

## INTERNATIONAL ENVIRONMENTAL LAW

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### 1. Introduction: The Goals of International Environmental Law

International environmental law is an area of international law that is ultimately concerned with the survival of the human race. Although it is probably not within humanity’s power to render the earth lifeless, it would be a far simpler matter to render the earth incapable of sustaining human life. And such a tragedy is more likely to occur as a result of inadvertence than of malice.

In addition to, and in some instances in opposition to, this goal of international law – preventing acts of environmental damage that might cumulatively lead to the extinction of humanity – is another: Preservation of pristine wilderness and individual species of plants and animals for their own sake. While almost all nations and almost all people can agree on the importance of the first goal, there is considerable division on the second. It would be overly simplistic to characterize the difference as a North-South split; still, there is a widespread belief in the developing world that the preservation of pristine natural areas for the enjoyment of developed-country tourists comes at the expense of industry, agriculture, jobs and development for the poor of the countries in which these natural areas are located. Similar sentiments are entertained in many poorer rural areas of developed countries, especially with regard to the protection of endangered species.

The problem of the first area of environmental law is to determine, often using incomplete or disputed scientific evidence, what must be done to ensure the continued maintenance of an ecosystem fit for human habitation. Even where the risks and solutions are known, the rulemaking process often encounters opposition from industries and government officials who are more concerned with short-term profits than with long-term survivability.

The second area involves these problems as well, but an even greater problem is the balancing of purely environmental concerns against economic and quality-of-life concerns for those directly affected. For example, a Native Alaskan might ask, “How many people will ever visit the Arctic National Wildlife Refuge?” She might answer herself, “Very few and those will be wealthy tourists from the lower forty-eight states, from Japan, and from Europe. And all of their money will be spent on tour operators based in Anchorage or even Seattle; none of it will be spent here, where many poor people need jobs. Why shouldn’t we drill for oil, and perhaps provide jobs for our people, who in turn will provide medical care, education and a chance at a better life for our children?”

The remainder of this article will examine the difficulties raised by these questions, first through a discussion of the contexts and underlying concepts of modern international environmental law, and then through an examination of the specific problems of protecting endangered species and freshwater resources and of environmental damage caused by war.

## **2. Context: The Development and Limitations of International Environmental Law**

Although the development of international environmental law is still in its relatively early stages, it can already be observed: that activity that directly threatens human life, health or economic welfare is more closely regulated than activity that threatens flora and fauna and has only an indirect impact on humanity, with one significant exception.

The exception is the protection of endangered species. A few species of animals, mostly large mammals, have captured the public imagination to a sufficient extent to rate a well-developed regime of international law to protect them. The development of this body of law has been greeted with a certain amount of unease, detractors refer to the elephants, pandas, polar bears, whales and so forth singled out for special protection as “charismatic megafauna,” pointing out that their prominence in the media and their ability to attract human affection is utterly unrelated to their importance to the ecosystem.

Despite some environmental provisions in earlier treaties, international environmental law as a clearly defined area of international law did not exist before World War II, and did not really come to prominence until some decades later. The post-World War II era saw a steady increase in awareness of environmental problems, along with an increase in the severity and incidence of those problems. The increase in environmental problems was paralleled by an increase in global economic activity, although the exact relationship between the two is complex and the subject of furious debate. Some argue that free trade and the wealth it produces is necessary to promote environmental

protection by providing countries with additional resources to ensure sustainable development. Others suggest that trade must be limited to ensure that its environmentally harmful impacts are constrained; the contention that trade is related to wealth is also disputed.

National boundaries are geographically and environmentally arbitrary. In some cases they indicate the limits of some past kingdom's military expansion; in others they are lines drawn on a map by some colonial power or by agreement between the countries concerned. In very few cases do they conform to the boundaries of environmental regions? When a border follows the watershed line of a mountain range, for instance, there is a certain environmental logic to it. When the border follows the midpoint of a river, on the other hand, it is an environmental absurdity: The river receives water from tributaries on both sides of the border, and surface water and groundwater move constantly and freely across the border. When (as often happens) the two countries' legal regimes of environmental protection differ dramatically, one country will suffer environmental harm as the result of the other's lax regime.

### **3. Emerging Concepts: Intergenerational Equity, the “Polluter Pays” Principle, and the Prevention Principle**

A number of related international environmental law concepts have arisen in recent decades, and have often served to highlight the differences in the interests of developing and developed nations. Three concepts incorporated, in varying degrees, into many environmental agreements are – intergenerational equity, the “polluter pays” principle, and the prevention principle.

#### **3.1. The Rights of Future Generations: Intergenerational Equity**

Intergenerational equity is the idea that we who now live on the earth owe a duty to future generations to provide them with an environment no worse (and, if possible, better) than we have received, and not to deplete resources to such a degree that they will be unavailable to future generations. It is thus closely related to the idea of sustainable development: Resources should not be consumed faster than they can be replaced. A desert country that uses a “fossil” (non-replenishing) aquifer to grow wheat, for instance, is engaging in unsustainable development. Its well-watered neighbor that burns its forests for fuel at a rate faster than new trees can be grown is also engaging in unsustainable development. The sustainable solution would be for the well-watered country to grow the wheat, and the desert country to use its supply of sunlight to generate electricity, perhaps by replacing wheat fields with fields of solar cells.

On this level, the idea is closely related to the idea of comparative advantage. But in reality, some developing countries argue the “sustainable” solutions offered by the developed world are rarely workable, and when workable, succeed only in sustaining an existing level of poverty; “sustainable development” is often seen as a code for “no development.”

Similarly, many in developing countries see intergenerational equity as requiring them to remain poor today so that the descendants of the rich can continue to be rich in the

future. Further, some argue that the duty of the poor to their children is to become rich, so that they can provide their children with the same advantages that the children of the rich enjoy. The protection of endangered species provides a particularly illustrative example of the problems of intergenerational equity. Once a species is extinct, it can not be restored; yet the term “equity” seems to require each generation to furnish its successors with an earth equipped with all of the same species as the earth it inherited. Specific performance, after all, is an equitable remedy.

Yet the cost of maintaining a particular endangered species may be unreasonably high. Some charismatic megafauna – pandas, say – are rare in any case, and support a sufficient tourism industry to pay their own way. Others, though, even if equally charismatic, are far more costly to support. African elephants, for example, are much less rare than pandas, are spread over a wide range, and compete directly with humans for land. Less land to farm and raise cattle means more poverty in Africa. An economic solution to the danger posed by poaching seems obvious – cut off the elephants’ tusks and sell the ivory to support anti-poaching efforts – although the solution has met with massive opposition from environmentalists and animal rights activists. An economic solution to the problem of habitat destruction and human encroachment on elephant range (or, depending on one’s viewpoint, of elephant encroachment on humanity’s range) seems much more difficult to achieve. Although tourists do come to see elephants, they visit only a few, relatively stable, countries. It will be many years before any significant number of tourists visits Congo to view the forest elephants. Even countries that at one time supported a wildlife tourism industry, such as Rwanda, will find that industry difficult or impossible to restore if a political and humanitarian disaster frightens away the tourists.

### **3.2. A Helping Hand for the Invisible Hand: the “Polluter Pays” Principle**

The “polluter pays” principle is an application of classical liberal economics, and is much less controversial. The idea is that pollution enables a polluter to dispose of wastes at little or no cost. These externalized costs are borne by those who live downstream or downwind, and whose property, health and livelihood are adversely affected. Although the costs to these persons may be enormous, the polluter has no incentive to stop polluting. If costs are not internalized, there is actually an incentive to engage in environmentally destructive behavior.

One of the primary goals of international environmental law is to force polluters to internalize the costs of pollution through the use of some mechanism such as lawsuits, effluent fees, or tax laws. In some cases, it may continue to be profitable for the polluter to pollute; by compensating others for the injuries caused by the pollution, the polluter could continue the profitable activity. This result is generally pleasing to developed and developing countries, but not to environmental activists.

### **3.3. An Ounce of Prevention is Better than a Pound of Cure: The Prevention Principle**

The idea behind the prevention, or preventative, principle is that when the risks of any process or product are unknown, one should always err on the side of prevention. For

example, pollutants whose environmental harmfulness has not yet been determined should be treated as harmful. Industries in developed and developing countries object to the principle as lacking any sound economic basis. Environmentalists, on the other hand, point out that prevention is far cheaper than remediation. Examples abound of substances that ultimately proved far more costly in terms of damage to human health and the environment, or in costs of remediation or amelioration, than any benefit gained therefrom: Asbestos, leaded gasoline, mercury, and thalidomide are just a few. And once a substance is determined not to be harmful, it can always be removed from the list of proscribed substances.

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