WHAT IS INTERNATIONAL ENVIRONMENTAL LAW?

International Environmental law is part of International law. As the problems of environment is of transboundary in nature, measures has to be adopted internationally to protect and safeguard our earth.

International environmental regulation seeks to control and minimize the harmful results of humankind's impact on the environment, such as the use of harmful substances that deteriorate air quality or interfere with the functioning of ecosystem

WHY WE NEED INTERNATIONAL ENVIRONMENTAL LAW?

A country can regulate its citizens or companies both domestically and when they operate abroad. However, when a problem is not limited to the jurisdiction of a single country, intergovernmental cooperation is required.

Many international environmental problems are the kind of global problems that call for joint and efficient actions by all humankind: for instance, the reduction of greenhouse gas emissions in the atmosphere.

INTERNATIONAL ENVIRONMENAL MILESTONES

1972 - The United Nations Conference on the Human Environment (UNCHS) in Stockholm. Resulted in Stockholm Principles.

1982 - The 1982 Earth Summit in Nairobi (Kenya). An Earth Summit was held in Nairobi, Kenya, from 10 to 18 May 1982. The events of the time (Cold War) and the disinterest of US President Ronald Reagan (who appointed his delegated daughter Of the United States) made this summit a failure. It is not even mentioned as an official Earth Summit.

1992 - The United Nations Conference on Environment and Development (UNCED) or Earth Summit in Rio de Janeiro (Brazil). Resulted in Rio Principles.

2002 - The World Summit on Sustainable Development, Earth Summit 2002 or Rio+10, Johannesburg (South Africa)

2009 - 2009 United Nations Climate Change Conference or Copenhagen Summit, Copenhagen (Denmark)

2012 - The United Nations Conference on Sustainable Development (UNCSD) or Rio+20, Rio de Janeiro (Brazil)

2018 - The 7th Digital Earth Summit 2018, DES-2018, on Digital Earth for Sustainable Development in Africa was to be held in El Jadida, Morocco, at the Faculty of Science, Chouaib Douakkali University from April 17-19, 2018

2019 - The Santiago Climate Change Conference, featuring the 25th session of the Conference of the Parties (COP 25) to the United Nations Framework Convention for Climate Change (UNFCCC) and meetings of the UNFCCC subsidiary bodies, will convene from 2nd to 13th of December 2019.

COMPREHENSIVE NOTES

REVISION NOTES AT PAGE 26

MODULE 15 PROTECTION AND IMPROVEMENT OF THE HUMAN ENVIRONMENT: INTERNATIONAL EFFORTS

CHAPTER OVERVIEW

1. **Introduction to International Environmental law**
2. **Development of International Environmental law**
3. **UNCHE 1972**
4. **UNCED 1992**
5. **Sources of International Environmental Law.**
6. **Concept of Sustainable Development.**
7. **State responsibility and Environment with Important Case laws.**
8. **7-Key Principles in Introduction to International Environmental law**
9. **Discussion on Climate Change, Nuclear Material, Marine Pollution & UNCLOS, damage by private persons, International watercourses, Outer Space.**

INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW

Environmental problems is now the subject of serious international concern.

WHAT PROBLEMS? It may include *atmospheric pollution, marine pollution, global warming and ozone depletion, the dangers of nuclear and other extra-hazardous substances and threatened wildlife species.*

SO WHAT? Actually these problems have international dimension in *two obvious respects.*

PROBLEM 1	*PROBLEM 2*
Pollution generated from within a particular state often has a serious impact upon other countries. *Example : acid rain.*	It is now apparent that environmental problems cannot be resolved by states acting individually. Example : Ozone depletion.

TRADITIONAL VIEW : A state would only be responsible in the international legal sense for damage caused where it could be clearly demonstrated that this resulted from its own unlawful activity.

MODERN VIEW : The international community has slowly been moving away from the classic state responsibility approach to damage caused towards a regime of *international co-operation.* Such co-operation is required from ***States & international organisations***, whether at the global, regional or bilateral level.

DUTY TO CO-OPERATE
Principle 24 of the Stock-holm Declaration 1972 noted that 'international matters concerning the protection and improvement of the environment should be handled in a co-operative spirit
Principle 7 of the Rio Declaration 1992 emphasised that 'states shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem'.
Principle 13 of Rio Declaration clarified that 'States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction'
Principle 18 provides that states shall immediately notify other states of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those states.
Principle 19 stipulates that states shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect and shall consult with those states at an early stage and in good faith.

HUMAN RIGHTS AND ENVIRONMENT:

- Every human being has the right to live in a healthy environment'.[1]
- The preamble to the *Stockholm Declaration of the UN Conference on the Human Environment 1972* noted that the environment was 'essential to . . . the enjoyment of basic human rights – even the right to life itself ', while Principle 1 stated that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.'
- Article 29 of the Convention on the Rights of the Child, 1989 explicitly referred to the need for the education of the child to be directed inter alia to *'the development of respect for the natural environment'.*

BALANCING ECONOMIC DEVELOPMENT AND ENVIRONMENT : The correct balance between development and environmental protection is now one of the main challenges facing the international community and reflects the competing interests posed by the principle of state sovereignty on the one hand and the need for international co-operation on the other.

Stockholm Declaration of the United Nations Conference on the Human Environment 1972	Principle 8 : "economic and social development is essential for ensuring a favourable living and *working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life"*
United Nations Conference	• Principle 2 : States have 'the sovereign right to exploit their own

[1] Refer 1994, the final report on Human Rights and the Environment. Also see., Institut de Droit International, resolution on the environment at its Strasbourg Session in September 1997.

on Environment and Development 1992/Rio Declaration	resources pursuant to their own environmental and developmental policies' • Principle 3 : that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

WORKING EXAMPLE : The Energy Charter Treaty signed at Lisbon in 1994 by OECD and Eastern European and CIS states : Article 19 notes that *contracting parties 'shall strive to minimise in an economically efficient manner harmful environmental impacts'. In so doing, parties are to act 'in a cost-effective manner'.*

DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW (IEL)

Discuss the role of United Nations in protection and improvement of human environment. UPSC 2021
No Question asked from this topic in UPSC 2022
Write a critical note : International efforts towards protection and improvement of human environment
UPSC 2019. Question 8(a)
What do you mean by Human Environment? Discuss the role of United Nations Organisation (UNO) in protecting and improving the human environment.
UPSC 2017. Question 7(a)

International Environmental law could be said to have begun in a small way with the *Trail Smelter arbitral award* in 1938. In the *Trail Smelter case*, Canada was held liable for damage in the United States caused by the fumes from a Canadian smelter.

- Although there were a few environmental treaties in the 1940s and 1950s, mostly about fauna (whales, fish, birds and seals) and oil pollution, *the start of the era of IEL proper began with the Stockholm Declaration of Principles 1972*, adopted by the UN Conference on the Human Environment (UNCHE).
- The ***United Nations Conference on the Human Environment (also known as the Stockholm Conference)*** was an international conference convened under United Nations auspices held in Stockholm, Sweden from June 5-16, 1972. It was the UN's first major conference on international environmental issues, and marked a turning point in the development of international environmental politics.

Principle 21 of Stockholm declaration largely reflects the *Trail Smelter arbitration* in confirming the sovereign right of a State to exploit its own resources pursuant to its environmental policies, but subject to its responsibility not to cause damage to other States.

- Following UNCHE, the UN General Assembly established in 1972 **the UN Environment Programme (UNEP),** with its headquarters in Nairobi.
- Only with the '***Brundtland Report'*** in 1987 did 'sustainable development' become a well-known concept.
- The UN Conference on Environment and Development (UNCED) produced the ***Rio Declaration on Environment and Development 1992 (Rio Declaration).*** Its twenty-seven principles on sustainable development attempt to balance the interests of developed and developing countries. Agenda 21 (a forty-chapter programme of action), and the Convention on Climate Change and on Biological Diversity were then adopted.

OVERVIEW OF EARTH SUMMITS
1972 - The United Nations Conference on the Human Environment (UNCHS) in Stockholm.
1982 - The 1982 Earth Summit in Nairobi (Kenya). An Earth Summit was held in Nairobi, Kenya, from 10 to 18 May 1982. The events of the time (Cold War) and the disinterest of US President Ronald Reagan (who appointed his delegated daughter Of the United States) made this summit a failure. It is not even mentioned as an official Earth Summit.
1992 - The United Nations Conference on Environment and Development (UNCED) or Earth Summit in Rio de Janeiro (Brazil).
2002 - The World Summit on Sustainable Development, Earth Summit 2002 or Rio+10, Johannesburg (South Africa)
2009 - 2009 United Nations Climate Change Conference or Copenhagen Summit, Copenhagen (Denmark)
2012 - The United Nations Conference on Sustainable Development (UNCSD) or Rio+20, Rio de Janeiro (Brazil)
2018 - The 7th Digital Earth Summit 2018, DES-2018, on Digital Earth for Sustainable Development in Africa was to be held in El Jadida, Morocco, at the Faculty of Science, Chouaib Douakkali University from April 17-19, 2018
2019 - The Santiago Climate Change Conference, featuring the 25th session of the Conference of the Parties (COP 25) to the United Nations Framework Convention for Climate Change (UNFCCC) and meetings of the UNFCCC subsidiary bodies, will convene from 2nd to 13th of December 2019.

The United Nations Conference on the Human Environment(UNCHE) / Stockholm Conference |1972
The 1972 Stockholm "Declaration on Human Environment" and "Action Plan on Human Environment" create a new relation ship of rights and obligations between developed and developing countries. Explain.
UPSC 2005. Question 7(b)

The 1972 United Nations Conference on the Environment in Stockholm was the first world conference to make the environment a major issue. The participants adopted a series of principles for sound management of the environment including the *Stockholm Declaration* and *Action Plan for the Human Environment* and several resolutions.

The Stockholm Declaration, which contained 26 principles, placed environmental issues at the forefront of international concerns and marked the start of a dialogue between industrialized and developing countries on the link between economic growth, the pollution of the air, water, and oceans and the well-being of people around the world.	The *Action Plan* contained three main categories: a) Global Environmental Assessment Program (watch plan); b) Environmental management activities; (c) International measures to support assessment and management activities carried out at the national and international levels. In addition, these categories were broken down into 109 recommendations.

The Conference resulted in four major initiatives at the *normative, institutional, programmatic, and financial levels,* which together provided the driving force for developments in the UN during the next decade and beyond.

Normative	Adoption of the Stockholm Declaration on the Human Environment, intended to 'inspire and guide the peoples of the world in the preservation and enhancement of the human environment'
Institutional	Establishment of a new institution within the UN, the UN Environment Programme (UNEP)
Programmatic	Adoption of an Action Plan for the development of environmental policy, to be administered by UNEP
Financial levels	Voluntary contributions of an Environment Fund.

The Stockholm Conference of 1972 on the human environment served to identify those areas in which rules of International environment law, acceptable to international community as a whole can be laid down, and as well as those areas in which the formation of environmental rules must encounter insurmountable obstacles. Discuss the principles of international environment law proclaimed in the Stockholm Declaration.

Asked in UPSC 2011.

CORE PRINCIPLES OF UNCHE

Principles 2–5 proclaim that the earth's natural resources 'must be safeguarded for the benefit of present and future generations', 'that its capacity to produce vital renewable resources must be maintained and, if practical, restored or improved', and that humans have a responsibility to 'safeguard and wisely manage the heritage of wildlife and its habitat'.

Principles 6 and 7 relate to pollution control, calling for cessation of the discharge of toxic and other substances into the environment in quantities that exceed the capacity to render them harmless, to ensure that no irreversible damage is inflicted on ecosystems, and to prevent pollution of the sea. The reference to preservation of ecosystems was considered a significant step, long advocated by NGOs, but still controversial today. In deference to the economic concerns of developing countries,

Principles 8–11 recognize, inter alia, that economic and social development is essential, and that environmental policies should 'enhance and not adversely affect the present or future development potential of developing countries'.

Principles 12–17 set out policies on environmental and resource management that are in many respects repeated twenty years later in the Rio Declaration. These include the need for capacity-building and financial assistance for developing states (Principle 12); integration of development planning and environmental protection (Principles 13 and 14); adoption of policies on urbanisation and population planning (Principles 15 and 16) and the creation of national institutions with responsibility for 'enhancing environmental quality'.

Finally, **Principle 22** requires states to further develop international law on liability and compensation for pollution and other forms of environmental damage to areas beyond their jurisdiction; subsequent progress in this regard has been very slow

United Nations Conference on Environment and Development (UNCED) 1992

The United Nations Conference on Environment and Development (UNCED), also known as the Rio de Janeiro Earth Summit, the Rio Summit, the Rio Conference, and the Earth Summit (Portuguese: ECO92), was a major United Nations conference held in Rio de Janeiro from **June 3rd to June 14th in 1992.**

ISSUES ADDRESSED IN UNCED 1992

- systematic scrutiny of patterns of production — particularly the production of toxic components, such as lead in gasoline, or poisonous waste including radioactive chemical.
- alternative sources of energy to replace the use of fossil fuels which delegates linked to global climate change
- new reliance on public transportation systems in order to reduce vehicle emissions, congestion in cities and the health problems caused by polluted air and smoke
- the growing usage and limited supply of water

An important achievement of the summit was an agreement on the Climate Change Convention which in turn led to the ***Kyoto Protocol and the Paris Agreement*.**

UNCED 1992: Two unusual features of UNCED were:

- first, its sponsorship not only by donor governments but also by major companies (e.g. ICI) and foundations (e.g. the MacArthur and Rockefeller Foundations) and,
- secondly, the fact that NGOs were allowed to play a major role in the preparatory committees.
- Major differences arose along a ***North–South divide*** on issues relating to sovereignty over natural resources, economic costs, equitable burden-sharing, funding, the role of multilateral institutions, transfer of technology, climate change, biological diversity, and deforestation.

NORTH-SOUTH DIVIDE?

The Stockholm Conference marked the beginning of the North-South divide on environmental protection and development. Here North denotes "Developed countries" and south connotes "Developing countries"

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. Developing countries argued for more distributive justice and developed countries insisted on conservation and better use of natural resources.

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.

The Earth Summit/UNCED resulted in the following 4 major instruments.

INSTRUMENT 1 : The Rio Declaration on Environment and Development : This set of twenty-seven principles, finely balanced between the priorities of developed and developing states, sets out the principal contours of sustainable development as now endorsed by the UN, **but it also has much greater legal significance than its 1972 predecessor.`**

WHY ?

- First, unlike the earlier Stockholm Declaration of 1972, it is expressed mainly in obligatory terms. Although some principles use the words 'States should . . . ', most start with the injunction that 'States shall . . . '.There is little doubt that many of its carefully drafted terms are capable of being and were intended potentially to be norm creating or to lay down the parameters for further development of the law.
- Second, its twenty-seven principles represent something of a 'package deal', negotiated by consensus, rather like the 1982 UNCLOS, and must be read as a whole.

- Third, as we have seen, the Declaration reflects a **real consensus of developed and developing states on the need to identify agreed norms of international environmental protection.**

Some of its provisions **reflect the interests of developed states**, such as Principles 4 (integration of environmental protection and development), 10 (public participation), 15 (the precautionary approach) and 17 (environmental impact assessment).

Others were more **strongly supported by developing states**, including

- Principle 3 (right to development),
- Principles 6 and 7 (special needs of developing states and common but differentiated responsibility), and
- Principles 5 and 9 (poverty alleviation and capacity building).

SHORTCOMINGS – IN COMPARISON TO STOCKHOLM PRINCIPLES

The worth noting are those matters which the Rio Declaration does not address, mainly at the insistence of developing countries.

- The human right to a decent environment articulated in Principle 1 of the Stockholm Declaration is **not repeated.**
- Unlike the Stockholm Declaration, the Rio Declaration is explicitly *anthropocentric in character (Principle 1) and* ***makes no reference to animal rights, or the conservation of flora, fauna, habitats, and ecosystems.***
- It does not deal with **environmental crimes.**
- On liability for environmental damage, it merely reiterates the need to develop the law (Principle 13).
- Lastly, it calls for the further development not of international law relating to the environment but of international law 'in the field of sustainable development' (Principle 27).
- Moreover, Principle 12 on trade policy and Principle 16 on the polluter-pays principle are, unusually, **expressed in aspirational rather than obligatory terms**, suggesting a rather weaker commitment on these economic issues than developed states would have liked to see.

INSTRUMENT 2 OF RIO DECLARATION : Agenda 21 :

- **Agenda 21** is a programme of action covering many issues, including climate change, deforestation, desertification and protection of the oceans. It is not legally binding.
- Agenda 21 is directed primarily at states, but it also gives international agencies, including the UN and the World Bank, a role in supporting and complementing action by states, including the promotion of enhanced international cooperation and capacity building.

INSTRUMENT 3 : The Framework Convention on Climate Change and the Convention on Biological Diversity : These important agreements create new regulatory regimes for two of the most significant problems facing contemporary society: the consequences of energy use, and large-scale natural resource depletion.

INSTRUMENT 4 : The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.

In order to ensure compliance to the agreements at Rio (particularly the Rio Declaration on Environment and Development and Agenda 21), delegates to the Earth Summit established the Commission on Sustainable Development (CSD). In 2013, the CSD was replaced by the High-level Political Forum on Sustainable Development that meets every year as part of the ECOSOC meetings, and every fourth year as part of the General Assembly meetings. Critics point out that many of the agreements made in Rio have not been realized regarding such fundamental issues as fighting poverty and cleaning up the environment.

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.

The two major outcomes of WSSD are: (1) Johannesburg Declaration on Sustainable Development; and (2) Johannesburg Plan of Action

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, 'The Future We Want' outlines the key issues and challenges in the path of achievement of the goal of sustainable development.

The 7th Digital Earth Summit 2018, DES-2018, on Digital Earth for Sustainable Development in Africa was to be held in El Jadida, Morocco, at the Faculty of Science, Chouaib Douakkali University from April 17-19, 2018

The Santiago Climate Change Conference, 2019, featuring the 25th session of the Conference of the Parties (COP 25) to the United Nations Framework Convention for Climate Change (UNFCCC) and meetings of the UNFCCC subsidiary bodies, will convene from 2nd to 13th of December 2019.

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.

Evaluate the main sources of International Environmental Law. Explain and discuss in particular the emergence of "Soft Law" and principles of International Environmental Law and how this has influenced the development of this area of International Law.

Asked in UPSC 2020. Question 8(b)

CUSTOM : The role of customary international law in international environmental law is still limited, but not insignificant. 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.

Many significant principles of International Environmental law such

- no harm (nowadays understood as due diligence),
- prevention,
- cooperation (notification and consultation), or
- reasonable and equitable utilisation of international watercourses,
- shared natural resources,
- requirement to conduct an environmental impact assessment

Are the result of customary International law only.

TREATIES : The role played by treaties has grown steadily since the adoption of the Stockholm Declaration in the 1970s.

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.

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).

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. 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 'no 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 another'.

SOFT LAW : Soft law has played a major role in the development of international environmental law since its modern inception. The two texts that could be described as its founding documents, namely the 1972 Stockholm Declaration and the 1992 Rio Declaration, are instruments of soft law.

The use of the adjective 'soft' to describe the legal status of an instrument is intended to stress that the instrument, as such, is not legally binding, regardless of its content. The contents of the instrument may, however, be legally binding in some other way.

For example, the principle of prevention enshrined in both the Stockholm Declaration (Principle 21) and the Rio Declaration (Principle 2). This principle, which is currently considered a cornerstone of international environmental law, is not legally binding because of its inclusion in a number of soft-law instruments, including the two

aforementioned declarations, but by virtue of its **customary status , which was recognised by the International Court of Justice (ICJ) on a number of occasions.**[2]

Do you agree with the statement that "Beginning with the Stockholm Declaration of 1972, there has been an increased reliance upon non-binding international instruments dealing with environment"? Why has this trend developed and have these instruments been more useful than treaties? Explain.

Asked in UPSC 2018. Question 8(b)

The instruments are non-binding in the sense that they are not treaties, but they may nevertheless shed light on political commitments of States and, to some degree, on obligations of States under international law.

The term "soft law" or "non-binding instruments" refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as "hard law"

USE OF NON-BINDING INSTRUMENTS : Soft law instruments or "non-binding instruments" are usually considered as non-binding agreements which nevertheless hold much potential for morphing into "hard law" in the future. This "hardening" of soft law may happen in two different ways.

One is when declarations, recommendations, etc. are the first step towards a treaty-making process, in which reference will be made to the principles already stated in the soft law instruments.

Another possibility is that non-treaty agreements are intended to have a direct influence on the practice of states, and to the extent that they are successful in doing so, they may lead to the creation of customary law. Soft law is a convenient option for negotiations that might otherwise stall if legally binding commitments were sought at a time when it is not convenient for negotiating parties to make major commitments at a certain point in time for political and/or economic reasons but still wish to negotiate something in good faith in the meantime.

Soft law or "non-binding instruments" is also viewed as a flexible option - it avoids the immediate and uncompromising commitment made under treaties and it also is considered to be potentially a faster route to legal commitments than the slow pace of customary international law.

[2] Legality of Nuclear Weapons, supra footnote 8, para. 29; Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7 (Gabčíkovo-Nagymaros Project), para. 53; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order (13 July 2006), ICJ Reports 2006, p. 113, para. 72 (Pulp Mills); Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a road in Costa Rica along the river San Juan (Nicaragua v. Costa Rica), Judgment of 16 December 2015 (ICJ), para. 104

Soft law or "non-binding instruments" has been very important in the field of international environmental law where states have been reluctant to commit to many environmental initiatives when trying to balance the environment against economic and social goals. It is also important in the field of international economic law and international sustainable development law.

DROIT DÉRIVÉ : The French term droit dérivé refers to the laws and regulations adopted by a body that is empowered to do so by a treaty. In international environmental law, these regulations mainly take the form of decisions adopted by the COPs (or MOPs) on various subjects, such as: (i) internal rules (procedural, administrative or financial), (ii) regulations implementing the obligations arising from an MEA or (iii) external regulations (on issues such as compliance, cooperation with other treaties, or the elaboration of a variety of standards intended to guide the conduct of States and other entities)

JUDICIAL DECISIONS : Judicial decisions and teachings of the most highly qualified publicists are regarded as 'subsidiary means for the determination of rules of law' under the ICJ Statute. 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).

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

With the adoption of the Rio instruments, sustainable development became and has so far remained the leading concept of international environmental policy.

The Brundtland Report characterized sustainable development as a process that '**meets the needs of the present without compromising the ability of future generations to meet their own needs'.**

Three '***interdependent and mutually reinforcing pillars of sustainable development'*** were identified in the Johannesburg Declaration—economic development, social development, and environmental protection.

Forty years on from the ***Brundtland Report*** we are still little nearer to an internationally agreed understanding of what constitutes sustainable development in any detail, and the concept itself has proved almost infinitely malleable.

1. Sustainable development is not to be confused with zero growth. Economists readily accept that in some cases even zero growth may be unsustainable: zero growth in the output of CFCs will not save the ozone layer, for example.

2. The switch from coal or oil to gas-fired or nuclear power stations is one example of environmentally friendly growth of this kind, and in general more environmentally.

The International Court in the *Gabčíkovo–Nagymaros Project* case referred specifically to the concept of sustainable development, while

- Principle 3 of the Rio Declaration notes that the right to development must be fulfilled so as to 'equitably meet developmental and environmental needs of present and future generations' and
- Principle 4 states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development pro-cess.
- Principle 27 called for co-operation in the further development of international law in the field of sustainable development.

STATE RESPONSIBILITY AND ENVIRONMENT

"The general principles and prescriptions of International Law are not without applicability to problems of transnational pollution - an environmental degradation. Thus fundamental principle of international limits action by one State which would cause injury in the territory of another state " "There has been general recognition of the Rule that a State must not permit the use of its territory for purposes injurious to the interest of another State. Explain.

Asked in 2008 UPSC. Refer Trail Smelter Arbitration case.

THE BASIC DUTY OF STATES: *The principles of state responsibility dictate that states are accountable for breaches of international law.* Such breaches of treaty or customary international law enable the injured state to maintain a claim against the violating state, whether by way of diplomatic action or by way of recourse to international mechanisms where such are in place with regard to the subject matter at issue.

CASE LAWS ON STATE RESPONSIBILITY AND ENVIRONMENT	
The River Oder case	The Permanent Court of International Justice noted that "*The difference between an international and national river is that the first must be navigable and naturally provide more than one State with access to the sea".*
The Island of Palmas case	The concept of territorial sovereignty incorporated an obligation to protect within the territory the rights of other states.
Trail Smelter	The Tribunal was concerned with a dispute between Canada and the

arbitration	United States over sulphur dioxide pollution from a Canadian smelter, built in a valley shared by British Columbia and the state of Washington, which damaged trees and crops on the American side of the border. The Tribunal noted that: *under principles of international law, as well as the law of the United States, no state has the right to use or permit the use of 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.*
Corfu Channel case	The International Court reinforced that it was the obligation of every state 'not to allow knowingly its territory to be used for acts contrary to the rights of other states'. [See Article 198 of UNCLOS, Article 13 of Basel Convention]
Nuclear Tests Case 1974	ICJ came to its conclusion with regard to French nuclear testing in the Pacific was 'without prejudice to the obligations of states to respect and protect the environment'.
***Legality of the Threat or Use of Nuclear Weapons* Case**	ICJ declared that 'the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment'.

ABSOLUTE OBLIGATION : States are under an absolute obligation to prevent pollution and are thus liable for its effects irrespective of fault. While the advantage of this is the increased responsibility placed upon the state, *it is doubtful whether international law has in fact accepted such a general principle.*

The leading cases are inconclusive.

- In the *Trail Smelter* case Canada's responsibility was accepted from the start, the case focusing upon the compensation due and the terms of the future operation of the smelter, while the strict theory was not apparently accepted in the *Corfu Channel* case.
- In the *Nuclear Tests* case the Court did not discuss the substance of the claims concerning nuclear testing in view of France's decision to end its programme.

DAMAGE CAUSED: The first issue is whether indeed any damage must actually have been caused before international responsibility becomes relevant.

*Can there be liability for risk of damage? I*t appears that at this stage international law in general does not recognise such a liability, certainly outside of the category of ultra-hazardous activities. It would be difficult, although not impossible, both to assess the risk

involved and to determine the compensation that might be due.

Article 1(4) of the Convention on the Law of the Sea, 1982 defines pollution of the marine environment as '*the introduction by man, directly or indirectly, of substances or energy into the marine environment . . . which results or is likely to result in . . . deleterious effects'.*

- Article 1(2) of the Vienna Convention on the Ozone Layer, 1985 defines adverse effects upon the ozone layer as changes in the physical environment including climatic changes '*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'*
- *The Climate Change Convention, 1992* defines adverse effects of climate change as '*changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare'*

7-KEY PRINCIPLES IN INTERNATIONAL ENVIRONMENTAL LAW

PRINCIPLE 1 : *Principles of Common Heritage and Common Concern of Humankind.*

- This principle maintains that all humans have a stake in resources located outside the territory of states, such as the high seas, the deep sea-bed, Antarctica, and outer space.
- As such, no one state should be able to exhaust the resources of these global commons and all are obliged to cooperate peacefully in managing them. *See, e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*

Example : "the conservation of biological diversity is a common concern of humankind." Convention on Biological Diversity, June 5, 1992.

PRINCIPLE 2 : *Prevention of Environmental Harm Principle.*

- *Stockholm Principle 21* provides that: The sovereign right (of a state) to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.
- *Rio Declaration Principle 2* stressed that in exercising such sovereignty states must ensure that their activities (including activities by their nationals) do not harm the environment beyond their territory.

INTERPRETATION : This principle is usually interpreted as

- prohibiting significant (or at least substantial) damage to other states or,
- alternatively, as requiring a state to exercise due diligence in seeking to prevent such damage.

Trail Smelter Arbitration (1931–41), 3 R.I.A.A. 1905 : Asserting a duty on the part of Canada to protect the United States from injurious transboundary air pollution generated by a Canadian smelter.

The *Lake Lanoux Arbitration* (1957), 12 R.I.A.A. 281 : Holding that if France had adversely affected waters that flowed into Spain, France would have violated Spanish rights.

PRINCIPLE 3 : *Precautionary principle*

MEANING : The precautionary principle/ precautionary approach generally provides that *where there are threats of serious or irreversible damage*, the lack of full scientific certainty that such threats will happen *should not be used as a reason for postponing cost effective measures* to prevent the potential environmental degradation. The possibility of harm must be foreseeable.

This is based on *Rio Declaration, principle 15.*

Principle 15 of the Rio Declaration	*In order to protect the environment, the precautionary approach shall be 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.*

IS IT MANDATORY? Despite the use of mandatory language (such as 'shall'), Principle 15 **does not represent a principle of customary international law**, its scope and application being unclear.

Substance of this principle [Rio Declaration] appears in virtually all international environmental agreements adopted since 1990.

WORKING EXAMPLE : The Vienna Convention for the Protection of the Ozone Layer 1985, and its Montreal Protocol 1987, require the parties to limit the use of chlorofluorocarbons (CFCs) even before it had been proved conclusively that they cause damage to the ozone layer.

PRINCIPLE 4 : *"Polluter pays" principle.*

MEANING : The polluter pays principle provides that the polluter who creates an environmental harm generally should be forced to pay the costs of remedying that harm.

OBJECT : The essential idea in this principle is to force polluters to internalize costs that would otherwise be imposed on others, so that polluters will consider environmental factors when making economically efficient decisions.

Principle 16 of the Rio Declaration: 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.

This principle shows that it is only a suggestion as to the economic policy that a State may follow when apportioning the cost of remedying pollution or other environmental damage so that the State does not have to bear an unfair share. Generally, each State has been left to decide what policy to follow.

The **Rhine Arbitration (Netherlands/France) (2004)** held that the principle that the polluter pays is not part of international law. But, it may still be influential in the development of environmental treaties.

PRINCIPLE 5 : Principle of non-discrimination.

This principle provides that each state should ensure that its regime of environmental protection, when addressing pollution originating within the state, does not discriminate between pollution affecting the state and pollution affecting other states.

An important example of this may be seen in multinational agreements on environmental impact assessments, which essentially require states to assess the extraterritorial environmental effects of projects within their jurisdiction in the same manner as they do the national effects of those projects.

EXAMPLE : Convention on Environmental Impact Assessment in a Transboundary Context, (1991) (Espoo Convention).

PRINCIPLE 6 : Principle of Common but Differentiated Responsibilities.

This principle recognizes that because developed states have contributed disproportionately to global environmental degradation, and because they command greater financial and ecological resources, those states have a special responsibility in shouldering the burden of pursuing global sustainable development.

This principle is contained in Principle 7 of Rio Declaration.

PRINCIPLE 7 : Principle of Intergenerational Equity

This principle stresses that in making choices about meeting the needs of present generations, the needs of future generations should not be sacrificed.

This principle is contained in Principle 3 of Rio Declaration.

CLIMATE CHANGE

The problem of global warming and the expected increase in the temperature of the earth in the decades to come has focused attention on the issues particularly of the consumption of fossil fuels and deforestation. In 1980s, States had become acutely aware of the damage that had been done to the ozone layer in the stratosphere by, in particular, the CFCs in aerosols and coolants.

In a Recommendation adopted in 1974 by the Organisation for Economic Co-operation and Development, pollution is broadly defined as 'the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment'.

REMEDYING THE PROBLEM :

- The Vienna Convention for the Protection of the Ozone Layer 1985
- Montreal Protocol on Substances that Deplete the Ozone Layer 1987.

These two, in effect, had required the *parties to reduce, and ultimately to eliminate, the production and consumption of certain ozone-depleting substances according to a timetable*. This protocol is largely successful in comparison to other environmental treaties.

The **2016 Kigali Amendment to the Montreal Protocol** aims to reduce the emissions of hydrofluorocarbons, a group of powerful greenhouse gases which served as a replacement for banned ozone-depleting gases. This strengthened the makes the Montreal Protocol a stronger agreement against climate change.

CLIMATE CHANGE 1992 TREATY : The UN Framework Convention on Climate Change 1992 has 192 parties. It deals with the much more intractable problem of the warming of the atmosphere (global warming) caused by 'greenhouse gases', being gases, such as carbon dioxide (CO2), produced by the use of fossil fuels released into the atmosphere, for example by motor vehicle exhausts.

This convention laid down the broad principles on which future measures should be based, in particular that developed States should take the lead.

This was followed by **Kyoto Protocol 1997**, which sets individual emission limits and timetables for certain developed parties in respect of six greenhouse gases. This Protocol had been ratified by 186 States and the European Union, but not by the United States and entered into force on **16 February 2005.**

This protocol allows

- A State to set off against its emissions for those changes made by it, in land use or forestry activities that result in the removal of greenhouse gases (*a forest can amount to a 'sink' by removing a greenhouse gas from the atmosphere).*
- two or more parties, by joint action, to fulfil their obligations by innovative means: aggregation of combined emissions; trade in emissions permits etc.

PARIS AGREEMENT : In 2015, all UN countries negotiated the Paris Agreement, which aims to keep global warming well below 1.5 °C (2.7 °F) and contains an aspirational goal of keeping warming under 1.5 °C.The agreement replaced the Kyoto Protocol.

- Unlike Kyoto, no binding emission targets were set in the Paris Agreement.
- Instead, the procedure of regularly setting ever more ambitious goals and re-evaluating these goals every five years has been made binding.
- The Paris Agreement reiterated that developing countries must be financially supported.
- As of February 2021, 194 states and the European Union have signed the treaty and 188 states and the EU have ratified or acceded to the agreement.

NUCLEAR MATERIAL

The use of nuclear technology brings with it risks as well as benefits and the accident at the Chernobyl nuclear reactor in 1986 brought home to international opinion just how devastating the consequences of a nuclear mishap could be. *In 1963 the Treaty Banning Nuclear Weapons Testing in the Atmosphere, Outer Space and Under Water was signed.*

The International Atomic Energy Agency (IAEA) is an international organization that seeks to promote the peaceful use of nuclear energy, and to inhibit its use for any military purpose, including nuclear weapons. The IAEA was established as an autonomous organisation on 29 July 1957. It is not a UN specialised agency, although it is part of the 'UN family' and has close links with the United Nations.

- The ***OECD Convention on Third Party Liability in the Field of Nuclear Energy 1960 (Paris Convention)*** is limited to the metropolitan territory of OECD members, or associate countries, which have always had the biggest concentration of nuclear installations.
- Its purpose is to harmonise the parties' legislation on liability for nuclear accidents, placing on the operator of a nuclear installation (reactor, factory, storage plant) absolute (but limited) liability, and established a common scheme for compensation.

- The ***1960 Brussels Agreement Supplementary to the Paris Convention*** provides for State-funded compensa-tion for a loss that exceeds the limited liability of the operator under the Paris Convention. Both Conventions have been extensively amended.
- ***The (Vienna) Convention on Civil Liability for Nuclear Damage 1963***, concluded within the IAEA, closely follows the Paris Convention but was replaced by the (Vienna) Protocol on Civil Liability for Nuclear Damage 1997.
- ***The Convention on Early Notification of a Nuclear Accident 1986*** was adopted following the Chernobyl disaster.It requires a party to notify immediately any State (not necessarily a party) which is or might be physically affected by a nuclear accident in its territory, or on a ship or aircraft on its register, from which a release of radioactive material occurs, or is likely to occur, if the material has entered, or may enter, the territory of another State and cause significant radiological safety concern.

MARINE ENVIRONMENT

Marine pollution can arise from a variety of sources, including the operation of shipping, dumping at sea, activities on the seabed and the effects of pollution originating on the land and entering the seas.

- **The London Convention (1972)** – a United Nations agreement to control ocean dumping.
- The most important general treaty is the **International Convention for the Prevention of Pollution from Ships (MARPOL)** adopted by International Maritime Organization (IMO) in 1973. Its parties represent most of the world's tonnage of merchant shipping, and covers all types of intentional pollution of the sea by such ships, except dumping of waste. The all-important annexes to it are frequently amended. Regional treaties follow MARPOL.

UNCLOS : The 46 Articles of United Nations Convention on the Law of the Sea (UNCLOS) devoted to this subject demonstrate the importance of preventing pollution of the marine environment. Article 211(2) of the Convention on the Law of the Sea, 1982 provides that states are to legislate for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry.

- Flag States have a duty to enforce the legislation wherever the infringement occurs (Article 217).
- A coastal State has certain powers to legislate for foreign ships in its territorial sea or EEZ. A coastal State has the right to arrest foreign ships for certain breaches of its anti-pollution laws in its territorial sea and EEZ (Article 220); otherwise the flag State can effect the arrest.
- A port State has wider powers over a foreign ship: when it is in one of its ports, the State can arrest and prosecute the ship for violation of its anti-pollution laws

committed while in its territorial sea or EEZ (Article 220). It can also do so in respect of pollution of the high seas (Article 218).

- Moreover, if it is unseaworthy and therefore a threat to the marine environment, the port State can prevent it sailing (Article 219).
- None of the above applies to warships or other State vessels on government, non-commercial service (Article 236).

ON EMERGENCY : The ***International Convention on Oil Pollution Preparedness, Response and Co-operation 1990*** provides for cooperation to deal with oil pollution incidents, including the sharing of costs. If as the result of an incident at sea (collision, stranding, etc.) a foreign ship is causing or is threatening to cause major pollution, a coastal State may in its territorial sea or EEZ, or even on the high seas, take such direct measures as may be necessary to prevent, mitigate or eliminate an imminent danger to its coastline.

In 1967, the oil tanker Torrey Canyon was stranded on the high seas off the United Kingdom spilling 120,000 tons of crude oil. To prevent a worse catastrophe, the Royal Air Force bombed it to set the remaining oil alight.

LIABILITY : *The International Convention on Civil Liability for Oil Pollution Damage 1969* was replaced in 1992 by a Convention bearing the same title.

- It imposes liability on a shipowner if oil from his ship damages the territory, territorial sea or EEZ of a party. The liability is generally limited. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 supplemented the 1969 Convention, but was replaced in 1992 by a Convention, again of the same name.
- If the shipowner is not liable or is unable to pay in full, or the limit of liability is exceeded, compensation may be payable by the Fund. There are also treaties imposing strict liability for damage to the marine environment by hazardous and noxious substances and by radioactive material.

DUMPING : *The* ***Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972*** **(**previously known as the 'London Dumping Convention', and now, as amended by a 1996 Protocol, known as the 'London Convention') prohibits the dumping of waste at sea. The main exceptions are dredged materials, sewage sludge, fish-processing wastes, ships, and continental shelf oil and gas installations. Incineration of waste at sea is also prohibited.

HAZARDOUS WASTES : *The (Basel) Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989* is particularly successful.

- It now has 172 parties.
- It covers most waste, with the exception of radioactive waste.
- If a party prohibits the import of hazardous waste, another party must not permit its export to that party.
- Even if a party has not prohibited the import, other parties must not permit export of the waste to that party if the latter has not given written consent to the specific import or if it does not have the capacity to dispose of the waste in an environmentally friendly manner.
- Illegal traffic in hazardous waste is made a criminal offence.
- If waste is illegally exported, the State of export must ensure that the waste is taken back. If this is impracticable, the State of export must ensure that the waste is disposed of properly.

LIABILITY FOR DAMAGE CAUSED BY PRIVATE PERSONS

A particular problem relates to the situation where the environmental injury is caused not by the state itself but by a private party. A state is, of course, responsible for unlawful acts of its officials causing injury to nationals of foreign states and retains a general territorial competence under international law. In general, states must ensure that their international obligations are respected on their territory.

In some cases, an international agreement might specifically provide for the **liability of the state for the acts of non-state entities.**

Article 6 of the Outer Space Treaty, 1967, for example, stipulates that states parties bear international responsibility for 'national activities in outer space . . . whether such activities are carried out by governmental agencies or by non-governmental agencies'.

INTERNATIONAL WATERCOURSES

International watercourses are systems of surface waters and ground wa-ters which are situated in more than one state.

The International Law Association, a private organisation of international lawyers, proposed *the Helsinki Rules on the Uses of the Waters of International Rivers in 1966,* in which it was noted that each basin state was entitled to a reasonable and equitable share in the beneficial use of the waters and that all states were obliged to prevent new forms of water pollution that would cause substantial injury in the territory of other basin states.

In 1992, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted in Helsinki within the framework of the UN Economic Commission for Europe. Under this Convention, all parties must take all appropriate measures to prevent, con-trol and reduce any significant adverse effect on the

environment resulting from a change in the conditions of transboundary waters caused by a human activity. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and also effects on the cultural heritage.

The Convention on the Law of the Non-Navigational Uses of Interna-tional Watercourses, 1997 provides that watercourse states shall in their respective territories utilise an international watercourse in an 'equitable and reasonable manner'.

Gabčíkovo–Nagymaros Project Case : Hungary and Czechoslovakia entered into a treaty in 1977 by which there would be created on the Danube between the two states a barrage system, a dam, a reservoir, hydro-electric power stations and a 25-kilometre canal for diverting the Danube from its original course through a system of locks. A dispute developed in the light of Hungary's growing environ-mental concerns. In 1992, Hungary an-nounced the termination of the treaty of 1977 and related instruments. The ICJ found that the treaty was still in force and Hungary was not entitled to terminate it.

OUTER SPACE

The *Outer Space Treaty, 1967* provides that the exploration and use of outer space is to be carried out for the benefit and in the interests of all states. This treaty precludes any claims of national sovereignty and permits all states to freely explore outer space. Despite the drafting of UN resolutions for the peaceful uses of outer space, anti-satellite weapons have been tested in Earth orbit.

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979 provides that the moon and its natural resources are the 'common heritage of mankind' and are to be used exclusively for peaceful purposes. The 1979 Moon Treaty turned the jurisdiction of all heavenly bodies (including the orbits around such bodies) over to the international community. The treaty has not been ratified by any nation that currently practices human spaceflight.

While liability for damage caused by objects launched into space is absolute, the specific problem of space debris has been addressed in *the Buenos Aires International Instrument on the Protection of the Environment from Damage Caused by Space Debris, adopted by the International Law Association at its 1994 Conference*. The principle proclaimed by the draft is that each state or international organisation party to the instrument that launches or procures the launching of a space object is internationally liable for damage arising therefrom to another party to the instrument as a consequence of space debris produced by any such object.

REVISION NOTES

MODULE 15 PROTECTION AND IMPROVEMENT OF THE HUMAN ENVIRONMENT: INTERNATIONAL EFFORTS

=

INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW

Environmental problems are of International Concern. Traditional view whereby state was held liable for damage caused is shifting towards the Modern view whereby Co-operation is required for all ***States & international organisations.***

Principle 24 1972 Stockholm Declaration & Principle 7 of Rio Declaration- has effect that international matters concerning the protection and improvement of the environment should be handled in a **co-operative spirit** to conserve, protect and restore the health and integrity of the Earth's ecosystem

HUMAN RIGHTS AND ENVIRONMENT: Every human being has the right to live in a healthy environment. *This was asserted in 1972 Stockholm Declaration Preamble & Article 1.*

BALANCING ECONOMIC DEVELOPMENT AND ENVIRONMENT : International community faces an challenge to how to balance between development and environmental protection.

Stockholm Declaration of the United Nations Conference on the Human Environment 1972	Principle 8 : "economic and social development is essential for ensuring a favourable living and *working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life"*
United Nations Conference on Environment and Development 1992/Rio Declaration	• Principle 2 : States have 'the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies' • Principle 3 : that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.

DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW (IEL)

International Environmental law could be said to have begun in a small way with the *Trail Smelter arbitral award* in 1938. In the *Trail Smelter case*, Canada was held liable for damage in the United States caused by the fumes from a Canadian smelter. Although there were a few environmental treaties in the 1940s and 1950s, mostly about fauna

(whales, fish, birds and seals) and oil pollution, *the start of the era of IEL proper began with the Stockholm Declaration of Principles 1972*, adopted by the UN Conference on the Human Environment (UNCHE) . This was followed by UNCED 1992 → WSSD 2002→ UNCSD 2012 → DES 2018 → COP 25.

The United Nations Conference on the Human Environment(UNCHE) / Stockholm Conference |1972

The 1972 United Nations Conference on the Environment in Stockholm

- 1st World conference to make the environment a major issue.
- Resulted in *Stockholm Declaration (containing 26 Principles)* and *Action Plan for the Human Environment* and several resolutions.

The *Action Plan* contained three main categories: a) Global Environmental Assessment Program (watch plan); b) Environmental management activities; (c) International measures to support assessment and management activities carried out at the national and international levels. In addition, these categories were broken down into 109 recommendations.

CORE PRINCIPLES OF STOCKHOLM DECLARATION

Principles 2–5 –

- Safeguard earth's natural resources for the benefit of present and future generations ;
- maintain, if not restore, vital renewable resources ;
- manage wildlife and its habitat wisely.

Principles 6 and 7 relate to pollution control and ensure that no irreversible damage is inflicted on ecosystems, and to prevent pollution of the sea.

Principles 8–11 | Economic and social development is essential -without adverse effect on environment.

Principles 12–17 laid policies for future.

- Need for capacity-building and financial assistance for developing states (Principle 12);
- integration of development planning and environmental protection (Principles 13 and 14);
- adoption of policies on urbanisation and population planning (Principles 15 and 16) and the creation of national institutions with responsibility for 'enhancing environmental quality'.

Principle 22 requires states to further develop international law on liability and compensation for pollution and other forms of environmental damage to areas beyond their jurisdiction.

United Nations Conference on Environment and Development (UNCED) 1992

The United Nations Conference on Environment and Development (UNCED), was a major United Nations conference held in Rio de Janeiro from **June 3rd to June 14th in 1992.** An important achievement of the summit was an agreement on the Climate Change Convention which in turn led to the ***Kyoto Protocol and the Paris Agreement*.**

The Earth Summit/UNCED resulted in the following 4 major instruments.

INSTRUMENT 1 : The Rio Declaration on Environment and Development : This set of twenty-seven principles, finely balanced between the priorities of developed and developing states, sets out the principal contours of sustainable development as now endorsed by the UN, **but it also has much greater legal significance than its 1972 predecessor.`**

WHY ?

- Principles have the tone to make these as norm or obligatory in future.
- Real consensus of developed and developing states on the need to identify agreed norms of international environmental protection was found.

Some of its provisions **reflect the interests of developed states**, such as Principles 4 (integration of environmental protection and development), 10 (public participation), 15 (the precautionary approach) and 17 (environmental impact assessment).	Others were more **strongly supported by developing states**, including • Principle 3 (right to development), • Principles 6 and 7 (special needs of developing states and common but differentiated responsibility), and Principles 5 and 9 (poverty alleviation and capacity building).

SHORTCOMINGS – IN COMPARISON TO STOCKHOLM PRINCIPLES

The worth noting are those matters which the Rio Declaration does not address, mainly at the insistence of developing countries.

- The human right to a decent environment articulated in Principle 1 of the Stockholm Declaration is **not repeated.**
- Unlike the Stockholm Declaration, the Rio Declaration is explicitly *anthropocentric in character (Principle 1) and* ***makes no reference to animal rights, or the conservation of flora, fauna, habitats, and ecosystems.***
- It does not deal with **environmental crimes.**
- On liability for environmental damage, it merely reiterates the need to develop the law (Principle 13).
- Lastly, it calls for the further development not of international law relating to the environment but of international law 'in the field of sustainable development' (Principle 27).
- Moreover, Principle 12 on trade policy and Principle 16 on the polluter-pays principle are, unusually, **expressed in aspirational rather than obligatory terms**, suggesting a rather weaker commitment on these economic issues than developed states would have liked to see.

INSTRUMENT 2 OF RIO DECLARATION : Agenda 21 is a programme of action covering

many issues, including climate change, deforestation, desertification and protection of the oceans. It is not legally binding.

INSTRUMENT 3 : The Framework Convention on Climate Change and the Convention on Biological Diversity : These important agreements create new regulatory regimes for two of the most significant problems facing contemporary society: the consequences of energy use, and large-scale natural resource depletion.

INSTRUMENT 4 : The Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.

- World Summit on Sustainable Development (WSSD), 2002 : The two major outcomes of WSSD are: (1) Johannesburg Declaration on Sustainable Development; and (2) Johannesburg Plan of Action
- United Nations Conference on Sustainable Development (Rio+20), 2012 outcome document, 'The Future We Want' outlines the key issues and challenges in the path of achievement of the goal of sustainable development.
- The 7th Digital Earth Summit 2018, DES-2018.
- The Santiago Climate Change Conference, 2019, featuring the 25th session of the Conference of the Parties (COP 25) to the United Nations Framework Convention for Climate Change (UNFCCC) and meetings of the UNFCCC subsidiary bodies, will convene from 2nd to 13th of December 2019.

SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW

CUSTOM : Courts and tribunals at the international level have recognised and used customary norms on various occasions.

- Principle of reasonable and equitable utilization in the context of the use and conservation of international watercourses - *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.

TREATIES : The role played by treaties has grown steadily since the adoption of the Stockholm Declaration in the 1970s.

More than 100 MEAs were concluded between 1972 and 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).
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.

Novel trend that a ***treaty/convention***, which laid down general principles for a subject-matter, was, later followed with a ***protocol,*** which laid down the concrete obligations.

Example : Convention on Biological Diversity, 1992 - followed with Cartagena Protocol 2000.

GENERAL PRINCIPLES OF LAW : The *Trail Smelter Arbitration (US v. Canada, 1941)* : 'no 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 another' Such general principle of law was applied in that case.

SOFT LAW : Soft law has played a major role in the development of international environmental law since its modern inception after 1972 Stockholm Declaration and the 1992 Rio Declaration, which are instruments of soft law.

The use of the adjective 'soft' to describe the legal status of an instrument is intended to stress that the instrument, as such, is not legally binding, regardless of its content. The contents of the instrument may, however, be legally binding in some other way.

Example : The principle of prevention enshrined in both the Stockholm Declaration (Principle 21) and the Rio Declaration (Principle 2) is binding, *not because of former two instruments,* rather because such principle acquired **status of custom** by the decision of ICJ.

USE OF NON-BINDING INSTRUMENTS : Soft law instruments nevertheless hold much potential for morphing into "hard law" in the future. This "hardening" of soft law may happen in two different ways.

One is when declarations, recommendations, etc. are the first step towards a treaty-making process, in which reference will be made to the principles already stated in the soft law instruments.	Another possibility is that non-treaty agreements are intended to have a direct influence on the practice of states, and to the extent that they are successful in doing so, they may lead to the creation of customary law.

Soft law or "non-binding instruments" is also viewed as a flexible option - it avoids the immediate and uncompromising commitment made under treaties and it also is considered to be potentially a faster route to legal commitments than the slow pace of customary international law.

Soft law or "non-binding instruments" has been very important in the field of international environmental law where states have been reluctant to commit to many

environmental initiatives when trying to balance the environment against economic and social goals. It is also important in the field of international economic law and international sustainable development law.

JUDICIAL DECISIONS : Judicial decisions in practice was strongly influence in International Environmental law. 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).

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

The Brundtland Report characterized sustainable development as a process that '**meets the needs of the present without compromising the ability of future generations to meet their own needs'.** Three '***interdependent and mutually reinforcing pillars of sustainable development'*** were identified in the Johannesburg Declaration—economic development, social development, and environmental protection.

STATE RESPONSIBILITY AND ENVIRONMENT

THE BASIC DUTY OF STATES: *The principles of state responsibility dictate that states are accountable for breaches of international law.* Such breaches of treaty or customary international law enable the injured state to maintain a claim against the violating state, whether by way of diplomatic action or by way of recourse to international mechanisms where such are in place with regard to the subject matter at issue.

CASE LAWS ON STATE RESPONSIBILITY AND ENVIRONMENT	
The River Oder case	The Permanent Court of International Justice noted that "*The difference between an international and national river is that the first must be navigable and naturally provide more than one State with access to the sea".*
The Island of Palmas case	The concept of territorial sovereignty incorporated an obligation to protect within the territory the rights of other states.
Trail Smelter arbitration	*no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein*
Corfu Channel case	The International Court reinforced that it was the obligation of every state 'not to allow knowingly its territory to be used for acts contrary to the rights of other states'. [See Article 198 of UNCLOS, Article 13 of Basel Convention]
Nuclear Tests Case 1974	ICJ came to its conclusion with regard to French nuclear testing in the Pacific was 'without prejudice to the obligations of states to respect and protect the environment'.
***Legality of the Threat or Use of Nuclear Weapons* Case**	ICJ declared that 'the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment'.

ABSOLUTE OBLIGATION : States are under an absolute obligation to prevent pollution and are thus liable for its effects irrespective of fault.

DAMAGE CAUSED: The first issue is whether indeed any damage must actually have been caused before international responsibility becomes relevant.

7-KEY PRINCIPLES IN INTERNATIONAL ENVIRONMENTAL LAW

PRINCIPLE 1 : *Principles of Common Heritage and Common Concern of Humankind.*

This principle maintains that all humans have a stake in resources located outside the territory of states, such as the high seas, the deep sea-bed, Antarctica, and outer space.
Example : "the conservation of biological diversity is a common concern of humankind." Convention on Biological Diversity, June 5, 1992.

PRINCIPLE 2 : *Prevention of Environmental Harm Principle.*

- *Stockholm Principle 21* & *Rio Declaration Principle 2* deal with this principle.

INTERPRETATION : This principle is usually interpreted as

- prohibiting significant (or at least substantial) damage to other states or,
- alternatively, as requiring a state to exercise due diligence in seeking to prevent such damage.

Trail Smelter Arbitration (1931–41), 3 R.I.A.A. 1905 : Asserting a duty on the part of Canada to protect the United States from injurious transboundary air pollution generated by a Canadian smelter.

The *Lake Lanoux Arbitration* (1957), 12 R.I.A.A. 281 : Holding that if France had adversely affected waters that flowed into Spain, France would have violated Spanish rights.

PRINCIPLE 3 : *Precautionary principle*

This is based on *Rio Declaration, principle 15.*

Principle 15 of the Rio Declaration	*In order to protect the environment, the precautionary approach shall be 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.*

IS IT MANDATORY? Despite the use of mandatory language (such as 'shall'), Principle 15 **does not represent a principle of customary international law**, its scope and application being unclear.

WORKING EXAMPLE : The Vienna Convention for the Protection of the Ozone Layer 1985, and its Montreal Protocol 1987, require the parties to limit the use of chlorofluorocarbons (CFCs) even before it had been proved conclusively that they cause damage to the ozone layer.

PRINCIPLE 4 : *"Polluter pays" principle*.

MEANING : The polluter pays principle provides that the polluter who creates an environmental harm generally should be forced to pay the costs of remedying that harm.

Principle 16 of the Rio Declaration: 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.

The **Rhine Arbitration (Netherlands/France) (2004)** held that the principle that the polluter pays is not part of international law. But, it may still be influential in the development of environmental treaties.

PRINCIPLE 5 : Principle of non-discrimination.

This principle provides that each state should ensure that its regime of environmental protection, when addressing pollution originating within the state, does not discriminate between pollution affecting the state and pollution affecting other states.

PRINCIPLE 6 : Principle of Common but Differentiated Responsibilities.

This principle recognizes that because developed states have contributed disproportionately to global environmental degradation, and because they command greater financial and ecological resources, those states have a special responsibility in shouldering the burden of pursuing global sustainable development.

This principle is contained in Principle 7 of Rio Declaration.

PRINCIPLE 7 : Principle of Intergenerational Equity

This principle stresses that in making choices about meeting the needs of present generations, the needs of future generations should not be sacrificed. This principle is contained in Principle 3 of Rio Declaration.

CLIMATE CHANGE

- The Vienna Convention for the Protection of the Ozone Layer 1985
- Montreal Protocol on Substances that Deplete the Ozone Layer 1987.

These two, in effect, had required the *parties to reduce, and ultimately to eliminate, the production and consumption of certain ozone-depleting substances according to a timetable*. This protocol is largely successful in comparison to other environmental treaties.

The **2016 Kigali Amendment to the Montreal Protocol** aims to reduce the emissions of hydrofluorocarbons, a group of powerful greenhouse gases which served as a replacement for banned ozone-depleting gases. This strengthened the makes the Montreal Protocol a stronger agreement against climate change.

CLIMATE CHANGE 1992 TREATY : The UN Framework Convention on Climate Change 1992 deals with the much more intractable problem of the warming of the atmosphere (global warming) caused by 'greenhouse gases', being gases, such as carbon dioxide (CO2), produced by the use of fossil fuels released into the atmosphere, for example by motor vehicle exhausts. This was followed by **Kyoto Protocol 1997**, which sets individual emission limits and timetables for certain developed parties in respect of six greenhouse gases.

PARIS AGREEMENT : In 2015, all UN countries negotiated the Paris Agreement, which aims to keep global warming well below 1.5 °C (2.7 °F) and contains an aspirational goal of keeping warming under 1.5 °C.The agreement replaced the Kyoto Protocol.

- Unlike Kyoto, no binding emission targets were set in the Paris Agreement.
- Instead, the procedure of regularly setting ever more ambitious goals and re-evaluating these goals every five years has been made binding.

NUCLEAR MATERIAL

The International Atomic Energy Agency (IAEA) is an international organization that seeks to promote the peaceful use of nuclear energy, and to inhibit its use for any military purpose, including nuclear weapons.

- *In 1963 the Treaty Banning Nuclear Weapons Testing in the Atmosphere, Outer Space and Under Water was signed.*
- ***OECD Convention on Third Party Liability in the Field of Nuclear Energy 1960 (Paris Convention*** = is to harmonise the parties' legislation on liability for nuclear accidents, placing on the operator of a nuclear installation (reactor, factory, storage plant) absolute (but limited) liability, and established a common scheme for compensation.
- The ***1960 Brussels Agreement Supplementary to the Paris Convention*** provides for State-funded compensation for a loss that exceeds the limited liability of the operator under the Paris Convention. Both Conventions have been extensively amended
- ***The (Vienna) Convention on Civil Liability for Nuclear Damage 1963***, concluded within the IAEA, closely follows the Paris Convention but was replaced by the (Vienna) Protocol on Civil Liability for Nuclear Damage 1997.

- ***The Convention on Early Notification of a Nuclear Accident 1986*** requires a party to notify immediately any State (not necessarily a party) which is or might be physically affected by a nuclear accident in its territory.

MARINE ENVIRONMENT

Marine pollution can arise from a variety of sources, including the operation of shipping, dumping at sea, activities on the seabed and the effects of pollution originating on the land and entering the seas.

- **The London Convention (1972)** – a United Nations agreement to control ocean dumping.
- **International Convention for the Prevention of Pollution from Ships (MARPOL)** 1973 - covers all types of intentional pollution of the sea by such ships, except dumping of waste.

UNCLOS : Article 211(2) of the Convention on the Law of the Sea, 1982 provides that states are to legislate for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry.

- Flag States have a duty to enforce the legislation wherever the infringement occurs (Article 217).
- A coastal State has certain powers to legislate for foreign ships in its territorial sea or EEZ. A coastal State has the right to arrest foreign ships for certain breaches of its anti-pollution laws in its territorial sea and EEZ (Article 220); otherwise the flag State can effect the arrest.
- A port State has wider powers over a foreign ship: when it is in one of its ports, the State can arrest and prosecute the ship for violation of its anti-pollution laws committed while in its territorial sea or EEZ (Article 220). It can also do so in respect of pollution of the high seas (Article 218).
- Moreover, if it is unseaworthy and therefore a threat to the marine environment, the port State can prevent it sailing (Article 219).
- None of the above applies to warships or other State vessels on government, non-commercial service (Article 236).

ON EMERGENCY : The ***International Convention on Oil Pollution Preparedness, Response and Co-operation 1990*** provides for cooperation to deal with oil pollution incidents, including the sharing of costs - in case of incident at sea (collision, stranding, etc.).

LIABILITY : *The International Convention on Civil Liability for Oil Pollution Damage 1969* was replaced in 1992 by a Convention bearing the same title. It imposes liability on a shipowner if oil from his ship damages the territory, territorial sea or EEZ of a party.

DUMPING : *The* ***Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972*** **(**previously known as the 'London Dumping Convention', and now, as amended by a 1996 Protocol, known as the 'London Convention') prohibits the dumping of waste at sea. The main exceptions are dredged materials, sewage sludge, fish-processing wastes, ships, and continental shelf oil and gas installations. Incineration of waste at sea is also prohibited.

HAZARDOUS WASTES : *The (Basel) Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989* is particularly successful.

- It now has 172 parties. It covers most waste, with the exception of radioactive waste.
- If a party prohibits the import of hazardous waste, another party must not permit its export to that party.
- Illegal traffic in hazardous waste is made a criminal offence.

LIABILITY FOR DAMAGE CAUSED BY PRIVATE PERSONS

A state is, responsible for unlawful acts of its officials causing injury to nationals of foreign states and retains a general territorial competence under international law. In general, states must ensure that their international obligations are respected on their territory.

In some cases, an international agreement might specifically provide for the **liability of the state for the acts of non-state entities.**

Article 6 of the Outer Space Treaty, 1967, for example, stipulates that states parties bear international responsibility for 'national activities in outer space . . . whether such activities are carried out by governmental agencies or by non-governmental agencies'.

INTERNATIONAL WATERCOURSES

International watercourses are systems of surface waters and ground waters which are situated in more than one state.

Helsinki Rules on the Uses of the Waters of International Rivers in 1966 : Each basin state was entitled to a reasonable and equitable share in the beneficial use of the waters and that all states were obliged to prevent new forms of water pollution.

In 1992, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted in Helsinki within the framework of the UN Economic Commission for Europe. **No significant adverse effect should be caused in transboundary waters.**

The Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997 provides that watercourse states shall in their respective territories utilise an international watercourse in an 'equitable and reasonable manner'.

Gabčíkovo–Nagymaros Project Case : Hungary and Czechoslovakia entered into a treaty in 1977 by which there would be created on the Danube. A dispute developed in the light of Hungary's growing environmental concerns. In 1992, Hungary announced the

termination of the treaty of 1977 and related instruments. The ICJ found that the treaty was still in force and Hungary was not entitled to terminate it

OUTER SPACE

The *Outer Space Treaty, 1967* provides that the exploration and use of outer space is to be carried out for the benefit and in the interests of all states.

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979 provides that the moon and its natural resources are the 'common heritage of mankind' and are to be used exclusively for peaceful purposes.

While liability for damage caused by objects launched into space is absolute, the specific problem of space debris has been addressed in *the Buenos Aires International Instrument on the Protection of the Environment from Damage Caused by Space Debris, adopted by the International Law Association at its 1994 Conference*.