



# Book – Principles and concepts of international environmental law (Part 2)

Book to Unit 3 – Principles and concepts of international environmental law (Part II)

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Book: Book – Principles and concepts of international environmental law (Part 2)

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# 1. Cooperation, and Common but Differentiated Responsibilities

Principle 7 of the Rio Declaration provides:

## **1992 Rio Declaration Principle 7**

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

Principle 7 can be divided into two parts: (1) the duty to cooperate in a spirit of global partnership; and (2) common but differentiated responsibilities.

## Duty to cooperate

The duty to cooperate is well-established in international law, as exemplified in articles 55 and 56 of chapter IX of the Charter of the United Nations, to which all UN member states, at present 191, subscribe, and applies on the global, regional and bilateral levels. The goal of the Rio Declaration is, according to the fourth paragraph of its preamble, the establishment of a “...new and equitable global partnership...”

The concept of global partnership can be seen as a more recent reformulation of the obligation to cooperate, and is becoming increasingly important. Principle 7 refers to states, but the concept of global partnership may also be extended to non-state entities.

International organisations, business entities (including in particular transnational business entities), NGOs and Civil Society more generally should cooperate in and contribute to this global partnership. Polluters, regardless of their legal form, may also have also responsibilities pursuant to the “Polluter–Pays Principle”.

## Common but differentiated responsibilities

Principle 7 also speaks of common but differentiated responsibilities. This element is a way to take account of differing circumstances, particularly in each state's contribution to the creation of environmental problems and in its ability to prevent, reduce and control them. States whose societies have in the past imposed, or currently impose, a disproportionate pressure on the global environment and which command relatively high levels of technological and financial resources bear a proportionally higher degree of responsibility in the international pursuit of sustainable development.

In practical terms, the concept of common but differentiated responsibilities is translated into the explicit recognition that different standards, delayed compliance timetables or less stringent commitments may be appropriate for different countries, to encourage universal participation and equity. This may result in differential legal norms, such as in the 1987 Montreal Protocol on Substances that deplete the Ozone Layer. In designing specific differentiated regimes, the special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

According to the concept of common but differentiated responsibilities, developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, *inter alia* by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development. A number of international agreements recognize a duty on the part of industrialized countries to contribute to the efforts of developing countries to pursue sustainable development and to assist developing countries in protecting the global environment. Such assistance may entail, apart from consultation and negotiation, financial aid, transfer of environmentally sound technology and cooperation through international organizations.

## Examples

Article 4 of the 1992 Climate Change Convention recognizes the special circumstances and needs of developing countries and then structures the duties and obligations to be undertaken by states accordingly. The idea of common but differentiated responsibilities and respective capabilities is stated in article 3 as the first principle to guide the parties in the implementation of the Convention. Article 12 allows for differences in reporting requirements. The provisions of the Convention on joint implementation (article 4.(2)(a), (b)) and guidance provided on the issue by its Conference of the Parties are also of relevance.

The 1992 Convention on Biological Diversity states in article 20 (4) that implementation of obligations undertaken by developing countries will depend on the commitments of developed countries to provide new and additional financial resources and to provide access to and transfer of technology on fair and most favourable terms. Other parts of this Convention relate to the special interests and circumstances of developing countries (e.g., paragraphs 13-17, 19 and 21 of the Preamble and articles 16-21).

The 1994 Desertification Convention contains specific obligations for affected country parties (article 5) and recognizes additional responsibilities for developed country Parties (article 6).

Article 26 of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 1972 creates the opportunity for parties to adhere to an adjusted compliance time schedule for specific provisions.

## 2. Precaution

Precaution (also referred to as the “precautionary principle,” the “precautionary approach,” and the “principle of the precautionary approach”) is essential to protecting the environment (including human health) and is accordingly one of the most commonly encountered concepts of international environmental law. It is also one of the most controversial, however, because of disagreements over its precise meaning and legal status and because of concern that it may be misused for trade-protectionist purposes

Probably the most widely accepted articulation of precaution is Principle 15 of the Rio Declaration.

### **1992 Rio Declaration Principle 15**

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Principle 15 was one of the first global codifications of the precautionary approach. Other formulations also adopted in 1992 at UNCED appear in the ninth preambular paragraph of the 1992 Convention on Biological Diversity and in article 3(3) of the 1992 Climate Change Convention. The 1992 CBD states: “..where there is a threat of significant reduction or loss of biological diversity, lack of full scientific uncertainty should not be used as a reason for postponing measures to avoid or minimize such a threat.” This language is less restrictive than Principle 15, because “significant” is a lower threshold than “serious or irreversible” and the language does not limit permissible action to cost-effective measures.

Article 3(3) of the 1992 Climate Change Convention appears to take a somewhat more action-oriented approach than Principle 15, stating: “The parties should take precautionary measures to anticipate, prevent or minimize the cause of climate change and mitigate its adverse effects...” The next sentence, however, repeats Principle 15 almost *verbatim*.

## Examples

Other formulations also exist. One of the most forceful is that in article 4(3)(f) of the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of their Transboundary Movement and Management of Hazardous Wastes within Africa, which requires parties to take action if there is scientific uncertainty.

Another example can be found in the 1996 Protocol to the London Convention, which states in article 3(1): "In implementing this Protocol, Contracting parties shall apply a precautionary approach to environmental protection ... when there is reason to believe that wastes or other matter introduced in the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects". Its second preambular paragraph, emphasizes the achievements, within the framework of the London Convention, especially the evolution towards approaches based on precaution and prevention.

## Southern Bluefin Tuna Case

In the Southern Bluefin Tuna Case, the International Tribunal on the Law of the Sea (“ITLOS”) could not conclusively assess the scientific evidence regarding the provisional measures sought by New Zealand and indeed, the country requested the measures on the basis of the precautionary principle, pending a final settlement of the case.

ITLOS found that in the face of scientific uncertainty regarding the measures, action should be taken as a measure of urgency to avert further deterioration of the tuna stock. In its decision-making, the tribunal said that in its view, “the Parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna.”

*See* ITLOS, *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Order of August 27, 1999. The decision prescribed a limitation to experimental fishing to avoid possible damage to the stock.

### 3. Prevention

Experience and scientific expertise demonstrate that prevention of environmental harm should be the “Golden Rule” for the environment, for both ecological and economic reasons. It is frequently impossible to remedy environmental injury: the extinction of a species of fauna or flora, erosion, loss of human life and the dumping of persistent pollutants into the sea, for example, create irreversible situations. Even when harm is remediable, the costs of rehabilitation are often prohibitive. An obligation of prevention also emerges from the international responsibility not to cause significant damage to the environment extra- territorially, but the preventive approach seeks to avoid harm irrespective of whether or not there is transboundary impact or international responsibility.

The concept of prevention is complex, owing to the number and diversity of the legal instruments in which it occurs. It can perhaps better be considered an overarching aim that gives rise to a multitude of legal mechanisms, including prior assessment of environmental harm, licensing or authorization that set out the conditions for operation and the consequences for violation of the conditions, as well as the adoption of strategies and policies. Emission limits and other product or process standards, the use of best available techniques and similar techniques can all be seen as applications of the concept of prevention.

## Preventive mechanisms

One obligation that flows from the concept of prevention is prior assessment of potentially harmful activities. Since the failure to exercise due diligence to prevent transboundary harm can lead to international responsibility, it may be considered that a properly conducted Environmental Impact Assessment might serve as a standard for determining whether or not due diligence was exercised. Preventive mechanisms also include monitoring, notification, and exchange of information, all of which are obligations in almost all recent environmental agreements.

In fact, the objective of most international environmental instruments is to prevent environmental harm, whether they concern pollution of the sea, inland waters, the atmosphere, soil or the protection of human life or living resources. Only a relatively few international agreements use other approaches, such as the traditional principle of state responsibility or direct compensation of the victims.

## Examples

ITLOS, in its Order of 3 December 2001 in the MOX Plant Case, considered (para. 82) the duty to cooperate in exchanging information concerning environmental risks a “fundamental principle in the prevention of pollution of the marine environment” under the United Nations Convention on the Law of the Sea and general international law. Obligations to conduct EIAs are also found in the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on the Transboundary Effects of Industrial Accidents, and the 1993 North American Agreement on Environmental Cooperation.

Principle 17 of the 1992 Rio Declaration, Agenda 21, principle 8(h) of the 1992 Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (“Forests Principles, and article 14(1)(a) and (b) of the 1992 CBD treat both the national and international aspects of the issue. The concept is also contained in article 206 of UNCLOS.

The duty of prevention extends to combating the introduction of exogenous species into an ecosystem. Article V(4) of the 1976 Convention on Conservation of Nature in the South Pacific provides that the contracting parties must carefully examine the consequences of such introduction. More stringently, article 22 of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses requires watercourse states to “...take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.”

## 4. “Polluter Pays Principle”

Principle 16 of the Rio Declaration provides:

### **1992 Rio Declaration Principle 16**

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

Principle 16 on internalisation of costs includes what has become known as the “Polluter Pays Principle” or “PPP”. According to the PPP, the environmental costs of economic activities, including the cost of preventing potential harm, should be internalized rather than imposed upon society at large.

An early version of the PPP was developed by the Organization for Economic Co-operation and Development (“OECD”) in the 1970s in an effort to ensure that companies would pay the full costs of complying with pollution- control laws and were not subsidised by the state. The PPP was adopted by the OECD as an economic principle and as the most efficient way of allocating costs of pollution-prevention-and- control measures introduced by public authorities in the member countries. It was intended to encourage rational use of scarce resources and to avoid distortions in international trade and investment. It was meant to apply within a state, not between states. As a goal of domestic policy, it has been realized only partially in practice

## Application

Issues relating to the content of the polluter pays principle are evident in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic. According to article 2(2)(b), “The Contracting Parties shall apply: ...the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.” This can be interpreted in different ways depending upon the extent of prevention and control and whether compensation for damage is included in the definition of “reduction”. Further, the very concept of the “polluter” can vary, from the producer of merchandise to the consumer who uses it and who pays the higher price resulting from anti-pollution production measures.

In fact, pollution costs can be borne either by the community, by those who pollute, or by consumers. Community assumption of the costs can be demonstrated using the example of an unregulated industry that discharges pollutants into a river. There are at least three possibilities:

- (1) the river can remain polluted and rendered unsuitable for certain downstream activities, causing the downstream community to suffer an economic loss;
- (2) the downstream community can build an adequate water treatment plant at its own cost;
- (3) the polluter may receive public subsidies for controlling the pollution.

In all these possibilities, the affected community bears the cost of the pollution and of the measures designed to eliminate it or to mitigate its effects. The PPP avoids this result by obliging the polluter to bear the full costs of pollution, to “internalise” them. In most cases, presumably, the enterprise will in fact incorporate the costs into the price of its product(s) and thus pass the cost on to the consumer; but it need not do this for the PPP to have its intended effect.

## Examples

The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation states in its preamble that the PPP is "a general principle of international environmental law" (para. 7).

The 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area states in article 3(4) that the PPP is an obligatory norm, while the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes includes it as a guiding principle in article 2(5)(b).

More recent examples of reference to it are found in the 1996 Amendments to the 1980 Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Preamble para. 5), and the 2001 Stockholm Convention on Persistent Organic Pollutants (Preamble, para. 17).

## 5. Access and Benefit Sharing regarding Natural Resources

Many indigenous and other local communities rely on natural resources such as forests, high deserts, wetlands, waterways, and fisheries for their livelihood or even existence. In addition, indigenous and other local communities often have unique cultures integrated with natural resources. These communities typically relate to these resources in a sustainable way, or else their livelihoods would disappear or their cultures would perish.

As a general matter, it is clear from Rio Principle 10 and international human rights norms that these communities and the individuals comprising them have the right to participate in decision-making processes with respect to those resources. They may also have substantive rights to those resources, the nature of which depends on both international and domestic law. See, e.g., *Awas Tingni Mayagna (Sumo) Indigenous Community vs the Republic of Nicaragua*, Inter-American Court of Human Rights (2001).

In addition to international human rights law, an international law example is the 1995 United Nations Agreement on Fish Stocks, which in article 24(2)(b) requires states to take into account when establishing conservation and management measures the need to ensure access to fisheries by indigenous people of developing states, particularly Small Island Developing States. At the domestic level, in addition to standard legislation protecting property rights for everyone, several nation's constitutions, legislation or customary law recognizes property rights which indigenous or other local communities may exercise over their land and waterways or which enable indigenous or other local communities to take part in decision-making processes.

## Indigenous and local communities

A related issue is the extent to which indigenous and other local communities have the right to participate in, or otherwise should be involved in, the management, development and preservation of the resources on which they rely. Principle 22 of the Rio Declaration provides:

### **1992 Rio Declaration Principle 22**

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

The 1993 Nuuk Declaration on Environment and Development in the Arctic States, in Principle 7, recognizes the vital role of indigenous peoples in managing natural resources.

### **1993 Nuuk Declaration on Environment and Development in the Arctic States**

#### **Principle 7**

“We recognize the special role of indigenous peoples in environmental management and development in the Arctic, and of the significance of their knowledge and traditional practices, and will promote their effective participation in the achievement of sustainable development in the Arctic.”

With respect to biological diversity, the vital role of indigenous and other local communities is expressly recognized in preambular paragraph 12 of the 1992 Convention on Biological Diversity, and is further detailed in its articles 8(j), 10(c), and 17.2. Article 8(j) states that:

### **1992 Convention on Biological Diversity Article 8(j)**

Contracting Parties shall: "subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles...and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

As a practical matter, the knowledge of indigenous and other local communities, their participation in decision-making and their involvement in management is often crucial for the protection of local ecosystems, for sound natural resource management, and for the broader effort to achieve sustainable development taking into account their traditional knowledge and cultural environment. Their involvement in EIA procedures is an example of their valuable participation in decision-making for sustainable development.

## Prior informed consent

As a legal matter, the question has arisen whether indigenous and local communities have, in addition to the procedural and substantive rights identified above, the right to Prior Informed Consent (“PIC”) (sometimes referred to as “free, prior and informed consent” or “FPIC”) with respect to the use of their knowledge and the genetic resources on which they rely.

In the words of article 8(j) of the CBD, what does “with their approval” entail? Some believe that there is an absolute right to such prior informed consent; some believe that such a right exists but that it is subject to the proper exercise of eminent domain; and others believe that no such right exists unless embodied in domestic law.

Similarly, questions exist regarding the terms on which such knowledge and genetic resources may be used or, in the words of article 8(j), what is “equitable sharing”? The analysis of these questions may differ depending on whether the local community is indigenous or not, to the extent indigenous people have different or additional rights under international or domestic law. For example, the International Labour Organization has adopted various conventions relating to indigenous people, starting in 1936 with the, now outdated, Recruiting of Indigenous Workers Convention, to the 1989 Indigenous and Tribal Peoples Convention; also the 1992 Forest Principles 2(d), 5(a) and 12(d) refer to the recognition of traditional or indigenous rights.

The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly in 2007 established the free, prior and informed consent as a precondition to the access, development, utilization or exploitation of any resource, land or territory, the use of any cultural, intellectual, religious or spiritual property, or the adoption of any administrative or legislative measure or development of projects that may affect them

The 2010 Nagoya Protocol on Access to Genetic Resources and Benefit Sharing establishes a two-tier system of prior informed consent. According to article 6, “in the exercise of sovereign rights over natural resources (...) access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources.”

At second level, in accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

## 6. Common Heritage and Common Concern of Humankind

The concepts of “common heritage of humankind” and “common concern of humankind” reflect the growing awareness of the interdependence of the biosphere and the environmental problems besetting it, as well as of the global nature of many environmental problems and the critical importance of those problems. It is thus increasingly acknowledged that the international community has an interest in these issues.

The protection, preservation and enhancement of the natural environment, particularly the proper management of the climate system, biological diversity and fauna and flora of the Earth, are generally recognized as the common concern of humankind. Basic assumptions implicit in the common concern concept include that states and other actors should not cause harm with regard to issues of common concern, and that states and other actors share responsibility for addressing common concerns.

The resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are generally recognized as the common heritage of humankind. The international community’s interest in these is probably stronger, generally speaking, than it is with respect to common concern, though the contours of that interest are not clearly defined.

## 7. Good Governance

The concept of good governance is relatively recent and reflects a growing awareness of the importance to sustainable development of transparent, accountable, honest governance, as well as a growing awareness of the corrosive effect of corruption on public morale, economic efficiency, political stability and sustainable development in general.

The concept implies, among others, that states and international organizations should: (a) adopt democratic and transparent decision-making procedures and financial accountability; (b) take effective measures to combat official or other corruption; (c) respect due process in their procedures and observe the rule of law more generally; (d) protect human rights; and (e) conduct public procurement in a transparent, non-corrupt manner.

Good governance implies not only that Civil Society has a right to good governance by states and international organizations, but also that non-state actors, including business enterprises and NGOs, should be subject to internal democratic governance and effective accountability. In addition, good governance calls for corporate social responsibility and socially responsible investments as conditions for the existence of a sustainable global market that will achieve an equitable distribution of wealth among and within communities.

Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development, including the full participation of women in all levels of decision-making. Achieving good governance is essential to the progressive development, codification and implementation of international and domestic law relating to sustainable development.

Also, Goal 8 of the Millennium Development Goals on developing a global partnership for development, has as one of its targets (target 12) to “Develop further an open, rule-based, predictable, non-discriminatory trading and financial system. Includes a commitment to good governance, development, and poverty reduction - both nationally and internationally.”

## 8. Principle of progressive realisation and non-regression

The principle of progressive realization and non-regression originates from International Human Rights Law. “Progressive realization” clauses, which can be found in, for example, article 2(1) of the International Covenant on Economic, Social and Cultural Rights, article 4 of the Convention on the Rights of the Child and article 4 (2) of the Convention on the Rights of Persons with Disabilities, require States “to take steps” to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights.

According to the General Comment No.3 on Article 2(1) of the Covenant of the Committee on Economic, Social and Cultural Rights “*It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*” In other words, the obligation of “taking steps” (Progressive realization) ingrains the obligation of not deliberately backtracking or adopting regressive measures that would decrease the level of protection the rights (non-regression).

In the environmental domain, the principle of non-regression is gaining international and national recognition. Parties to the UN Convention on the Law of the Sea Article agreed that shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof (Article 311.6 UNCLOS).

More recently, the Rio+20 Outcome, *The Future we want*, reaffirmed all the principles of the Rio Declaration on Environment and Development and stated the importance of keeping up with previous commitments.

### **The future we want,**

#### **Rio+20**

15. We reaffirm all the principles of the Rio Declaration on Environment and Development including, inter alia, the principle of common but differentiated responsibilities, as set out in Principle 7 of the Rio Declaration.

20. We acknowledge that since 1992 there have been areas of insufficient progress and setbacks in the integration of the three dimensions of sustainable development, aggravated by multiple financial, economic, food and energy crises, which have threatened the ability of all countries, in particular developing countries, to achieve sustainable development. In this regard, it is critical that we do not backtrack from our commitment to the outcome of the Earth Summit. We also recognize that one of the current major challenges for all countries, particularly for developing countries, is the impact from the multiple crises affecting the world today.

## National level

At the national level, Ecuador has recognized in its constitution the principle of progressive realization and non-regression in regard to the harmonization of environmental law among Latin American countries (Article 423.3).

Several national courts have also invoked this principle, for example in Costa Rica, the Supreme Court of Justice applied the principle of non-regression in the Judgment 2010-18702 to avoid the enactment of a national law that would have allowed certain activities in marine protected areas.

In South Africa, the Constitutional Court ruled in the Grootboom case that “the State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing”.