Session 2: Lecture Notes on
INTERNATIONAL ENVIRONMENTAL LAW (IEL) IN THE
GLOBAL CONTEXT

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I. International Law and other Disciplines

International Law of the environment or environmental law is an area, which took shape in the early 20th century. There was a time when certain fringe areas of international law such as international space law, international human rights law, international telecommunications law and environmental laws were not regarded as a part of traditional international law. But today with more than three thousand multilateral environmental treaties and agreements it cannot be said that ‘environment’ is a field, which remains outside the purview of international law.

IEL to use an abbreviated term is something that has its roots in domestic law, as was seen in my lecture on Session I. In this regard, Judge Hersch Lauterpacht one of the greatest scholars in the field of international law wrote that “…all international laws are nothing but an offshoot of national laws …”.

A student of IEL cannot claim to have a superior understanding of the subject because study of the environment is a genuine inter-disciplinary area. While IEL would involve a study of laws its pertinent to see others areas such as: environmental sciences; environmental studies; environmental journalism, environmental politics; environmental engineering; study of international environmental relations and institutions; environmental planning; ecological studies, environmental ethics, environmental science
and natural resources etc. Let me attempt to explain these fields in a para or two, giving examples in one field say climate change.

**Environmental Law** involves the study of treaties, customs, other sources of international and domestic laws on the subject; cases, case studies, judicial decisions and the *ratio decidendi* or the principles enunciated in these cases.

**Environmental sciences/engineering** would involve a scientific understanding of the science of climate change. A hotly contested issue, whether the Reports of the Intergovernmental Panel on Climate Change (IPCC) are to be taken as a last word on the subject. What are the adverse effects of climate change? Is there such a thing as dangerous climate change? If so, what is the standard or threshold to decide when it has become dangerous? What can various issues such as environmental aspects of a dam, its parameters etc. be? What is this REDD?

**Environmental politics** has come to be regarded as a specialized field of research. Take for example the politics of establishing climate change networks funded by “interested parties” from the western world; The whole gamut of climate change negotiations from the time the WMO-UNEP initiative created the IPCC. Why are there so many different strands of arguments of pollution or GHG abatement measures? Why are huge resources spent to study the role of international processes and international institutions on climate change, often by similar mandated bodies? Why is the IPCC an independent body? Or is such independence compromised when most of the lead authors of the IPCC work or are funded
Environmental Ethics would involve a specialized branch of international relations and Environmental Journalism looks at environmental studies, project, and success stories to be taken up actively. In pith and substance in my understanding environmental law is incomplete if basic understanding of these areas is not undertaken.

II. Application of international environmental Law

Friends, having considered IEL as but a part of international law, it is but natural that the sources of IEL would be same as sources of international law. Article 38 of the Statute of the International Court of Justice (ICJ) provides treaties and customs as primary, and general principles recognized by civilized nations, judicial decisions as secondary sources of international law.

Treaties

Treaties are as the name suggests “formal sources of international law”. They are generally negotiated texts in which States have participated, are in written form and governed by international law. Treaties are also called conventions, agreements or memorandum of understanding (MoU), but the legal effect of all the three remains the same Types of treaties include-lawmaking treaties and general treaties. The former create international law because of the large participation of States in their adoption and adherence and their importance in international society. An example of these could be the UN Convention on the Law of the Sea 1982. This Convention is said to have progressively codified the customary law of the subject. It provides for a legal order governing nearly all activities of waters
beyond national boundaries i.e. seas and oceans such as maritime zones, uses and delimitation, deep seabed mining, dispute settlement, protection of the marine environment, navigation, passage etc. As opposed to such treaties, you also have ‘treaty contracts’ i.e. contracts/agreements creating obligation either bilaterally or for a particular purpose.

Bilateral contracts are agreed upon between two States. For examples India has signed and continues to have bilateral agreement in the field of climate change initiatives and CDM projects. There are also regional agreements, which bind States from a region; examples being the European Community laws on environment protection. The advantage with regional conventions is that they are flexible and suit the common requirement of a region.

Treaties are supposed to be adhered in ‘good faith’ as enunciated by pacta sunt servanda, which is a fundamental principle of international law. We’ll discuss more of this when discuss the principles of international law.

**Customs**

Customs are actions of States, which over a period come to be accepted as creating binding legal obligations. Example of customs can be prohibition of the use of force in international relations as provided in Article 2 paragraph 4 of the UN Charter. However, to constitute a custom or a customary obligation two elements must be fulfilled. One, there must be a general consistent state practice; and two; there must be opinion juris or an animus or ‘mental element’ wherein States undertake obligation not because of a usage but because of a legal obligation. Not only must the acts concerned amount to a certain practice, but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a
belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris* (*North Sea Continental Shelf Cases ICJ Reports* 1969, at p. 73).

It is also seen that customary rules often create obligations binding upon all States, except those States who have persistently objected. This is often called the persistent objector principle. As opposed to this need of consistent State practice and *opinio juris* there can also occur an emergence of instant international customary law though the adoption of United National General Assembly resolution (Bin Cheng., “United Nations Resolutions on Outer Space: “Instant” International Customary Law? *Indian Journal of International Law*, vol.5, 1965, pp.132-152). Instances of such instant customary law are said to have evolved with respect to the adoption of the Declaration on the Peaceful Use of Outer Space and Other Celestial Bodies by the General Assembly in 1963 and the UN Declaration Concerning Cooperation and Friendly Relations among States adopted by the General Assembly in 1970.

### III. General Principles of International law

Besides treaties and international customs, Article 38 of the Statute of the ICJ, provides for “general principles of law recognized by civilized nations” as a source of international law. The phrase “civilized nations” denotes those States that have a developed legal system. General principles do not need to show evidence as a proof of binding legal obligation, as is the case of treaties and international customs.

General principles of international law play a facilitative role in strengthening relations among States. Some of the recognized general principles in the field of international are: good faith, the maxim *sic utere*
*jure tuo ut alienum non laedas*, the prohibition of abuse of rights and the principle of good neighbourliness.

**Good Faith**

The principle of good faith or *pacta sunt servanda* is the one of the fundamental principles of customary or treaty obligations. States are under an obligation not to do anything that shall destroy the trust on the basis of which the treaty was agreed upon in the first place. It also goes to that international obligations are serious business and a State can ignore its duty to abide by an obligation at its own peril. The ICJ held in the Nuclear Test Cases (1976) that:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by a unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected”.

Likewise, the principle of good faith came under judicial scrutiny in the more recent case of *Gabcikovo-Nagymoros Project* where while highlighting the importance of the principle in international environmental law, the ICJ held that:

“ What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties…. ‘ Every treaty in force is binding upon the Parties to it and must
be performed by them in good faith’…The principle of good faith obliges Parties to apply it in a reasonable way and in such manner that its purpose can be realized”.

Sic utero jure tuo ut alienam non laedas

The principle of sic utere jure tuo ut alienam non laedas (hereinafter sic utere tuo) is a recognized as a fundamental principle of international law governing transboundary harm. In Latin the maxim means, "Use your own property in such a way as not to injure that of other". The maxim has special relevance in IEL because of regulatory control it has imposed on States to desist from establishing hazardous or polluting factories/units on the border. In the case of the Trail Smelter Arbitration (United States and Canada 3 UNRIA (1938/1941), p.1907, at p. 1965) where Canada complained of escape of noxious sulphur gases into its territory, from the United States, the Arbitral Tribunal stated that "No State has a right to use or permit the use of its territory in such a manner as to cause injury by fumes 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".

The case assumes special significance for a public international law approach to the issue of transboundary harm and the ensuing injury/liability. One of the earliest cases to bring to fore the issue of transboundary harm, it highlighted the characterization of a legal injury caused by a noxious activity. More importantly, it laid down principles of equity

Good neighbourliness

This principle has been recognized as one of the important general principles governing friendly relations among States. The idea of two or more States showing reciprocity by means of peaceful behaviour and mutual inter-dependence is at the core of this principle. In this way the principle is
similar to *sic utere tuo*, which calls for ensuring that effects of harmful activities are not transferred to your neighbour. Good neighbourliness apart from preventing the causing of harm also obliges a State to protect its own territory out of self-interest.

Article 74 of the Charter of the United Nations provides that "States… conduct themselves according to … the general principles of good neighbourliness, due account should be taken of the interests and well being of rest of the world in social, economic and commercial matters”.

The principle of good neighbourliness is applied for the equitable utilization of watercourses between river basin States. Article 4 of the Helsinki rules provides that:

“Each Basin State is entitled, within its territory, to a reasonable and equitable share in such uses.” In the, *Lac Lanoux* arbitration, (International Law Reports, 1957, p.119) between France and Spain applied the principle of good neighbourliness for resolving its disputes. The case involved a proposal by France to construct a dam on the River Carol with a view to increase the capacity of the Lake Lanoux for hydroelectric power generation. Spain objected claiming that the construction of the dam would jeopardize its interest in irrigation.

The principle essentially has an interpretative value and has been recognized by scholars as having a fundamental role in international law. On a larger plane especially with respect to global commons or open spaces, *inter se* States can argue for an “ecological good neighbourliness policy” to create *erga omnes* obligations.

Though a right to a clean and healthy environment is guaranteed under all municipal legislation, it was the Declaration of the 1972 that Stockholm Conference that stated “Man has the fundamental right to
freedom, equality and adequate conditions of life, in an environment of quality which permits life of dignity and well-being...”. Thereafter the Rio Declaration, which was adopted at the United Nations Conference on Environment and Development (UNCED), again reiterated, “Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.

Since 1992, the development of international environmental law has undergone a dramatic normative and paradigmatic shift from anthropocentrism to environmentalism proper. Every instrument-adopted post-Rio has as emphasis on preservation of the environment, for the sake of environment alone. While such ethical arguments mean little to the larger needs of the developing world, it is true that an inter-temporal value and jurisprudential basis is being offered for protection of the environment for present and future generations.

IV. General Principles of International environmental Law

In the post Rio period a number of new principles of IEL evolved, which along with the general principles of international law have strengthened the legal framework governing transboundary polluting activities. These to name a few include: duty of prevention, precautionary approach, polluter pays principle, inter-generational equity, general principles of diverse legal systems, principle of notification and mutual assistance, principle of non-discrimination, cooperation, public participation and good governance.

(i) Duty of Prevention

The concept of prevention is a common obligation found in most national environmental legislations. The duty of prevention involves
minimizing the environmental damage as a chief objective. It must be
remembered that the principle of prevention is not a ‘post facto’ situation
wherein liability is involved, as it involves an obligation by a State to
prevent damage to the environment within its own jurisdiction and beyond.
The notion of the obligation of prevention has its genesis not in
environmental considerations but from the obligation to respect the
territorial integrity and political independence of States. As was seen in the
Island of Palmas case (Hague Court Reporter, 2\textsuperscript{nd} (Scott), 84, 93 (Permanent
Court of Arbitration, 1928), “States had the duty to protect within their
territory the rights of other States, in particular their right to integrity and
inviolability in peace and war”. Likewise, this principle is also evident in
Article 2, paragraph 7 of the Charter of the United Nations which declares
that "Nothing contained in the present Charter shall authorize the United
Nations to intervene in matters which are essentially within the domestic
jurisdiction of any state or shall require members to submit such matters to
settlement under the present Charter."

With respect to environmental issues, the most authoritative
formulation of this principle can be found in Principle 21 of the Stockholm
Declaration that provided "States have, in accordance with the Charter of
United Nations and the principles of international law, the sovereign right to
exploit their own resources pursuant to their environmental policies".

As is well known there are two schools on the issue of environmental
protection. One, the ‘preventive’ school believes that while it is necessary to
set standards of liability, it is more important to prevent the danger from
occurring, especially when dealing with hazardous and ultra-hazardous
substances. The other is the ‘mitigative’ school, which finds it more
effective to have a curative remedy by means of liability and compensation.
This school presumes that States shall undertake activities irrespective of their hazard potential.

The principle of prevention, finds place in a number of multilateral environmental agreements especially the agreements drawn up under the UNEP Regional Seas Programmes that provide for due diligence obligations, to prevent, reduce and control pollution.

The International Law Commission (ILC) has done pioneering work on the duty of prevention in international law wherein the Special Rapporteur on the topic of international liability has produced a entire first report on the Prevention of Transboundary Damage from Hazardous Substances and later three reports on international liability for allocation of loss suffered by victims of pollution hazards.

(ii) Precautionary approach

The principle of precaution states that where there are threats of serious or irreversible harm, a lack of full scientific certainty about the causes and effects of environmental harm shall not be used as a reason for postponing measures to prevent environmental degradation. It presupposes that scientific certainty may take too long a time to arrive at a definite understanding of the harmful effects of a hazardous substance. In such cases there should not be any delay in stopping the occurrence of harm, which could lead to an irreversible state or damage, examples could include extinction of species or massive pollution of the oceans.

At a normative level, the Rio Declaration, which identified a number of more specific procedures and principles to promote the goal of sustainable
development, refers to principle of precautionary approach. Principle 15 which reads:

"In order to protect the environment, the precautionary approach shall be widely 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”

While dealing with hazardous substances, the precautionary principle can play an important role in influencing preventive measures that can save the environment from degradation rather than undertaking mitigative measures after the damage has occurred. However, as opposed to undertaking preventive measures before the harm is caused, the precautionary approach comes into play only when there is uncertain scientific evidence as regards the effects of an activity. Thus while preventive measures have well-defined substantive obligations, a precautionary approach will largely depend upon a number of procedural obligations that would be necessary to implement an agreement or treaty.

At least three international regimes can be identified where the precautionary rule is incorporated. First, the 1996 Protocol to the London Convention of 1972, which has adopted the precautionary approach and rejected the now obsolete and retrograde understanding of the ‘assimilative capacity’ of the oceans approach. The 1996 Protocol, which entered into force in 2006, contribute to shifting the burden of proof from the victim to the polluter, where the latter has to come clean and show that the dumped substance is not hazardous. Second, the 1995 Agreement to the United Nations Convention on the Law of the Sea on Straddling Fish and Highly Migratory Species which adopts an ecological approach regulating the
allowable catch of straddling (anadromous and catadromous species) and highly migratory fishes. This Convention is based on a precautionary approach that guarantees optimal or sustainable catch in order to protect and conserve the highly endangered fish stocks, which despite cooperation at the international and regional level, are seen to be fast depleting.

And lastly, the precautionary rule has been applied in the international regime on harvesting of whales. The International Whaling Commission established in 1946 led to the International Convention for Regulation of Whaling, which has played a significant role in the conservation of the world’s largest mammals. The Revised Management Procedure adopted by the Whaling Convention ensures that the ‘optimal; catch includes whales, which are not endangered, and only those required for scientific experimental purposes. Besides, the Whaling Commission through efforts on non-whaling nations and environmental lobbies had succeeded in imposing a self-imposed moratorium on whaling of certain species. The moratorium based on a precautionary approach stands except for violations from errant states such as Iceland and Norway.

It is submitted that the precautionary principle is of persuasive and hortatory value. The principle is applicable generally wherever there is a possibility of a significant and irreversible damage, even though the same is subject to scientific uncertainties.

(iii) Polluter pays principle

The principle has its roots in Organization for Economic Cooperation and Development (OECD) and European Community law. In essence it is a principle of economic policy wherein the person responsible for causing pollution should ultimately be held responsible for bearing the cost of pollution abatement or remedying the harm caused. The principle is a
measure devised by the OECD countries as an effective and efficient way of allocating costs of pollution prevention and control measures by the public authorities in order to encourage rational management of environmental resources. Principle 16 of the Rio Declaration of 1992 provides that, "national authorities should endeavour to promote the internalization of environment 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 environment".

Principle 16 dealt with costs of pollution and environmental costs, i.e. other cost of pollution abatement, control and reduction measures. Such other cost would involve cost of remedial measures (cleanup operations for example in an oil spill); cost of compensatory measures (compensation to victims of damage); cost of ecological damage (compensation for reduction or damage to the environment in general); and cost of pollution charges (tradable emission charges like those being provided the Kyoto Protocol on Climate Change).

Developed countries in their relations *inter se* apply the polluter pay principle as a principle for economic guidance and not a legal principle. There have also been a number of views expressed during the Rio Conference that the principle should be applied only at the domestic level and should not in any way govern responsibilities between states at the international level. This principle finds place in a number of conventions where essentially issues of liability and fixing of responsibility are involved.

However, many writers question such an understanding as in international law, issues relating to liability and responsibility are not easily translated into the polluter pay principle. It is also felt that, when one
considers PPP, it is also important to understand that the principle has to be viewed in a larger context of equity considerations between the developed and the developing world and not amongst a few developed European States.

The principle despite its initial success had its testing time the Chernobyl nuclear incident took place in 1989 and also the Rhine chloride pollution incident across the whole of Europe in 1976, when a number of States agreed to the apportionment of environmental liability. Another tricky situation which countries can find themselves is when the polluter pays principle becomes more of a trade related bargaining technique and less of an environmental principle. This can happen when issues such as granting of subsidies, decisions on unfair competitive advantage, come up before trade related dispute settlement bodies such as the GATT or the WTO.

(iv) Inter-generational equity

There is another general principle that of equity, which often plays an important role in environmental decision-making. Although equity per se is not an accepted general principle of international law, it is seen that a number of environmental treaties such as the United Nations Convention on Climate Change, the Bio-diversity Convention and the Montreal Protocol on Ozone Depleting Substances, provide for the principle of equity in ascertaining either the appropriate contribution of emissions and the fair and equitable sharing of benefits arising out of the use of genetic resources. It is also seen that equity is a concept that is often linked to intra-generational and inter-generational rights.

Under common law the principle of equity in the absence of a stricto sensu situation of rights and obligations could provide succor to the cause of protection of the environment. Similar situations are envisaged at the
international level not for the enjoyment of the rights by the present generation only but also for future generations. The underlying presumption of the principle of inter-generational equity is that human beings living in the natural environment of the planet earth with all other species and living beings hold the earth in trust for future generations. Further, this principle assumes that there are two relationships of man with natural environment. First, is the relationship between human species; and second, is relationship of man with his natural environment. The theory calls for equality among human generations, wherein each generation has a duty to keep the Earth in a robust state, to ensure planetary health to the enjoyment of future generations.

The Expert Group on Environmental Law of the World Commission on Environmental Development reviewed this principle and had recommended to the international community “that they should ensure that the environment and natural resources are conserved and use for the benefit of the present and future generations”. This principle was later reflected in the Rio Declaration, which read, “the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of the present and future generations”. This principle in essence provides two sets of obligations. First, states have a basic obligation to conserve for the future by means of holding the existing natural resources in trust. Second is the obligation for prevention or abetment of pollution, which would render the natural resources, either depleted or in an extremely degraded state not fit for use or that could which would involve a huge financial burden for the cleanup operation.

The principle of inter-generational equity is reflected in a number of international conventions which include the United Nations Charter, the

The principle is linked to the established principle/right to development, which has been recognized, by a number of international instruments. To clear some conceptual inconsistencies the Experts Group recommended: (a) that present generations should use their resources in such a way that the right to sustainable development of future generations is protected; (b) that long term protection of the environment is guarantee; (c) that interests of future generations are adequately taken into account while framing policies on development; (d) that to avoid disproportionate environmental harm caused by activities of the present generations, and (e) to ensure a non-discriminatory allocation of current environmental benefits.

While the above-mentioned steps are easy to collate, problems should arise in devising an implementation strategy to put into effect the principle of inter-generational equity. According to one view, right of future generations can be used to enhance the legal standing of members of the present generation to bring claims on behalf of the former by relying on substantive provision of environmental treaties where they can be doubts on the implementation of rights created an obligation enforceable by individuals.

Planetary rights and obligations in each generation are inter-linked in such a way that "generations to which the obligations are held are future generations, while the generations with which rights are linked are past generations. Thus, the rights of the future generations are linked to the

As opposed to the moral dimension of equity provided by Prof. Weiss, a legal principle is said to have evolved in the view of some authorities. One of the primary documents, a precursor of UNCED was the Report 'Our Common Future' by the Brundtland Commission. The Commission is credited with coining the term of sustainable development as "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs". The definition very clearly shows that sustainable development is largely concerned with the responsibility for future generations.

Moreover, Principle 3 of the Rio Declaration qualifies the right of development, as a means of equitably meeting the developmental and environmental needs of future generations. In this regard, the preambular of the United Nations Convention on Climate Change provides for "the protection of the global climate as a common concern of mankind". Further, the Convention adds, that all Parties… be guided on the “basis of equity in their actions to achieve the objectives of the Convention”.

**(v) General Principles of Diverse Legal Systems**

Apart from the general principles of international seen before and the evolving principles of international environmental law, there are a number of general principles of diverse legal systems which proscribe transboundary harm or had provided value similar to the principle of *sic utero tuo*. These principles have their roots in private and public law, “which contemplation of the legal experiences of civilized nations leads one to regards obvious
maxims of jurisprudence of a general and fundamental character”. It was held that such principles could include “…principle that no one can be a judge in his own cause, that a breach of a legal duty entails the obligation of restitution, that a person cannot invoke his own wrong as arson for release from a legal obligation, that the law will not countenance that abuse of a right, that legal obligations must be fulfilled and rights must be exercised in good faith.”

Besides, general principles are derived from the judicial decisions of municipal courts. Article 38 of the Statute of the ICJ recognizes judicial decisions as a subsidiary means for the determination of the rules of law, which cannot exclude ‘decisions of municipal courts’ as a valid source of international law.

While it is agreed that many positivists will question this reasoning saying State consent is needed for international law, it cannot be denied that at the domestic level municipal courts are the “main instruments for the judicial determination of international law”.

It has often been said that English common law has had a very limited influence in shaping international environmental law. However, there is no denying that Law of Tort, has contributed enormously to the understanding of the more accepted principles of general principles of law. To put it more specifically, the torts of nuisance, negligence and trespass and the Rylands rule on strict liability, have in some ways laid the jurisprudential basis for understanding the whole concept of ‘environmental damage’, which to date remains a controversial and misunderstood aspect on international environmental law.

The Law of Tort, as is well known in English common law, essentially protected the interests in lands. Among all torts, the tortious
liability arising out of ‘nuisance’ comes closest to environmental protection. In contrast, courts have fought shy to award damage for acts involving ‘negligence’, as the standards of the test of proof of special care and also claim to personal injury are of a high order. Trespass, on the other could have an environmental element involved, as is amounts to an unjustifiable interference or even negligent entry onto the land.

However, for the purposes of our study the Ryland rule of strict liability laid down in the case of Ryland v. Fletcher interference is of special significance. To recall the words of Justice Blackburn

“ We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape”.

While these words have prophetic, the impact of the Ryland rule on the law of torts in commonwealth countries and other legal systems has been exceptional. Not only has the Ryland rules been applied by Indian and other commonwealth country courts, but it has been cited by a number of decisions of international courts and tribunals, too.

The Ryland rule was applied in two celebrated cases namely Read v. Lyons Co. Ltd. and the Cambridge Water Company v. Eastern Leather plc. 1994. In the former case, the Court of Appeal led the foe liability to flow –there must be a dangerous thing likely to cause mischief; such a thing must be brought on to land; it must escape; and must cause damage to the non-natural user of the land. In the Cambridge case, although the High Court had dismissed the plaintiff that the Eastern Leather Co. had been polluting the ground water meant for public consumption, the Court of Appeal reversed
the decision. It held that the Leather Co. “…interfered in the natural right of the Cambridge Water Co. to extract naturally occurring groundwater and such an interference amounted to an actionable claim of nuisance”.

In India to the *Ryland* ratio has been applied by the Supreme Court of India and other High Courts in cases relating to strict liability for hazardous activities. The *Ryland* rule is extremely important for the study at hand as an analogy can be drawn to management of hazardous wastes. If a State cannot manage the radioactive waste generated from the use of nuclear substances, for whatever purposes they are used, then that State should not be dabbling in an ultra-hazardous activity! It also gives you useful insight in the study of liability, which remains an extremely complex subject under international law.

(vi) The Principles of Notification and Mutual Assistance and Cooperation

The principles of notification and mutual assistance which have developed in the context of, first, the sharing of international watercourses and second, in the context of accidents resulting in atomic radiation require more time, can be regarded as principles of international harm or liability. Moreover, the reaction of States to the Chernobyl accident was quite divided and their practice was not uniform in dealing with post-accident claims.

In addition to the above, the problem of fixing appropriate thresholds for determining legal harm, to which we have referred above, is equally important in this context for quantifying actual compensation and for assigning appropriate shares to different actors or operators involved.
The principles of cooperation, exchange of information, notification, consultation and negotiation in good faith

The general principle of cooperation among States is an important principle in respect of prevention. Other relevant principles in this regard are the principles of good faith and good-neighborliness. The principle of cooperation was emphasized by the Charter of Economic Rights (Article 3), the Law of the Sea Convention (Article 197), international conventions, resolutions of the UN General Assembly and by the principle 24 of the Stockholm Declaration. The greater reliance on the principle of cooperation is significant in that it marks a departure from the classical approach based on principles of coexistence amongst States and emphasizes a more positive or even integrated interaction among them to achieve common ends, while charging them with positive obligations of commission.

Cooperation could involve, standard setting and institution building as well as action undertaken in a spirit of reasonable consideration of each other’s interests and towards achievement of common goals. Accordingly, there are several treaties, which incorporate principles of equitable sharing and adopt an integrated approach to the development of shared resources, particularly in the context of a river basin.

The duty to notify which is inherent in the principle of cooperation the potentially affected neighbouring States and to engage in consultations with such States is a specific obligation in the case of a planned activity, which has a risk of causing significant trans-boundary harm. The draft articles finalized by the International Law Commission on the regime of prevention and Article 9 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. The potentially affected neighbouring States could include States beyond the immediate borders of the State.
Information to be shared could be drawn from readily available sources and the need for undertaking any special studies could be related to payments by the requesting State.

While the duty to cooperate and engage in consultations and if necessary in the negotiation with the potentially affected State has to be understood as a duty to cooperate in good faith in international law. Solutions to be achieved through such consultations should aim at mutually beneficiary or satisfactory outcomes. The arbitral tribunal in the 1957 award in the Lake Lanoux case observed that, where different interests of riparian States are involved, “according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.

Similarly the permanent International Court of Justice in the case concerning the jurisdiction of the International Commission of the River Oder noted that in the case of a right of a passage in respect of a river the community interest in a navigational river should become the basis for the common legal right, “the essential features of which are the perfect equality for all the riparian in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian State in relation to others”.

It is also well established that the obligation to negotiate, where it arises, does not include an obligation to reach an agreement. However as the International Court of Justice in the *North Sea Continental Shelf Cases* pointed out negotiation to be in conformity with the obligation to negotiate should be meaningful, be a genuine endeavour at bargaining, and not a mere
affirmation of one’s claims without ever contemplating to meet the adversaries claim. Similarly, the Court also held in the *Fisheries Jurisdiction Case* (UK v. Iceland) that parties should conduct their negotiation on the basis that each must in good faith pay reasonable regard to the legal rights of the other.

Accordingly, the obligation to consult and negotiate in good faith, as appropriate, does not amount to prior consent from or a right of veto of the States with which consultations are required to be held. This has been confirmed by the International Law Commission which stated that such a right of veto does not “find support in State practice or international judicial decisions and (indeed the Lake Lanoux Arbitral Award negates it.)

**(vii) The Principle of Non-discrimination**

Reference to this principle has already been made in the context of reviewing the 1997 UN Convention on non-navigational uses. This was a principle that acquired currency in the context of Europe and recognized by the OECD countries. The principle is designed primarily to deal with environmental problems occurring among neighbouring States. It aims at providing equal treatment for aliens on par with nationals in respect of legal rights and remedies and right of access to judicial and administrative forums they enjoy in their own State. Article 32 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses and Article 15 of the draft articles on Prevention finalized by the ILC in 2001 provided for this principle. The Commission has recognized that it is a principle of progressive development of the law.
A problem with the application of the principle of non-discrimination is that there often existed drastic differences between the substantive remedies available in each of the neighbouring States. Differences exist for example among the national environmental laws. In some jurisdictions extra-territorial effects of administrative decisions are not justiciable. In some other cases, national law confers jurisdiction on the Courts of the place where the damage occurred. It is, therefore, necessary that in order for the principle of non-discrimination to be universally accepted certain amount of uniformity in national legislations under which the cause of action would arise as well as those governing jurisdiction is necessary. This could only occur with time and with greater and greater economic, social and political integration among the people of the region.

(viii) The Principle of Public Participation

The principle of non-discrimination is in some loose sense tied to the principle of public participation, which is also a principle stressed in the context of evolving international environmental law. Such participation of the public is essential both in the context of prior authorization of a hazardous activity and more particularly in the context of preparation and examination of an environment impact assessment. It becomes even more important in providing necessary and possible remedies in case of harm affecting a wide group of people or mass tort claims like in the case of Bhopal Gas tragedy. In situations of transboundary harm, both at the preventive stage where suitable regime for management of the risk involved is designed and in the case of actual harm the need to involve public both within and outside the boundaries of the State in which the risk bearing activity is to be situated is now recommended. Where foreign public is to be
allowed participation their views could be organized and presented through the channels of the government of the State of their nationality or even coordinated by the State itself before they are presented to the other State. At this stage, if the States themselves were directly involved in designing a suitable legal framework the principle of public participation involving foreign nations would not be that relevant.

Public participation is also regarded as essential for good governance. Principle 10 of the Rio Declaration recommended this. Article 13 of the draft articles of the ILC on Prevention provided for this, again as a measure of progressive development of international law. A number of other recent international instruments dealing with environmental issues have required States provide the public with information and to give it an opportunity to participate in the decision-making processes.

Public includes individuals, interest groups (NGOs) and independent experts. General public, however, is unorganized. Information supplied to the public should facilitate communication of the proposed policy, plan or programme under consideration. It must, however, be understood that requirements of confidentiality and State security may affect the extent of public participation. It is also understood, public is rarely involved or involved at a minimum level in any effort to determine the scope of a policy, plan or programme.

Public participation in national decision-making through organized or unorganized means including parliamentary representation on vital issues regarding development would enhance legitimacy of and compliance with decisions taken. It is also suggested given the development of human rights law, public participation could also be viewed as a growing right under national as well as international law.
(ix) **Capacity-building**

Compliance with international environmental obligations in general and with obligations concerning the prevention of transboundary harm in particular, involves the capacity of a State to develop appropriate standards and to bring more environmentally friendly technologies into the production process as well as the necessary financial, material and human resources to manage the process of development, production and monitoring of activities. There is also a need to ensure that risk-bearing activities are conducted in accordance with applicable standards, rules and regulations and that the jurisdiction of courts may be invoked in respect of violations to seek necessary judicial and other remedies.

Many developing countries are just beginning to appreciate the ills of pollution and unsustainable developmental activities. It has, therefore, been rightly pointed out that compliance with international environmental obligations requires resources, including technology and technical expertise not readily available in developing countries. In this regard, the WCED Report recommends a ‘spirit of global partnership to enable developing countries and countries undergoing economic transition to discharge the duties involved in their own self-interest and in the common interest of all nations. The issue of supplying additional financial resources and technical know-how has been provided for in a number of international treaties such as The Law of the Sea, the United Nations Conventions on Climate Change, Biological Diversity, Desertification as well as the Vienna Convention/Montreal Protocol on Control of Ozone Depleting Substances.
Transfer of technology and scientific know-how to developing countries, will also give rise to a number of problems governed by law relating to patents and copyrights. Hence, it is admitted that such know-how should be transferred within established legal frameworks and at a fair, reasonable and equitable price. Along with developed countries, international financial institutions within and outside the United Nations have an important role to play in capacity building of developing countries. It may also be noted that in spite of transfer of technologies and the development of proper legal framework for allocation of goods and cost involved, some issues of legitimacy, fairness and justice still remain unfulfilled.

Other areas of capacity-building which can supplement transfer of technology and financial resources include: remedying weaknesses and efficiencies in legislation, lack of political influence of environmental authorities, lack of public awareness, lack of well-established target groups, deficiency in managerial skills and information bases and underdeveloped educational system which does not cater to the need of highlighting environmental awareness and education. Further steps in this regard could include decentralization of authority between the Centre and federated units; environmental awareness at local authority levels; establishment of Data Centers, consultative bodies, monitoring agencies to improve enforcement and compliance; issuance of licenses, permits and EIA requirements; halting activities which violate environmental regulations; and establishing centers for ensuring preparedness in cases of environmental emergencies. Another area where special attention needs to be provided is training of environmental personnel; providing skills and knowledge on environmental
economics and environmental law; and imparting techniques for EIA and environmental auditing and conflict resolution

Apart from capacity-building measures mentioned above, it is also important that environmental law must be implemented not only by the administrative machinery of a State, but also by the judicial bodies and specialized tribunals.