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Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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REGULATING THE PRINCIPLES OF THE INTERNATIONAL ENVIRONMENTAL LAW A CRITICAL ANALAYSIS WITH RESPECT TO ENVIRONMENT

AUTHORED BY - JASLEEN KAUR BAHRI[1],
SHREEYA BISWAS[2] & MOHD YASIR KHAN[3]

"Sooner or later, we will have to recognize that the Earth has rights, too, to live without pollution. What mankind must know is that human beings cannot live without Mother Earth, but the planet can live without humans."

Evo Morales

ABSTRACT

The research study encompasses a critical analysis of the existing international environmental law principles. The emphasis has been laid on the shortcomings of the principles with a view to assess their efficacy in dealing with environmental issues. This has been done by analyzing the nature and origin of these principles and the extent to which they function in the protection of the international environment and their role as sources of environmental laws for the protection of the environment. The overall design is to make suggestions which enhance the growth of international environmental law in this regard.

INTRODUCTION

Massive enhancement of scientific knowledge, developmental and economic pursuit by human beings has resulted in radical and irrevocable changes in the environment, coupled with the augmentation of demographic statistics as well as the consistent decrease in non-renewable natural resources. Human activities have consistently degraded the quality of the land, air as well as water, which form the primary constituents of our environment. Such environmental

[1] Author
[2] Co- Author
[3] Co- Author 2

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issues led to the various conventions by the United Nations (UN) and other conventional bodies which further resulted in certain treaties, declarations etc. laying down methods to protect and preserve the environment for present as well as the future generations.

A byproduct of these conventional declarations & treaties are principles of international environmental law that have come to play an ever-increasing role in international as well as national environmental law and policy making. As a matter of fact, the protection and preservation of the environment is more and more seen as a "question of principle".[4] Therefore, in current times, the principles of international environmental law have gained much more importance. In this background, an in-depth study to assess the efficacy of these international environmental principles and their shortcomings is desirable in order to facilitate the growth of international environmental law.

The research study encompasses a critical analysis of the existing international environmental law principles. The emphasis would be laid on the inadequacies of the principles with a view to assess their efficacy in dealing with environmental issues. This would be done by analyzing the nature and origin of these principles and the extent to which they function in the protection of the international environment. Their role as sources of environmental laws for the protection as well as preservation of the environment would also be dealt with. The overall idea is to make suggestions which enhance the growth of international environmental law in this regard and help in creation of new frontiers for the application of these principles of international environmental law.

LITERATURE REVIEW

- **Wilkinson's *"Environment and Law"*** initially describes and explains law and legal systems, the concept of the environment, sources of environmental law and some of the techniques used in environmental law. It then examines some of the major connections between law and the disciplines of economics, science, ethics, and politics. Some of the issues discussed are: How economic instruments can offer alternatives and supplements to traditional 'command and control' forms of environmental regulation; the role of science in the resolution of environmental law disputes; the response of

[4] Wilkinson, D., "Environment and Law" (London: Routledge, 2002), 100.

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environmental law to the rise in theories of environmental ethics; and the kinds of political entities that are most conducive to high standards of environmental protection.

- **Burge's *"The principle of Polluter pays in Economic Law"*** identifies four versions of the polluter pays principle as: economically, it promotes efficiency; legally, it promotes justice; it promotes harmonization of international environmental policies; and it defines how to allocate costs within a State and thereafter, embarks upon the economic arguments in favour of and against the principle of polluter pays in international environmental law.
- **Kramer's *"E. C Treaty and Environmental Law"*** forms and excellent guide to European law relating to the environment. This text examines the content and impact of the various measures taken and the effect of, the environment articles of the EC treaty. It covers developments relating to Maastricht and the EEA.
- **McGoldrick's *"Sustainable Development and Human Right: An integrated conception"*** seeks to present an integrated conception of sustainable development, with particular emphasis on the contribution of international human rights law and theory. It considers parallels between sustainable development and self-determination, while providing some general reflections on international environmental law and international human rights in terms of analogous concepts, principles and systems.
- **Verschuuren's *"Sustainable Development and the Nature of Environmental Legal Principles"*** answers three fundamental questions: 1. Where does the high moral value that is usually attributed principles come from? 2. What is the exact difference between a principle and a legal rule, and between a principle and a policy? 3. What is the relationship between a principle and more concrete legal rules and policies? It is argued that principles of environmental law receive their high moral value from the ideal of sustainable development. The author asserts that the principles form a necessary link between directly applicable and enforceable environmental legal rules and the underlying ideal. They are a necessary medium for ideals to find their way into concrete rules and can be used to bridge the gap between the morality of duty and the morality of aspiration. Because of their basis in (written or unwritten) law and their possible direct and intense influence on legal rules concerning activities that may harm the environment, they must be placed within the morality of duty: a bridgehead within the morality of duty reaching out for the morality of aspiration.

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NATURE OF INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES

The principles in international environmental law basically derive their existence from different international conventions and the declarations that are made under them. A very good illustration of the same can be found in the Stockholm Declaration of 1972 which was adopted by the signatory countries at the "United Nations Conference on the Human Environment". It is the principles contained within the Declarations which have come to be known as principles of international environmental law.

BREAKING DOWN PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

International environmental law has given birth to a set of principles, which form the bottom-line of its application. This is because international law is formed by a "consensus of ideas and behaviour between states". A look at the conventions and declarations reveal the following major recognized principles of international environmental law.

[I.] THE PREVENTATIVE PRINCIPLE (NO-HARM RULE)

The preventative principle also known as the "no harm" rule is the idea that it is mandatory for the states, corporations, or individuals to take measures to refrain from causing damage to the environment, which is inclusive of the environment further than their territory. It has its origin in the *Trail Smelter Arbitration*[5] a case arising from damage to crop and property in the United States of America resulting from emissions from a Canadian Smelter. In formulating the principle, the tribunal held that:

> "Under the 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 its territory in such 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 injury and the injury is established by clear and convincing evidence."[6]

Principle 21 of the 1972 Stockholm Declaration at the UN Conference on the Human Environment reiterated the preventative principle:

[5] (1938/1941) 3 R.I.A.A. 1905.
[6] See also the Corfu Channel Case (UK v. Albania (1949) ICJ Rep. 4.

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> "States have…the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction."[7]

damage.[8] The above criticism is hinged on the fact that the obligation imposed by the preventive principle is imprecise and cannot easily be converted into concrete standards.[9] In the ***United State case of Amlon Metals v. FMC Corp. Inc***,[10] it was held that principle 21 of the Stockholm Declaration does not set forth any specific prescriptions, but rather refers in a general sense to the responsibilities of nations not to cause damage to extraterritorial environment.

[II.] THE PRECAUTIONARY PRINCIPLE

The precautionary principle is embedded in the notion that lack of full scientific evidence should not prevent or delay action to protect the environment from harm or prospective harm. In other words, the precautionary principle stipulates that measures to prevent environmental degradation should not be postponed as a result of absence of complete scientific evidence. The precautionary principle was included in principle 15 of the Rio Declaration on Environment and Development 1992, which provides as follows:-

> "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capacities. 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."

There appears to be confusion as to the thin line of difference between the precautionary principle and the preventative principle as some writers use the precautionary and the preventive principles without distinction.[11] This mistake has made one writer to say that the 'precautionary principle' is also known as 'prevention principle.[12] However, Thornton putting the facts straight had this to say:

> "The difference between the preventive principle and the precautionary principle…is that the former requires states to take action where there is a foreseeable risk of damage

[7] See principle 2 of the Rio Declaration on the Environment and Development, 1992 containing same principle.
[8] Ibid.
[9] Ibid.
[10] [1991] SDNY 668.
[11] Kramer, L., "E. C Treaty and Environmental Law" (London: Sweet & Maxwell, 1995), 53.
[12] Supra 3, 245.

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> to the environment, whist the later requires action where the risks associated with an activity are suspected but are not fully known."[13]

3. That the precautionary principle is too ambiguous and therefore can result in weak laws.

4. That the precautionary principle urges inaction and ends up creating more risk than it solves.[14]

5. That elevation of the precautionary principle to the legal plane may cause evidential difficulties.[15]

From the above, it appears the precautionary principle failed to answer the critical question of how much precaution to apply in a given circumstance before marginalizing the need to wait on scientific proof of damages, as it is based on the notion that full scientific certainty is not required before taking preventive measures. This therefore leaves it in an ambiguous realm that calls for clarity. It is further argued that the precautionary principle is too vague to guide actual decision making and that its application creates much problem. It creates the opportunity for arbitrary and unpredictable decisions by agencies, government and courts, etc.

Furthermore, the Precautionary principle does not provide specific guidance as to what exactly must be shown to justify precautionary measures as it leaves too much space for discretion. According to Turner and Hartzell:

> "The statement fails to indicate who must bear the cost of precaution: what constitutes a threat of harm, how much precaution is too much; and what should be done when environmental concerns and concern for human health pull in different directions."[16]

[III.] THE POLLUTER PAYS PRINCIPLE

The polluter pays principle is founded on the idea that the polluter should bear the expenses of carrying out environmental cleanup resulting from his polluting activities. The principle in substance means that the cost of environmental impairment, pollution damage and cleanup should not be borne with tax payers fund or by the society, but that the person who caused the pollution should bear the cost. The principle is contained in Principle 16 of the 1992 Rio Declaration as follows:

> "National authorities should endeavour to promote internalization of environmental costs and the use of economic instruments, taking into account the approach that the

[13] Thornton, J., and Bekwith, S., "Environmental Law" (London: Sweet & Maxwell, 1997), 38.
[14] Ibid.
[15] *Nichols v. Natural parks & Wildlife Service* [1994]5 Env. 1 ; Per Talbot J.
[16] Supra 23.

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polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without unduly distorting international trade and investment."

There are two justifications for this principle: one economic, one ethical.[17] The economic justification is explained away as reflecting the cost of pollution control back into the polluter ("internalization") wherein the balance is restored. Theoretically, the polluter pays principle applies both to (prospective) preventive controls and (retrospective) liability regimes. The ethical argument develops from Aristotle's view on corrective justice that a person who wrongly harms another should give redress for that harm.[18] Four versions of the polluter pays principle have also been identified as: economically, it promotes efficiency; legally, it promotes justice; it promotes harmonization of international environmental policies; and it defines how to allocate costs within a State.[19]

6. Polluters who pay usually pass the cost unto the consumers.

Despite the criticism and observations against the Polluter Pays Principle, it remains a modern innovation in fixing liability on the polluter of the environment. The existence of a standard framework of laws defining levels of pollution, their corresponding liability and centred on strict liability will remove the burden of proof associated with tort, i.e. proof of negligence.

[IV.] SUSTAINABLE DEVELOPMENT

This is the most forward looking principle to emerge from international activities on the environment. The concept of sustainable development originated in the realization that the world's environment, its economies and the ways in which it treats its humans and animals are all interlinked.[20] The concept has been defined in numerous ways, but the most widely accepted definition of sustainable development is that given in the Brundtland Report i.e., development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[21]and relates to economic development.[22] It has also been said that the principle overreaches a broad range of discipline. The achievement of sustainable development is supported by three pillars: International environmental law, International human rights law,

[17] Supra 1, 121.
[18] Ibid.
[19] Burge, H.C., "The principles of Polluter pays in economic Law", in Law and Economics, ed. Eide, E. and Van der Bergh, R. (Oslo: Juridisk Forlag, 1996), 16.
[20] Supra 3, 247.
[21] Report of the World Commission on Environment and Development: Our Common Future, 1987 (The Brundtland Report.).
[22] McGoldrick, D., "Sustainable Development and Human Right: An integrated conception" International and Comparative Law Quarterly 45 (1996) 796-818, available at: <http://www.jstor.org/stable/760584> (accessed: October 21, 2017).

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and International economic law.[23] Thus, the right to a sustainable environment is fundamental and equates with the right to life. Quality of human and ecological life can only be sustained where there is corresponding sustenance of the quality of the environment. Therefore, sustainable development is about more than quality of life and achieving balance among the social, economic and environmental price of a community.

Furthermore, principle 5 of the Rio Declaration also integrated environmental, economic and human rights issues as a pre requisite for attaining sustainable development. The principle exhorts all states and all peoples to co-operate in eradicating poverty and to decrease international disparities in standards of living in order to meet the needs of majority of the world's population. Sustainable development also extends to issues of production and consumption vis-a-vis the need to have specific population data. Sustainable development can only be achieved when there is accurate information on the population relying on the environmental resources for either economic, production or consumption purposes. Principle 8 of the Rio Declaration, 1992 further extends this point thus: "To achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."

Principle of Sustainable Use: This is the notion that states have a general obligation to ensure the sustainable us of both living and non living natural resources. This obligation is evidenced by the adoption of standards in treaties governing the rate at which resources may be exploited. An example of this obligation is entrenched in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which limits the rate of poaching and trading on endangered species of Flora and Fauna Nigeria was suspended in 2005 for non–compliance with the provisions of the convention on preservation of endangered species. It has however been said that there is no general obligation of States not to exhaust non-renewable energy resources.[24]discussion.

RECOMMENDATIONS

1. The ICJ must engage in Judicial Activism to give life to these principles and to accord them the status of Customary International Law.

[23] Supra 22, 41.
[24] Hayward, Steven, "Sustainability and Non-Renewable Resources", Mackinac Center for Public Policy, available at: <https://www.mackinac.org/2843> (accessed: October 22, 2017).

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2. In order to circumvent the weakness of the principles as soft laws, it is suggested that legislative bodies should make these principles the underlying factors in enacting environmental laws.
3. There is need to redefine the preventative principle to restrain the power to states to apart from not causing damage to other territories, not to cause damage to their internal environment.
4. The frontiers of the precautionary principle should be extended to place reliance on either scientific proof or clear empirical knowledge before it is applied. This will give it a 'look before you leap' character and not otherwise.
5. Developed nations must wake up to the responsibility of assisting developing nations with standard technology for efficient utilization of natural resources for sustainable development.
6. The principles of international environmental law should be made express in International Treaties so they can be clothed with an aura of legality and enforceability.

CONCLUSION

The nature of principles of international environmental law and its role as mere policy statements rather than laws in themselves is not in doubt. They however, act as sources of Customary International Law upon which states can legislate upon to protect the environment. What is important is the will to translate the principles into concrete enforceable norms as endorsement of the principles without clear evidence of action and will to enforce them on the part of states cannot establish these principles as rules of Customary International Law. The International Court of Justice must engage in judicial activism while relying on these principles to give valid decisions that transcend the limitations of the principles as the aspect of Customary Law usually relied upon is case law. The continued existence of these principles as "soft laws" or guiding principles renders them ineffective. This is in addition to the need for states to give life to the wordings of these principles as enforceable laws in their territories.

There is the need to rethink the principles of international environmental law to take cognizance of the technological advancements. The need to also stabilize the economic and developmental interest of developing nations before the issue of conservation is imposed should be the focus of future deliberations on principles of international environmental law. The conservation of natural resources cannot be addressed without addressing and alleviating the problems of poverty which must include universal access to education, access to safe drinking water, proper

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sanitation, proper health care, improved employment opportunities and transfer of technologies to the Developing nations which can only be achieved through committed international cooperation. Unless the observed principles are rebranded to address this imbalance between developing and developed nations, conservation of natural resources and addressing of climate change problems would remain a wild goose chase. Mere Principles of International environmental Law will not save the environment from the hazards of human activity unless they are rebranded and translated into concrete enforceable customary international laws and the time to act starts now.

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