Comments 20/11/2016 Does not gain court brands grade.

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Environmental Law: Formative Essay

Answer the question.

To what extent do environmental principles help courts to settle disputes?

Which disputes? Broad.

Word Count (excluding footnotes): 1,500 words

Introduction

Environmental principles exist in international declarations (such as the Rio Declaration); policy documents, treaties, directives and, most importantly for the purposes of this essay, the jurisprudence of the courts. However, owing to the vague and multiple definitions of these principles, there continues to be 'considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law";'[1] and which environmental treaty laws or principles have developed customary international law. The extent to which these environmental principles help courts to settle disputes is an ongoing discussion that we shall examine here.

Polluter Pays Principle

The Environmental Damage (Prevention and Remediation) Regulations 2009 are based on the polluter pays principle, which states that those individuals who are liable for any environmental damage are required to prevent and, if needs be, remedy the damage. The enshrinement of the polluter pays principle in Article 191(2) of the TFEU makes it binding on EU legislature when implementing EU law, though it's judicial review is limited. The Polluter Pays Principle is also reflected in directives (e.g. Environmental Liability Directive 2004/35/EC), setting up a scheme whereby operators have to prevent or pay to remedy particular environmental damage.

The reinforcement of this principle has proved to be helpful in disputes settled by the Court of Justice of the European Union (CJEU). In this capacity, the polluter pays principle should not place insurmountable hurdles in the way of regulation and a key consideration is whether the costs are 'manifestly disproportionate' to the volumes or nature of waste produced.[2] Advocate General Kokott has suggested that 'revenue-earning capacity cannot as a social factor justify higher contributions'.[3]

Why

In order to decide who is the polluter and who should be paid, one must first establish who possesses the rights to the resource whose use is in dispute. There are circumstances where ownership is in dispute or property rights are undefined. These problems need to be clarified, either in the courts, as is typically the case when there are disputes over property rights, or legislatively, as may be necessary when rights are completely unclear, as may be the case with rivers, the ocean, etc.[4] A property rights based polluter pays principle, if implemented, would solve many of these problems by enforcing existing property rights and providing principled guidance for the privatization of currently unowned resources by courts and legislatures. It will be

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[1] Iron Rhine Arbitration, *Belgium* v *Netherlands*, Award, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration [PCA].

[2] Case C-254/08 *Futura Immobiliare* v *Comune di Casoria* [2009] ECR I-6995 [56].

[3] Ibid [65].

[4] R. E. Cordato, *The Polluter Pays Principle: A Proper Guide for Environmental Policy*, Institute for Research on the Economics of Taxation Studies in Social Cost, Regulation, and the Environment: No. 6 (Washington, D.C. 2006), p ii.

much easier for lawmakers and adjudicators of court disputes to move in the right direction once the problem is clearly identified.[5]

Source Principle

Similarly to the polluter pays principle, the source principle aims to ensure that the communities pay all and only their own costs. The principle also rests on the acknowledgment that it is more effective to deal with environmental problems early at their source.[6] The source principle has been instrumental in helping courts to settle disputes by fairly distributing costs.[7] A key example of this was in the *Standley* case, in which the European Court of Justice (ECJ) ruled that the Nitrates Directive 91/676/EEC (concerning the protection of waters against pollution caused by nitrates) did not mean that farmers had to take on burdens for the elimination of pollution 'to which they had not contributed'.[8]

Precautionary Principle

Many environmental lawyers have argued that the precautionary principle is already a principle of customary international law.[9] While the Treaty Establishing the European Community does not provide a definition of the precautionary principle, decisions by the European Court of Justice and other EU courts denote elements of a general application of the precautionary principle ~~in EU law to support action~~. These include uncertainty, risk, and lack of a direct causal link between the risk and the perceived harm.[10] Regulation cannot legally be based on a 'purely hypothetical approach to risk' 'on mere conjecture which has not been scientifically verified'.[11] Risk must be 'adequately backed up by the scientific data available at the time' even if the scientific evidence is inconclusive.[12]

However, some of the core issues that occur from this use of the precautionary principle include the fact that the requirement to take precautions is modified by the balancing of costs and benefits of taking actions. This weaker version sadly reflects the present EU and UK court approaches. By taking uncertainty seriously, the precautionary principle implies that mere facts are not satisfactory for making a court

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[5] Ibid.
[6] EC Treaty, Article 174(2).
[7] N. De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002), p 325.
[8] Case C-293/97 *Standley* [1999] ECR I-2603, para 51.
[9] Some experts argue that there is sufficient state practice to support the emergence of the precautionary principle as a principle of customary international law. See Theofanis Christoforou, "The Precautionary Principle in EC Law and Science," in Joel Tickner (ed.), *Environmental Science and Preventive Public Policy*, Island Press, 2003, Chapter 16; J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law," in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law*, Kluwer, 1996, p. 52. Other academics consider that the precautionary principle is not yet a principle of international law particularly given the variety of interpretations. See P. Birnie and A. Boyle, *International Law and the Environment*, Oxford University Press, 2002, page 98.
[10] Case C-157/96, BSE (1998), ECR1-2211; Case T-13/99 *Pifzer* (2002) ECR 11-3305, and Case T-70/99 *Alpharama* (2002) ECR 11-3945. For an in-depth treatment of these cases, see Theofanis Christoforou, "The Precautionary Principle in EC Law and the WTO Legal System," in G. Kremlis, G. Balias and A. Sifakis (eds.), *The Precautionary Principle*, Athens: Sakkoulas, 2004, pages 99-149.
[11] Ibid.
[12] Ibid.

decision. The EU has expressed it's objective to establish guidelines for the use of the precautionary principle so as to clarify arrangements for its application.[13] A common understanding of the precautionary principle would further consistency in judicial decisions in arising disputes.[14]

Preventative Principle

The preventative (or prevention) principle bears some resemblance to the source principle in that it informs us that action to protect the environment should be taken in order to prevent damage before the damage has actually occurred. It operates on the basis that the reparation of damage is less satisfactory than it's prior prevention. Although much environmental legislation is drafted in response to catastrophes, preventing environmental harm is cheaper, easier, and less environmentally dangerous than reacting to environmental harm that already has taken place.[15] The preventative principle is the fundamental notion behind laws regulating the generation, transportation, treatment, storage, and disposal of hazardous waste and laws regulating the use of pesticides.

The prevention principle has featured in the jurisprudence of the CJEU. In a court decision prompted by a referral from an English court, *Air Transport Association America* v *Secretary of State for Energy and Climate Change*,[16] the Court examined the legality of preventative measures applicable to areas beyond national jurisdiction. The case concerned the extension of the Emissions Trading Directive[17] to aviation and, more specifically, to flights departing or landing in EU territory. The Court upheld the legality of the companies operating such flights were required to present carbon allowances for emissions produced beyond EU territory, in international air space. Although, the Court did not discuss the prevention principle explicitly, for present purposes, the extension of the EU Emissions Trading System (EU ETS) could be construed as a measure to prevent environmental harm beyond national jurisdiction. Of course, such interpretation would not be entirely accurate as emissions of carbon dioxide have a global impact, irrespective of where they were produced. Therefore, the harm is occurring not just beyond national jurisdiction but everywhere, by reason of the contribution of such emissions to climate change.[18]

The customary prevention principle has also been debated in some domestic courts concerning environmental harm. In the *Reinwater* case, before Dutch courts, the principle *sic utere tuo* (no-harm) was recognised by a Rotterdam court of first instance as an appropriate basis to hold the defendant, the mining company Mines de

[13] S. Shaw and R. Schwartz, 'Trading Precaution: The Precautionary Principle and the WTO', United Nations University – Institute of Advanced Studies Report 2005, p 4.
[14] Ibid, p 8.
[15] The preventative principle formed the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which sought to minimize the production of hazardous waste and to combat illegal dumping. The prevention principle also was an important element of the EC's Third Environmental Action Programme, which was adopted in 1983.
[16] Case C□366/10 *Air Transport Association America* v *Secretary of State for Energy and Climate Change* [2011] WLR (D) 386.
[17] Directive 2003/87/EC, 'EU Emissions Trading Directive' (Consolidated version of July 2013).
[18] J. E. Viñuales, *The Rio Declaration on the Environment and Development* (Oxford University Press 2015), p 133.

Potasse d'Alsace, liable for having discharged saline waste into the river Rhine.[19] Although the finding was reversed by the Appeals Court of the Hague, on the grounds that the principle cannot be applied in the relations between private parties,[20] the case provides an early illustration of the jurisprudential relevance of the customary prevention principle.

Environmental Principles in UK Law

Aside from the effects of EU law on UK law, there is a minimal legal role ~~of~~ for environmental principles in UK law. Yet, the failure of the UK to obey environmental regulations laid down by EU law has previously led to international disputes. Such disputes include circumstances where there was a failure to take principles into account as a material consideration in decision-making; principles were used as aids to construe contested provisions; the precautionary principle had no legal force and was viewed as a policy objective,[21] or the where the House of Lords rejected the argument advanced by Environment Agency (EA) that Part IIA of the Environmental Protection Act (EPA) 1990 should be interpreted on the basis of the Polluter Pays Principle.[22]

Since 1992, environmental principles have been addressed by a rising number of international courts and tribunals, adding to the jurisprudence of the historically significant arbitral awards in the *Bering Fur Seals* case (1893), the *Trail Smelter* case (1941) and the *Lac Lanoux* case (1957). ~~On the whole,~~ the recent decisions have played a significant role in boosting the legitimacy of international environmental concerns and proving that global rules can play a substantial role in contributing to the protection of shared environmental resources. International courts and tribunals have also attempted to explain the meaning and effect of treaty norms, to recognise the existence of customary norms of general application, and to determine a more central role for environmental concerns in the international legal order.[23]

Conclusion

Despite the current ~~strive~~ drive for upholding environmental principles, there remain particular areas of international law in which international environmental norms are yet to be recognised as having an integral role to play. This is exemplified in the field of foreign investment laws, the rules of international law that seek to encourage investment flows by establishing norms prohibiting expropriation or unfair or inequitable treatment. ~~As in the field of trade, where progress has been made, the key issue is the relationship between two different subject matter areas in international law.~~

[19] *Reinwater* v *Mines de Potasse d'Alsace*, District Court of Rotterdam (8 January 1979), NJ 1979, no 113, cited in A. Nollkaemper, 'International Environmental Law in the Courts of the Netherlands', in M. Anderson and P. Galizzi (eds.), *International Environmental Courts in National Courts* (British Institute of International and Comparative Law 2002), 183, 187.

[20] Appeals Court of the Hague (10 September 1986), the Hoge Raad (23 September 1989), NJ 1989, no 743, cited in Nollkaemper, 'International Environmental Law in the Courts of the Netherlands'.

[21] *R* v *Secretary of State for Trade and Industry, ex parte Duddridge* [1995] Env Lr 151.

[22] *R (National Grid Gas plc (formerly Transco plc))* v *Environment Agency* [2007] UKHL 30.

[23] P. Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*, Session 2.2: The policy framework for investment: the social and environmental dimensions (OECD 2008), p 2.

go to Foreign investment sector.

Conclusion to be much shorter.

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As issues become more interrelated, it will be incumbent upon those involved in arbitrating disputes with an environmental factor to strive for balance between potentially competing objectives of environmental protection on one hand, and the protection of rights of foreign investors on the other hand. Neither of these essential societal interests should trump the other; they should be treated in an integrated manner. Such environmentally conscious values are therefore key to settling court disputes in a fair and appropriate manner.

Vague.

Conclusion 2,

They play a part but not sufficiently legally defined.

Bibliography

Directives

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Emissions Trading Directive
Directive 91/676/EEC

Legislation

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EC Treaty, Article 174(2).

Case Law

Books

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