 21000 participants were present at the Summit with delegates from 191 governments. WSSD did not focus on adoption of new MEAs. Instead, the focus was on implementation of existing MEAs.

The two major outcomes of WSSD are:

(1) Johannesburg Declaration on Sustainable Development; and
(2) Johannesburg Plan of Action.

WSSD was originally convened to promote sustainable development. However, the Summit ended up focusing mainly on development and it only marginally addressed environmental issues. It failed to make any significant progress in promoting the environmental agenda. At Johannesburg, the environment was treated as a sideshow and the focus was mostly on development and poverty eradication. The Plan of Implementation was also development oriented. In effect, the environment became relevant only in the context of development. For example, the Plan of Implementation indicates that measures to protect and manage natural resources are essentially viewed as a base of economic and social development. WSSD steered the development discourse in a new direction by giving more importance to the development needs of the Third World rather than the environmental part, which the developed countries had been pursuing.

5.4. *United Nations Conference on Sustainable Development (Rio+20), 2012*

The United Nations Conference on Sustainable Development took place in Rio de Janeiro from 20 to 22 June 2012. The Rio+20 outcome document, ôThe Future We Wantô outlines the key issues and challenges in the path of achievement of the goal of sustainable development. To a great extent, the Rio+20 Summit was a continuation of WSSD in terms of the nature of the discourse. The outcome document covers almost all issues pertinent to development such as inclusive and equitable economic growth; reduction of inequalities; raising of basic standards of living; equitable social development; and sustainable management of natural resources.

The outcome document reasserts the three pillars of sustainable development identified at WSSD, that is, economic development, social development and environmental protection. It also reinforces poverty eradication as an indispensable requirement for sustainable development. In addition, the outcome document emphasises the importance of technology transfer to developing countries. It was also resolved to strengthen the institutional framework for sustainable development.

The Rio+20 outcome document does not provide any concrete ómeans of implementationô or new and additional resources in order to achieve sustainable development. It has been observed that developed countries failed to fulfil their previous commitments on finance and technology for sustainable development. Some other critiques present an optimistic view of the Rio+20 outcome. According to them, the mandated actions in the Rio+20 text reflect the important work in the years ahead at the UN.

6. International Institutions: Emerging Trends

The institutional framework for international environmental law used to follow the idea of establishing independent institutions for the proper implementation of MEAs. This is evident from the establishment of the UNEP and CSD in the aftermath of the Stockholm Conference and the Rio Conference respectively. These institutions have indeed played a crucial role in the development and implementation of international environmental law.

However, the institutional mechanism under international environmental law has undergone dramatic changes in the recent past. The new institutional arrangements usually comprise a Conference of Parties (COP) or Meeting of the Parties (MOP) with decision-making powers, a secretariat, and one or more

specialist subsidiary bodies. At the global level, very few MEAs concluded since 1972 rely on an existing inter-governmental organisation (IGO) for implementation.

COP is a post-1970 phenomenon. Previously, MEAs used to set up an IGO with legal personality. Examples include the International Whaling Commission (established by the International Convention for the Regulation of Whaling, 1946) and the International Commission for the Northwest Atlantic Fisheries (established by the International Convention for the Northwest Atlantic Fisheries, 1949). However, traditional IGOs were expensive and bureaucratic in nature. This resulted in disinterest to create new IGOs in the environmental field.

COPs are not IGOs in the traditional sense. They are freestanding and distinct both from the states that are parties to a particular agreement and from existing IGOs. They are also autonomous in the sense that they have their own lawmaking powers and compliance mechanisms. This marks a distinct and different approach to institutionalised collaboration between states, being both more informal and more flexible, and often innovative in relation to norm creation and compliance.

COPs perform a variety of functions such as establishment of subsidiary bodies, arrangement of meetings, adoption of rules of procedure for itself and for subsidiary bodies and providing guidance to the subsidiary bodies and the secretariat. COPs also contribute to the development of new substantive obligations by the parties by amending an MEA or by adopting new protocols. Another important function of a COP is its role in ensuring implementation of and compliance with MEAs.

7. The North-South Debate

The Stockholm Conference marked the beginning of the North-South divide on environmental protection and development. The South was skeptical of the conservationist approach of industrialised nations mainly because of its implications for their economic development. At the same time, the North argued in favor of protection and conservation of the environment neglecting the social and economic needs of developing countries.

The North-South divide became very clear during the Rio Conference. Developing countries argued for more distributive justice and developed countries insisted on conservation and better use of natural resources. The Forest Principles adopted at the Rio Conference is an example of the North-South divide on environmental issues. Developing countries strongly resisted a legally binding regime on forests although developed countries pushed for a legally binding agreement.

The Rio Conference attributed historical responsibility to industrialised countries for environmental degradation. While industrialised countries sought progress on climate change, biodiversity, forest loss and fisheries issues, developing countries pushed for market access, trade, technology transfer, development assistance and capacity building. At the Rio Conference, developing countries managed to include the development agenda as part of the discourse.

Thus, the Rio Declaration represents a delicate balance between the interests of developing and industrialised countries. This balance is reflected in two sets of key principles. They are, on the one hand, the precautionary approach and the polluter-pays principle and, on the other hand, the right to development, poverty alleviation and the recognition of common but differentiated responsibilities.

The North-South debate could also be seen in the fact that developing countries made their acceptance of environmental obligations contingent upon the provision of financial assistance, and at the same time developed countries argued for effective institutions to ensure compliance. This scenario led to two developments ï financial mechanism and compliance mechanism.

The North-South debate and the consequent impasse in environment negotiations resulted in finding a via media to achieve consensus between the North and the South by coining the terms ôenvironmentô and ôdevelopmentô together. It led to a paradigm shift from environmental law to the law of sustainable development. However, the concept of sustainable development remained ambiguous and susceptible to different uses by different actors.

8. Summary

International environmental law has expanded dramatically both in quantitative and qualitative terms over the last few decades. While it originated with a limited focus on state responsibility for transboundary harm and protection of a limited number of species, international environmental law has been transformed into a key component of international law addressing not just environmental protection but also various other related aspects such as poverty eradication and trade. While the development of international environmental law has brought about positive changes in controlling environmental degradation in many areas (e.g. protection of the ozone layer), it proved to be inadequate and ineffective in many other areas (e.g. climate change). In some cases, old environmental problems have worsened and new environmental threats and challenges have emerged.