

International Environmental Law

Judicial Enforcement of Environmental Law in Uttar Pradesh
Workshop

October 19-21 2003

By
Mr. John Pendergrass
Senior Attorney
Director, Judicial Education
Environmental Law Institute

Introduction

In August 2002, more than 120 judges from 59 countries, including India, met in Johannesburg, South Africa to consider the role of law in sustainable development. At the conclusion of the Global Judges Symposium the judges adopted The Johannesburg Principles on the Role of Law and Sustainable Development. Those principles provide a synopsis of the evolution of environmental law over more than three decades and an introduction to concepts of sustainable development. The Principles state that “the framework of international and national law that has developed since the United Nations Conference on Human Environment held in Stockholm in 1972 provides a sound basis for addressing the major environmental threats of the day, including armed conflict and attacks on innocent civilians, and should be underpinned by a more determined, concerted and sustained effort to implement and enforce these legal regimes in order to achieve their objectives.” The Principles then emphasize the importance of environmental law and place it in the context of sustainable development, stating that “the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of future generations are not compromised.”

I. Emerging Principles of International Environmental Law

Sustainable Development

The preceding quote from the Principles lays out the fundamental concepts of sustainable development: integrating environment and development to meet the needs of the current generation while preserving the ability of future generations to meet their needs.

At least five principles have been identified as being important to sustainable development: the polluter-pays principle, the precautionary principle, intergenerational equity, integrated decision making, and developed country leadership. The first two are also among the most important principles of international environmental law and the others may become equally important if sustainable development evolves, as it should, into the unifying concept of human interaction with the environment. Other important principles of environmental law include the principle of proportionality, environmental impact assessment, and access to information.

Polluter Pays

The polluter pays principle combines principles of fairness and economics. Principle 16 of the Rio Declaration on Environment and Development of the United Nations Conference on Environment and Development (UNCED) (1992) states, “National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in practice, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” This principle becomes important because pollution prevention is not yet widely practiced, but

will always be necessary because some level of pollution will occur regardless of the success of pollution prevention. This principle states that it is better policy and economics to have the polluter pay the costs created by pollution and damage to the environment. It is considered more equitable for the polluter to pay these costs than the general public. Making the polluter bear the costs of pollution also makes more sense economically because it provides an incentive for the polluter to avoid those costs by preventing pollution, and the polluter can pass those costs on to the consumer. This internalization of the costs of pollution is considered by economists to be the most powerful method of changing behavior that harms the environment. In order for the polluter pays principle to be effective, governments must eliminate subsidies, including hidden ones, that make it cheaper to pollute or waste resources.

The polluter pays principle can be implemented through the so-called command and control approach. Legal requirements for conducting polluting activities can to some degree force the polluter to bear the costs of pollution. But, most environmental regulatory schemes allow some level of pollution to occur, by setting standards for allowable emissions or standards for how an activity is to be conducted, which means the polluter does not bear the cost of the permitted amount of pollution. Market-based instruments attempt to achieve similar pollution reduction goals at lower overall costs by relying on the economics of markets. Environmental taxes seek to make it more expensive to pollute, thus creating the incentive to reduce pollution. Cap and trade systems combine command and control, through use of an enforceable limit on the total amount of a pollutant that may be emitted by all polluters, with market mechanisms that allow the polluters to allocate how much they each pollute based on who can reduce their emissions at the lowest cost.

Perhaps the most effective means of implementing the polluter pays principle is liability for environmental damage. Environmental liability systems impose on the polluter the cost of cleaning up pollution and restoring the environment to the state it was in prior to the pollution. The best known of such liability regimes deal with oil and hazardous substance pollution. The *Exxon Valdez* oil spill resulted in Exxon being required to pay the U.S. government and the state of Alaska almost \$1 billion, plus unrecorded additional hundreds of millions to native tribes and commercial fishermen who used Puget Sound. It also resulted in a new U.S. law (the Oil Pollution Act of 1990) that required double-hulled tankers in order to avoid such spills in the future, an example of a regulatory scheme to force the potential polluters to pay for the cost of measures to prevent pollution. The Oil Pollution Act also required polluters to pay for the cost of cleaning up oil spills and for the cost of restoring or replacing damaged natural resources.

Several international agreements have adopted the polluter pays principle, particularly in the context of damage to natural resources. These include agreements on preventing pollution from ships and the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal.

Precautionary Principle

The Precautionary Principle is perhaps best stated in Principle 15 of the Rio Declaration on Environment and Development of the United Nations Conference on Environment and

Development (UNCED): “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.” Several fundamental concepts underlie and provide a strong basis for the precautionary principle. First, it is generally easier, less expensive, and more effective to prevent damage to the environment than to attempt to restore or remedy such damage. Second, science may not provide definitive answers to questions about how to effectively or efficiently protect the environment. Moreover, delay while waiting for definitive scientific results, or even slightly better scientific information, may result in damage to the environment. Since the nature of scientific knowledge incorporates some level of uncertainty for any question, absolute scientific certainty will never be achieved and decisions and actions could easily be paralyzed by the desire to avoid uncertainty.

The precautionary principle has been adopted in several international treaties. The Preamble to the Convention of Biological Diversity states, “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.” Similarly, Article 3 of the UN Framework Convention on Climate Change (UNFCCC) states:

the parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest cost.

Also, the Bamako Convention states:

each party should strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment, without waiting for scientific proof regarding such harm. The parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions.

As noted in the Bamako Convention, pollution prevention is a key method for implementing the precautionary principle. Pollution prevention is a simple concept that illustrates many of the reasons behind the precautionary principle as stated above. Pollution prevention seeks to avoid creating pollutants in the first place by changing product formulations, production processes, and waste disposal practices. First, it may be possible to change the product to avoid using a substance that would cause pollution. Two famous examples from the U.S. of this are eliminating lead in fuel and paints, which eliminated a major source of lead pollution in the air and is reducing exposure to lead from paint. Second, changes in the production process, such as using water-based cleaning solutions and solvents instead of volatile organic chemicals, can eliminate a source of pollution. Third, substances can be reused in the production process instead of disposing of them, greatly reducing the volume ultimately disposed. Finally, substances can be recycled and used by others, which also reduces the volume of material disposed. All of these

methods also can contribute to reducing the need for new raw materials, which can reduce the need for extraction of natural resources and reduce the pollution associated with mining, logging, and drilling.

II. Sources of International Environmental Law

Treaties or Hard Law

“Hard law” refers to bilateral or multilateral agreements between States that include rights or obligations that are binding on the signatories. They may govern the conduct of States and their citizens in relating to the global commons, such as does the UN Convention on the Law of the Sea, or govern the conduct of States with respect to shared resources, such as multinational water bodies.

Soft law

“Soft law” refers to international agreements that do not contain binding obligations. Typically they state principles that the signatories agree to or establish a plan of action for dealing with specific problems. Soft law agreements have been used when it has been impossible to obtain agreement on binding obligations.

Agenda 21

Agenda 21 is the detailed plan of action adopted at the UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992. It provided a series of chapters with directions for how States could achieve sustainable development within their own boundaries. It also called for cooperation among States and with non-governmental organizations (NGOs) in order to achieve sustainable development on a global scale. It was largely ignored in the U.S. Other examples of soft law include the Stockholm Declaration, which proclaimed the right to a healthy living environment to be a basic human right, the Rio Declaration, and the UN Framework Convention on Climate Change. The latter is an example of the type of soft law where States agreed to continue to work on a problem without reaching agreement on binding obligations. The Kyoto Protocol established the hard law binding obligations related to climate change (but it is yet to enter into force).

III. Compliance and Enforcement of International Environmental Obligations

In the environmental context there is relatively little to be said about formal enforcement of international agreements. The United Nations established a Compensation Commission to adjudicate claims for compensation for damage caused by Iraq in its invasion of and retreat from Kuwait in 1991. This commission is enforcing international law related to war, but it is a retrospective assessment of liability rather than prospective enforcement of obligations agreed to by States in treaties. Multilateral environmental agreements stand in contrast to the World Trade Organization, which has a well-established institutional framework for enforcement of trade agreements.

IV. Overview of Key Environmental Agreements

Aarhus Convention

UN/ECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters. Article 4 requires nations to provide a system to allow the public to request and receive environmental information from public authorities. Article 5 requires nations to provide a system under which public authorities collect environmental information and actively disseminate it to the public without request

Basel Convention

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 1989, entry into force 1992). This convention was intended to ensure that measures taken by States to manage hazardous wastes and other wastes, including their transboundary movement and disposal, are consistent with the protection of human health and the environment wherever they are disposed.

Kyoto Protocol

The United Nations Framework Convention on Climate Change (UNFCCC) (adopted 1992, entered into force 1994) was negotiated and drafted with the expectation that additional law was necessary to provide the details and clarification necessary to implement the far-reaching goals of the Convention.¹ Putting the precautionary principle to work in international law, nations agreed to establish the goals and process for dealing with climate change and committed to working out the details in later binding instruments. The Kyoto Protocol was the first installment in that process of providing clarification, details, and binding commitments, and the Marrakesh Accords added more specificity in the form of rules governing the mechanisms for implementing the Protocol.² Nevertheless, the process of implementing UNFCCC will require further elaboration, particularly since the Kyoto Protocol has yet to enter into force.³

POPs

The Stockholm Convention on Persistent Organic Pollutants (adopted 2001, not yet entered into force) seeks to protect human health and the environment from persistent organic pollutants (POPs). The goals of the convention are to eliminate the release of dangerous POPs into the environment, beginning with the twelve worst, support a transition to safer alternatives, target additional POPs for reduction, clean up stockpiles and equipment containing POPs, and cooperate toward achieving a future free of POPs.

Montreal Protocol

Vienna Convention for the Protection of the Ozone Layer (adopted 1985, entry into force 1988). The parties agreed to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities that modify or are likely to modify the ozone layer. The parties also agreed to adopt appropriate legislative or administrative measures and cooperate in harmonizing appropriate policies to control, limit, reduce, or prevent human activities under their jurisdiction or control that have or are likely to

¹ <http://unfccc.int/resource/guideconvkp-p.pdf> (last visited February 26, 2003).

² *Id.*

³ One of the conditions, ratification of the Protocol by more than 55 Parties to the UNFCCC, has been met. The other, ratification by industrialized countries listed in Annex I that represent 55% of the 1990 carbon dioxide emissions from that group, could be met if the Russian Federation ratifies the Protocol. *Id.*

have adverse effects on the ozone layer. The *Montreal Protocol on Substances That Deplete the Ozone Layer* (adopted 1987, entry into force 1989) seeks to implement the Vienna Convention by taking precautionary measures to control global emissions of substances that deplete the ozone layer. Annual consumption and production of substances listed in Annex A were required to be reduced to 80% or 50% of the 1986 annual level depending on whether they are in Group I or II. Developing countries that consume less than 0.3 kg per capita of the controlled substances were allowed to delay compliance by ten years.

V. Overview of Voluntary International Standards

ISO 14001

The International Organization for Standardization (ISO) establishes international standards for products and processes. ISO 14001 is a standard for Environmental Management Systems (EMSs) (adopted 1996) (revised 2004), which establishes a process for creating and maintaining a system for managing the environmental aspects of a business. It does not state what a business should do in managing its environmental aspects nor does it establish environmental performance standards, rather it provides the framework for the system. ISO 14001 contains standards by which an organization's environmental management system can be audited to determine and confirm that it conforms to the 14001 standards. Such evaluations can be one of three types: 1) internal, solely for the purpose of managing the organization; 2) self-declaration, also primarily internal, but declaring to the outside world that the organization has determined that it conforms to ISO 14001; and 3) third party certification of conformance to ISO 14001, which provides independent verification of conformance. A worldwide system of certification exists that starts with Certification/Registration Bodies (CRBs), which perform audits of organizations and certify their conformance to ISO 14001. These CRBs are in turn audited and accredited by national Accreditation Bodies that assure that the CRBs are performing their audits and certification systems in accordance with ISO 14001. The U.S. accreditation body is the ANSI-RAB Environmental Management Systems Council. These accreditation bodies are themselves audited by their peers to assure that they perform their functions in accord with ISO 14001.