

INTERACTIONS BETWEEN SUBSTANTIVE AND PROCEDURAL OBLIGATIONS IN PREVENTING ENVIRONMENTAL HARM

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ABSTRACT

I examine the prevention principle- one of the most important principles in international environmental law, in its internal structure and interaction mechanisms. I analyze respectively the requirements of the substantive and procedural obligations of the principle, as well as their connections through relevant environmental disputes such as the 'Pulp Mills' and 'Certain Activities' case and international environmental conventions like the CBD and UNFCCC. I conclude that substantive obligations act as guidance, while procedural obligations play an indispensable complementary role. Through the interactions, the prevention principle can thus provide clear instruction for courts to make decisions in environmental pollution cases and for countries to perform their obligations in relevant affairs.

KEY WORDS : The principle of prevention, Internal structure, Substantive obligations, procedural obligations, Interaction mechanisms.

INTRODUCTION

The principle of prevention is one of the essential principles under international environmental law and is commonly used to settle environmental pollution disputes among states. Starting from the original no-harm principle that states should avoid causing severe pollution to other states in the 'Trails Smelter' case (UN Reports of International Arbitral Awards, 1941, 1965), its content has developed a lot. In Principle 21 of the Stockholm Declaration, the object of damage is extended from 'other countries' to the environment in a general sense (Declaration, 1972). The magnitude of the harm shifted from 'significant' to 'in concreto' (Dupuy and Viñuales, 2018, 79). The nature of the damage changed from 'reparation' to 'risk minimization' (Dupuy and Viñuales, 2018, 83). In the meanwhile, the measures required to fulfill the purpose of the prevention principle have also been refined accordingly. The internal mechanism of the principle was constructed and gradually improved thereby. According to the customary model proposed by the International Court of Justice (ICJ) in the 'Certain Activities' (ICJ

Reports, 2015, para.104) case, the current meaning of the prevention principle contains two parts. One is the substantive obligations, including the negative duty, which is the original meaning that states should not do something harmful to the environment, and the positive duty that states should take measures to regulate and try to prevent the harm actively. The other is the procedural obligations, including the duty of cooperation (notification, consultation, etc.) and environmental impact assessment (EIA). The substantive and procedural obligations of the prevention principle complement and reinforce each other so that this principle could have more explicit guidance for the activities of the states.

INTERACTION

The procedural obligations are the prerequisites for the substantive obligations. Take EIA as an example. The ICJ reaffirmed in the 'Pulp Mills' case that states should conduct an EIA 'where there is a risk that the proposed industrial activity may have a significant adverse impact in a Trans boundary context' (ICJ,

2010, para .204). Also, the 'Certain Activities' case clarified that states are required to conduct an EIA as part of their 'due diligence' obligation arising from the principle of prevention 'prior to undertaking an activity having the potential adversely to affect the environment of another State' (ICJ Reports, 2015, para.153). EIA should be completed before the construction of a project to confirm whether it will cause transboundary environmental harm. Where the implementation of this project will cause damage to the environment in another country, the states involved can get together to discuss whether this project can be implemented and what measures need to be taken to mitigate the damage, based on the nature of the harm, the degree of the harm, possible scope of the damage, etc. produced in the previous procedure of EIA. Hence, the implementation of the substantive measures is based on the data obtained from EIA. In the Advisory Opinion of ICJ (ITLOS Reports, 2011, para.148), the application scope of EIA was expanded to the circumstances where there would be a risk out of national jurisdiction (Dupuy and Viñuales, 2018, 79), which further confirmed that the performance of EIA is the foundation of the implementation of substantive prevention obligations.

The implementation of procedural obligations can facilitate the fulfillment of substantive obligations, which is especially evident in applying the prevention principle in the area of 'common environmental concerns' (Beyerlin, 2007). For instance, it is stipulated in the Convention on Biological Diversity (CBD) that a state needs to notify, exchange information, and consult with other states on the activities within its territory which are likely to have a severe impact on the biological diversity 'by encouraging the conclusion of bilateral, regional or multilateral arrangements' and achieving 'joint contingency plans' (CBD, 1993). The damage caused by the reduction of biodiversity can be disastrous. The possible damage state can be minimized through timely notification, communication, and adequate cooperation in implementing the 'contingency plans' with other states. With procedural measures like cooperation (including notification, consultation, etc.), substantive obligations can be better achieved in a short time.

The fulfillment of procedural obligations can legitimize the unsuccessful performance of substantive obligations, which is the idea of 'due

diligence'. In the 'Responsibilities in the Area', the ICJ clarified that the substantive obligation of the principle of prevention is an obligation 'of conduct' and due diligence but not 'of result', which means that if the state has performed its due diligence to prevent the harm, but the harm still occurs, the state should be regarded as having fulfilled its obligations under this principle and should not be blamed (ITLOS Reports, 2011, para.110). Due diligence means the best endeavors, which can change over time and differ according to the risk level in different activities (ITLOS Reports, 2011, para. 117). Conversely, if a state did not perform its due diligence in a certain case, even if the damage arose from some incidental reason, it should be deemed to have breached its obligations of the prevention principle. For instance, in the 'Certain Activities' case, Costa Rica should conduct a preliminary EIA as part of its due diligence in the road construction project, but it did not provide any evidence that it had conducted such an assessment (ICJ Reports, 2015). As there is a risk of excessive sedimentation caused by road erosion, even if no actual harm occurs, Costa Rica has breached its obligations under the prevention principle (ICJ Reports, 2015, para.155 156).

The substantive obligations also have a significant impact on the procedural ones. One essential effect is that the substantive requirements play a key role in guiding the implementation of procedural obligations. For example, in addressing the global issue of climate change as one of the 'common environmental concerns', it is acknowledged in the United Nations Framework Convention on Climate Change (UNFCCC) that under the objective of 'preventing dangerous anthropogenic interference with the climate system' (Protocol, 1997, Art. 2), states have the obligation of 'the widest possible cooperation' as it is 'the global nature of climate change' (Protocol, 1997). In addition, more specific obligations of cooperation have been generated in the light of the requirement of substantive obligations, including establishing an international financial support system for solving the issue of climate change (Protocol, Art. 3, para.5), transfer of relevant technology (Protocol, 1997, para.c), etc. Without the guidance of the substantive obligations, the procedural obligations will lose their direction for development and value.

CONCLUSION

In conclusion, the substantive obligations are

guidance to the procedure obligations, while the procedural obligations act as a supplement to the substantive ones. Through the interaction of its substantive and procedural components, the prevention principle in international environmental law provides more clear guidance for countries to perform their obligations in international environmental protection and make adjustments to their domestic laws and regulations. The courts can thus make more reasonable decisions in environmental pollution cases based on a thorough consideration of the principle.

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REFERENCES

- Beyerlin, U. 2007. Different Types of Norms in International Environmental Law Policies, Principles, and Rules. In: *The Oxford Handbook of International Environmental Law*, p. 564, UK: Oxford University Press.
- Convention on Biological Diversity (CBD) (adopted 5 June 1992, entered into force 29 December 1993), Article 14, 1760 UNTS 79.
- Declaration, S. 1972. Declaration of the United Nations Conference on the Human Environment, United Nations.
- Dupuy, P.M. and Viñuales, J.E. 2018. Prevention in International Environmental Law. In: *International Environmental Law*, p. 79, UK: Cambridge University Press.
- ICJ, 2010. Pulp Mills on the River Uruguay (Argentina v. Uruguay) ('Pulp Mills'), para. 204.
- ICJ Reports, 2015. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River ('Certain Activities'), para. 104.
- ICJ Reports, 1996. Legality of the Threat or Use of Nuclear Weapons (Legality of Nuclear Weapons), p. 226, para. 30.
- ITLOS Reports, 2011. Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion ("Responsibilities in the Area"), para. 148.
- Protocol, K. 1997. United Nations Framework Convention on Climate Change (UNFCCC). Kyoto Protocol, Article 2, Kyoto 19: 1-21.
- UN Reports of International Arbitral Awards, 1941. Trail Smelter Arbitration case (USA v. Canada) ('Trail Smelter'), p. 1965, United Nations.