Analysis of the Applicability of Principle 2 of the 1992 "RIO Declaration"

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According to **Principle 2** of the 1992 "Rio Declaration", "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that 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."

a) How the content of principle has normally been understood?

b) How is this principle seen in light of the need to solve such global environmental problems as the climate problem and the loss of biodiversity?

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a.1) General context

The Rio Declaration on Environment and Development, held on 3rd to 14th June 1992 at Rio de Janeiro has been adopted by 178 Member States at the Earth Summit, was a milestone event bringing together Heads of State and Chiefs of Government than any other meeting in the history of international relations, along with senior diplomats and government officials from around the globe, delegates from United Nations agencies, officials of international organizations, and many thousands of nongovernmental organization (NGO) representatives and journalists.

It was at the time perceived as a progressive statement by all nations to recognize the indivisibility of the fate of mankind from that of the Earth, and established development in international law (Rio Declaration, 1992).

a.2) Introduction

The Declaration proclaimed a set of 27 principles, promoted principles, such as:

- The centrality of human beings to the concerns of sustainable development (Principle 1);
- States' sovereign right to exploit their own resources without causing

the damage to the environment of other States (Principle 2);

- The primacy of poverty eradication (Principle 5);
- The importance of the environment for current and future generations and its equal footing with development (Principles 3 and 4);
- The special consideration given to developing countries (Principle 6);
- The principle of Common but Differentiated Responsibilities (CBDR, Principle 7);
- The promotion of appropriate demographic policies (Principle 8);
- The effective environmental legislation (Principle 11);
- Supportive and open international economic system that would lead to economic growth and sustainable development in all countries (Principle 12);
- Environmental impact assessment (EIA), as a national instrument, to be undertaken for proposed activities that are likely to have a significant adverse impact on the environment (Principle 17);

The RIO declaration also encompassed the two critical economic principles of polluter pays (Principle 16) and precautionary approach (Principle 15). It introduced principles relating to participation and the importance of specific groups (women, youth, indigenous people and their communities, and other local communities) for sustainable development (Principles 10, 20, 21 and 22). Lastly, it requested Member states to put in place adequate legislative instruments to address environmental issues (Principle 26 and 27), (Rio Declaration, 1992).

a.3) Explanation of the content of principle 2 as it has normally been understood

First of all, the **Principle 2** is inspired by the language of principle 21 of the Stockholm Declaration, demonstrating the sustained commitment to this principle among member states. It upholds the right of nation States to exploit their own natural resources – a principle that may be invoked in the context of international negotiations to resist multilateral efforts that might constrain that right. Principle 2 balances this emphasis on sovereign rights by also invoking the responsibility of States not to cause damage to the environment in areas beyond their national jurisdiction. In the first instance this applies to activities that might pollute or degrade natural resources that span national boundaries – such as watersheds. But it also has implications for broader transboundary impacts – such as climate change caused by carbon emissions released in countries far removed from the impacts (UN, 2011).

Principle 2 throws up a number of challenges – firstly there is a potential incompatibility of natural resource exploitation on a national level with multilateral efforts to protect the environment and conserve global environmental goods and services.

Secondly, the significant expansion of transnational corporations (TNCs) has rendered obsolete the assumption that natural resources are invariably controlled by the Nation State.

Lastly, though the legal obligation on national sovereignty is balanced by the invocation of transboundary responsibility, it remains ambiguous in many cases as to how Nation States might be held to account for the transboundary impacts of their actions (UN, 2011).

As conclusion, by specifically invoking the UN Charter, the Principle 2 provides a foundation upon which the two core components of the principle should be based when implemented. The principle of sovereignty is strongly upheld in the Charter, thereby placing an emphasis on 'sovereign right' in a way that has the potential to surpass the responsibility States have to ensure they do not cause trans-boundary harm.

b) How is this principle seen in light of the need to solve such global environmental problems as the climate problem and the loss of biodiversity?

b.1) Introduction and Invocation of national sovereignty

Since the middle of the twentieth century the issue of state sovereignty over natural resources became ever more prominent, especially in the context of decolonization (Schrijver, 2010). The right to self-determination of those states that were determined for, or recently gained, independence became interlinked with national sovereignty. The tension between state ownership and control over those natural resources and the reliance on them by western states who had exploited them to develop their own economies came to the forefront with a series of nationalizations of large western operated companies in newly independent states (for instance, the nationalization of the Suez Canal Company and copper mines in Chile).

Hereafter there are some International agreements such as the Declaration on Permanent Sovereignty over natural resources (1962), the Stockholm Declaration (1972) and the UN Convention on the Law of the Sea (1982) would have influenced the decision to invoke the principle of state sovereignty in the context of resource management and trans-boundary pollution in the Rio Declaration. The principle of national sovereignty is afterward reiterated in numerous international environmental instruments, including the preamble to, and Article 3 of,

the Convention on Biological Diversity (CBD, 1992) reaffirming that States have sovereign rights over their own biological resources; the preamble to the United Nations Framework Convention on Climate Change (UNFCCC, 1992), reaffirming the principle of sovereignty of States in international cooperation to address climate change, the "Principles/ Elements" of the Forest Principles (non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, 1992), the United Nations Millennium Declaration and the Johannesburg Declaration on Sustainable Development (2002, Article 34-37).

In addition there are also numerous international treaties relating to armed conflict where it is invoked. The destructive nature of conflict and the correlating transboundary effects necessitate that international frameworks govern these activities (Rio declaration, principle 24).

b.2) Compensation

Where principle 2 provides a right for states to exploit their natural resources, it must necessarily follow that should they not exploit it they have a right to be compensated accordingly. This is especially relevant where the international community is in favor of a state not engaging in resource exploitative behavior, where it is felt that an international benefit will be gained as a result. A prominent example where international mechanisms have been established to facilitate this process is the Reducing Emissions from Deforestation and forest Degradation (REDD) scheme under the UNFCCC. In this situation the objective of principle 2 is logically applied so that those countries that effectively have a right to deforest are financially compensated for not engaging in deforestation. The internationally community benefits from this, because the forests as carbon sinks, are preserved (REDD, 2016).

In addition, an invocation of the *sovereign right* to exploit is also applied to the controversy around 'response measures' that fall under the UNFCCC and have been discussed in relation to mitigation targets. Where the REDD scheme provides a mechanism to compensate countries for not engaging in deforestation, it has been argued by States such as Saudi Arabia that, if they are not going to exercise their sovereign right to exploit their natural resource - oil – then they should be compensated. If Principle 2 is followed to its logical conclusion, this argument, logically, stands. The impacts of global policies aiming to reduce carbon emissions will reduce demand for that resource and have a significant impact on those states that

have built their economy around such exploitation (UN, 2011).

This contentious issue has become highly politicized in the UNFCCC negotiations not least because there are many states that do not accept that an oil-based economy should be compensated for not engaging in an activity that provides the means for other countries to increase carbon emissions. The Non Government Organization "NGO" community also regards this as inappropriate (Climate Action Network, 2011).

b.3) Sovereignty and international regimes

In addition to the tension that exists within Principle 2 itself, there are also wider tensions between the State sovereignty and international regimes, which goes to the heart of the efficacy of international law. The principle of state sovereignty is invoked to resist perceived, or actual, 'interference' of international frameworks and regimes. This is particularly relevant in the case of climate change where state sovereignty and the pursuance of national interests is used as an argument to trump attempts for establishing multilateral agreements that would have national application, and national governments – such as in Australia - reiterate the fact that "being a Party to the UNFCCC does not undermine Australia's national sovereignty. Similarly, this tension exists in relation to whaling. The International Whaling Commission has, since 1986, imposed a standstill on whaling for commercial purposes (Banyan, 2010). However, Japan continues to engage in this activity every year arguing that it is for research purposes. It also invokes the principle of national sovereignty and argues that it is strongly associated with Japanese culture and tradition (Banyan, 2010). In these cases the tension is played out on an international stage with both governments and environmental groups condemning the activity and applying pressure on Japan to cease (Nick Squires, 2007), often resulting in Japan accusing such groups as 'unjustified interference' (BBC, 2011).

b.4) Recognizing transboundary responsibility

Furthermore, despite the fact that the 'national sovereignty' element of the principle has been consistently invoked to reiterate the right of a nation State to exploit its own resources, without 'interference' from the international community, there are a number of examples where the transboundary element of the principle has also been upheld (UN, 2011).

e.g: The Rusumo Power Station (80 MW) on Akagera River shared by Rwanda and Tanzania, proposed to be completed in 2018 must recognize transboundary

responsibility between two countries in respect to the Convention on Environmental Impact Assessment in a Transboundary Context done at ESPOO (Finland), on 25 February 1991.

The same scenario must be applied to Rusizi III Power Station (147 MW) and Rusizi IV Power Station (200 MW to be respectively completed in 2020 and 2025, in regards to Rwanda, the Democratic Republic of Congo (DRC) and Burundi.

b.5) International case law

The second half of Principle 2 that has been invoked in a number of cases at an international level, thus is demonstrating its applicability in international Courts, as well as reinforcing the objective of principle 26 which relates to resolving environmental disputes peacefully. The ability of States having a means by which they can challenge an activity or decision that is perceived to go against Principle 2 is fundamental to its successful implementation.

The International case law was already developing on this point by the time the Declaration was established in Rio, since the tension between transboundary disputes and national sovereignty were already being played out on an international stage (UN, 2011).

The evolution of atomic science and the development of nuclear weapons resulted in disputes relating to transboundary harm being catapulted to the attention of politicians and civil society alike. The nuclear weapons testing led to the borders of nation states being put under threat from an activity that was conducted in the jurisdiction of one State but which could have serious negative impacts within the borders of another.

The *Legality of the threat or use of nuclear weapons* (International Court of Justice - ICJ, 1996) *case* brought to the ICJ by Australia and New Zealand (in separate cases) against France sought to invoke principle 2 in relation to nuclear weapons testing.

It was successfully invoked and applied in an advisory opinion (the case was not taken further since France had already agreed to not conduct more weapons tests), which confirmed in no uncertain terms 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 (ICJ, 1996).*

b.6) International processes relating to Principle 2

If a State invokes its sovereign right to exploit a resource, such as oil or a river, it must conduct environmental impact assessments (principle 17) as well as

consult with any State that might potentially be affected by the procedure of exploitation or the activity that uses the resource (principle 19) prior to proceeding with the project. The international courts recognize that this preparatory work is a crucial component of adhering to Principle 2 (UN, 2011).

This is illustrated by cases such as *Pulp Mills on the River Uruguay* (Argentina v. Uruguay, 2010), in which Argentina brought a case based on the unilateral decision of Uruguay to allow two pulp mills to be built on the river that flows between both States, in violation to the Treaty that governed such activities. A considerable part of the claim was centered on the potential pollution that the mills would cause to the river and marine life, and thereby causing damage to an area within the jurisdiction of the claimant state (Minister for Foreign Affairs of Argentina to the International Court of Justice (2006).

Principle 2 is designed to prevent these situations arising and in conjunction with the precautionary principle (15) must guide the process by which a state conducts its affairs, especially where there is risk of environmental and trans-boundary harm. This approach was affirmed by the International Court of Justice, which in unambiguous language stated that 'preventative rather than compensatory logic' should be applied when determining elements of risk (Al-Khasawneh, 2010).

b.7) Challenges

b.7.1) National sovereignty

The incantation of the principle of national sovereignty can have negative implications for the international community. The exploitation of natural resources by one state does not just benefit that state alone, the benefits derived from the environment and ecosystems are often global in nature.

Such global benefit must be recognized when establishing governance frameworks to manage these resources. On the other hand, the burden of exploitation of those natural resources is shouldered by the international community and as such, global cooperation for the preservation of such resources will be required. Necessarily, therefore, the international community will have an interest in the way in which these resources are managed; highlighting the fact that broader governance of natural resources is required beyond the narrow interests of the nation State if progress is to be made on establishing effective measures to achieve this (UN, 2011).

b.7.2) National economic interests

Overall Principle 2 is challenging to implement where a large proportion of national economic interests are tied up in

the activity, and where the cessation of the activity will significantly affect the economy and industry workers, the economic interest will override the imperative to prevent transboundary environmental harm. For instance, even though studies have shown that stocks of Blue Fin Tuna have declined by 80% in the past four decades, Japan (a country where about 75% of the fish is consumed) protested over proposals to put the species on the ban list of the UN Convention on the International Trade in Endangered Species (CITES, 1992). The proposed ban was not successful after Japan and Canada opposed it, arguing that the ban would 'devastate fishing industries' (BBC, 2011).

The decline of blue fin tuna as a result of overfishing constituting transboundary damage to the marine ecosystem, is just one such example where the sovereignty of a nation State won out when the two elements of Principle 2 needed to balanced against one another.

b.8) Transboundary impacts

b.8.1) Applicability of Principle 2 in international courts

The above examples demonstrate how the soft law provisions of principle 2 are being borne out in international law and how there is a deepening recognition of the responsibility that one state will have to another, especially with regards to pollution and environmental damage.

Certainly where the activity and impact is as well defined and understood as nuclear testing or indeed nuclear warfare, the principle relating to 'damage' in one (or more) jurisdictions resulting from an activity in a different jurisdiction can be applied. However, as the *Pulp Mills* case demonstrates, the ICJ is still (as recently as 2010) grappling with the issue of whether or not it has jurisdiction over matters such as those raised by Argentina. In addition there are other examples of transboundary issues relating to environmental damage such as, for instance, issues pertaining to climate change. In this latter example the principle will be very difficult to implement when the debate about causality and related effects continues (UN, 2011).

b.8.2) Identifying responsibility

Identifying responsibility so as to uphold the second part of Principle 2 can often be a challenge. The atmosphere can be affected by numerous activities that are undertaken in various different states, not least the result of burning fossil fuels and emitting carbon dioxide into the atmosphere. The issues surrounding cause and effect of climate change create serious challenges to providing the opportunity for state or individual actors to bring an action against another State that is causing harm 'beyond

their jurisdiction', as it is impossible to attribute the origin of the 'harm' to one particular nation State. Nonetheless, organizations such as World Wide Fund for Nature (WWF-UK) have tackled this issue by analyzing the legal duty to pay compensation for climate change, and have argued that the "widely recognized rule of customary international law is the no-harm rule, which essentially holds that no State must harm another" and it suggests that "this rule provides a basis for consultation and negotiation in the case of transboundary environmental disputes" (WWF-UK, 2008).

Up till now the no-harm rule, reflected in principle 2, applies to state-state harm. In the context of climate change the rule will only apply if it can be proved that the activity of one state caused the harm or damage in another state. The significant challenge when it comes to climate change is in proving causality and the application of the no-harm rule would require legal assessment of the scientific evidence and causes of climate change within a given 'damaged' State or States" (WWF-UK, 2008).

b.8.3) Shared resources and 'other' areas

As a shared resource and necessary component of the makeup of the earth that keeps ecosystems in balance, the atmosphere, as well as the marine ecosystems beyond state jurisdictions, is precisely the 'other' areas that principle 2 refers to. Unlike in situations where transboundary damage is felt by one (or more) jurisdictions and the state of that (or those) jurisdiction(s) can take action to try to prevent an activity that is causing damage to its citizens, when an area outside of the direct jurisdiction of one state is threatened there is not a defined 'agent' or state that can bring a case on its behalf. In this situation it becomes a challenge to implement the aspect of principle 2 that relates to damage done in other areas (UN, 2011).

b.9) Lessons learnt, Conclusion and recommendations

b.9.1) Lessons learnt in general

Principle 2 has successfully influenced a number of legal instruments that were established either at or subsequent to Rio in 1992. The language of the Principle has been adopted and applied in a number of contexts, in particular cases brought before the International Court of Justice which have established that it exists as part of the *corpus* of international environmental law, and both arguable and recognized in the courts. As has been highlighted, however, there is still a significant challenge to the principle being fully implemented. The opportunity now exists to build on the

successful examples where the principle has been recognized.

This may require strengthening the international institutional regime that will play a role in enforcing the principle, in addition to development of the understanding of the causality of transboundary environmental harm (UN, 2011).

b.9.2) Lessons learned in International Cooperation

Lessons can be learned from efforts to foster international cooperation in other areas, and how, despite potentially infringing on national sovereignty, such efforts have been successful.

In relation to Principle 2 and environmental transboundary harm, it is crucial that open and cooperative processes are entered into by States if tension inherent in the principle is to be overcome and the objective of the principle achieved. An instructive process that was established in 2004, which might be drawn on as an analogous example, is the United Nations Educational, Scientific and Cultural Organization (**UNESCO**) project to create an 'International Coalition of Cities against Racism' (Kelly, 2008). This ambitious program intends to unite cities in their efforts to overcome racism by implementing measures at the municipal level, thereby 'circumventing the authority of national governments.'

Note that programs such as these do challenge the concept of national sovereignty, however they are leading the way in encouraging international cooperation and collaboration through sharing knowledge and examples of successful mechanisms of implementation. By learning from examples such as this, and developing analogous models of international cooperation, NGO, civil society and state actors can work together to strengthen and enhance implementation of Principle 2.

b.10) Conclusion and recommendations

b.10.1) An International Court for the Environment

One significant challenge to the dispute in the *Pulp Mills* case (above) was the issue relating to the use of scientific experts, note above in the challenges section.

A proposal for strengthening the international legal framework, especially in relation to environmental issues, is to establish an International Court for the Environment (ICE). An ICE, according to the proposal of the ICE Coalition would be based on a tribunal structure with similar procedures allowing scientific experts to be called to give evidence in cases ICE Coalition. The ICE Coalition also proposes that non-state entities have standing, or the

ability, to bring cases against state and non-state actors. This has the potential to also overcome the significant challenge with enforcing many of the principles in the Rio Declaration, because within the current institutional framework it is only states that are able to bring a cause of action.

b.10.2) Applying multiple principles

It remains important to recognize that the principles of the Rio Declaration do not exist in isolation to one another, and that many of the principles complement and support each other. This is especially true for principle 2, which would benefit greatly from being applied in conjunction with the Precautionary Principle (Principle 10). In effect, this will result in a better understanding by States that activities undertaken in their jurisdiction must not affect jurisdictions outside of their control, even where there uncertainty about cause and effect of those activities.

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