International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 19, The Protection of the Environment

Question 1. *What is the legacy of the Stockholm Declaration (1972) and Rio Declaration (1992)?*

Students would be advised to begin with outlining their understanding of what the Declarations are. For example, they are not resolutions of the General Assembly. Both Declarations were non-binding 'final acts of conferences' that were published at the close of major international conferences at Stockholm and Rio de Janeiro, respectively. Nevertheless, they made serious contributions to the development of international environmental law.

The Stockholm Declaration outlined a number of key principles relating to human rights and environmental protection, inter-generational equity, and to the obligation of States not to cause transboundary environmental harm. Many of these have been adopted in major multilateral treaties and have been recognised by international courts as customary international law. Moreover, the Stockholm Declaration impelled the UN to establish the United Nations Environment Programme and to take a more active role in protecting the environment.

The Rio Declaration went even further, outlining several key principles such as the precautionary approach, the polluter-pays principle, and common but differentiated responsibility. Some of these have seen adoption in major international treaties: see the Convention on Biological Diversity and the UNFCCC. The principle of sustainable development has been recognised as customary international law by the ICJ in *Gabčíkovo-Nagymaros*. The Rio Declaration also

guided States to conduct environmental impact assessments, now recognised as customary international law in *Pulp Mills on the River Uruguay*.

Follow-up conferences in Johannesburg and Rio de Janeiro have reaffirmed the legacy of the Stockhom and Rio 1992 Declarations, but their biggest legacy has been in attracting international attention to the protection of the environment, elucidating principles for public debate and adoption, and contributing indirectly to the development of treaties, customary international law, and potentially to general principles of law through the adoption of environmental protection legislation within States. They are emblematic of the potential and contemporary importance of 'soft law' in guiding the development of new legal rules.

Question 2. *What is the purpose of the Paris Agreement on Climate Change? What challenges does it face?*

There are a number of key points that need to be considered here. The first is to recall that that the Paris Agreement is not a self-standing treaty: it is an agreement, somewhat like the Kyoto Protocol, that is concluded under the UN Framework Convention on Climate Change (UNFCCC). The UNFCCC does not itself impose binding obligations: that is left to agreements concluded under its aegis. The Paris Agreement is one such agreement.

When signed in Paris in 2015, the Paris Agreement had 195 signatories (all UN member States, the European Union, and the State of Palestine); at the time the book went to press, it had 177 ratifications. The parties to the Agreement undertake a series of 'nationally-determined contributions' that are binding, unlike in many previous agreements. All States parties must therefore take action to combat climate change, unlike agreements in which there is differentiated responsibility between, for example, developed and developing States.

Compliance remains a challenge. First, the United States declared its intention to withdraw, which takes effect three years after ratification (so in 2020). Moreover, there is no mechanism to order punitive measures or effective implementation of their obligations. However, it is true that States are obliged submit to regular

review of the effectiveness of their actions and to stricter targets over time, a public review that is unusual in international law, and which might work in making enforcement more effective.

Question 3. *What is the status of the 'precautionary approach' (or 'precautionary principle') in international environmental law?*

Students should first identify the term before proceeding to consider its status. The precautionary approach first found expression in the 1992 Rio Declaration, a non-binding instrument that nevertheless suggested that States were required to adopt a precautionary approach whenever considering measures that carried a risk of irreversible damage or harm—even in situations where the evidence was not fully conclusive and there was a degree of uncertainty.

It is a term that does find some adoption in treaties such as the 1995 Straddling Fish Stocks Agreement and the 1992 Transboundary Watercourses Convention; however, these are relatively specific. As to whether it is a principle of customary international law, however, the precautionary approach has been dismissed by the ICJ in *Gabčikovo-Nagymaros,* as well as in *Pulp Mills on the River Uruguay*, despite being raised by the parties in those disputes. Other courts have been equally hesitant, such as the WTO Appellate Body in *EC-Meat Products* and ITLOS in *Southern Bluefin Tuna.*

This might suggest that the precautionary approach has not found sufficient acceptance as a legal principle. However, the best answers will also consider the prominent place of 'soft law' and soft law processes in the development of international environmental law. Soft law, to recall, is the catchall term used to describe standards of action and recommendations that are aspirational rather than binding. Though not a source of obligation, therefore, many of them provide guidance towards a course of action or a consensus, and later find take-up into customary international law or adoption into treaty texts. It remains to be seen whether the precautionary approach will follow a similar path, of course, but other principles (such as sustainable development) have crystallised into customary international law.