

International Environmental Law's Dilemma: Betwixt General Principles and Treaty Rules

by
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Abstract/Outline of Presentation

While not in any way seeking to deny the growing significance and influence of international environmental law in the overall development of public international law, this contribution nevertheless argues that in the absence of a globally applicable environmental treaty, or sufficient confirming judgments of international tribunals, as to the customary legal status of the most important environmental principles; international environmental law will always be caught on the horns of a dilemma between generally applicable but non-binding principles on the one hand, and individual treaty regimes thoroughly regulating specific environmental problems, but without the ability to transcend these treaties to inform the *corpus* of universally applicable customary rules of international environmental law itself. International environmental law has fallen between the development of general environmental principles, mainly enunciated in non-binding international instruments (such as the 1992 Rio Declaration on Environmental and Development) and binding international environmental treaties which are nevertheless sector-specific in their orientation, or even when comprehensive in their approach to (several) environmental threats, are *regional* in their geographical scope of application. This developmental 'gap' between general environmental principles and specific treaty rules points towards a *substantive* failing within international environmental law as a viable sub-discipline of public international law generally. The lack of general application of even cornerstone principles of international environmental law can be seen by the examination of the evolution of the so-called 'golden' rule providing for State prevention and thus responsibility for transboundary environmental damage. Other well-known environmental principles are also conspicuous in their lack of full application by international tribunals even when circumstances apparently warrant their application. Instead, international environmental law has proceeded along at least *three* main pathways to secure better acceptance and especially implementation by States. These are alternative modes of as follows: First, through the negotiation of a multitude of increasingly sophisticated treaties addressing specific environmental threats, which are nonetheless dependent on States adopting and implementing them to have any impact. Second, by the development of treaty compliance mechanisms, the highlights of which are the enforcement branch of the 1997 Kyoto Protocol's compliance committee and the 1998 Aarhus Convention which allows individuals and even NGOs to make complaints against errant States parties. Third, through the progressive development of human rights protection to encompass environmental threats as

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potentially in breach of Articles 1 and 8 of the 1950 European Convention on Human Rights.

Useful though these developments are for the progress of international environmental law generally, they suffer from the following *systemic* problems of public international law: First, it is difficult to impute generally applicable customary rules of international environmental law from globally applicable but sector-specific treaties, or even regional treaty networks addressing several common environmental threats. This situation is both highlighted and exacerbated by the lack of a comprehensive, globally applicable treaty covering all major environmental threats. The *pacta tertiis* rule regarding the applicability of treaties to non-parties is a further obstacle in this respect, as is the lack of authoritative decisions from international courts and tribunals. Secondly, treaty compliance procedures, while performing a valuable role in ascertaining compliance to the specific treaty regime concerned do not yield authoritative judgments contributing to an understanding of the application of the accepted environmental principles for the wider international community as decisions of international courts and tribunals would do. Finally, the progressive development of individual human rights protection from environmental interferences do not address the issue of 'pure' environmental or ecological threats to wildlife and their habitats, or natural ecosystems.

Thus, the sooner international environmental law as a branch or sub-discipline of international law generally faces up to this reality of the intrinsic lack of an 'animating spirit of the law' at its heart that is focussed upon ensuring environmental protection, the better it will be for all those who are genuinely concerned with the ability of international law as a whole to require States to provide for, and achieve, both global and domestic environmental protection. In this respect, well known and arguably well-accepted concepts and principles of international environmental law such as sustainable development, the preventive and precautionary principles, the polluter-pays principle, the principle of co-operation, as well as the principle of notification, consultation, and consequently, citizen participation in environmental decision-making processes, must as far as possible be fleshed out in specific, and therefore enforceable, legal rules rather than remaining vague concepts or principles, relying on their claim of flexibility as a virtue, rather than a handicap, to the progressive development of international environmental law.