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Does One Need to be an International Lawyer to be an International Environmental Lawyer?

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INTERNATIONAL ENVIRONMENTAL LAW AT THE BEGINNING OF THE 21ST CENTURY

The panel was convened at 1:00 p.m., Friday, March 31, by its chair, Laurence Boisson de Chazournes of the University of Geneva, who introduced the panelists: Daniel Bodansky of the University of Georgia School of Law; Jutta Brunnée of the University of Toronto Faculty of Law; Kevin Gray, of the Department of Foreign Affairs and International Trade, Canada; Ellen Hey of the School of Law, Erasmus University Rotterdam; and Ileana Porras of Arizona State University College of Law.

INTRODUCTORY REMARKS BY LAURENCE BOISSON DE CHAZOURNES*

There is no doubt that environmental protection has become a common concern at the international level and that international law has evolved and adjusted itself so as to take into account the imperative of environmental protection. However, it is a fair question to ask ourselves whether international law as it has developed in the area of environmental protection can meet the challenges facing humankind in this area. Is it strong enough to impose itself in the face of important economic and political interests, and is it a solid enough legal pillar compared with international economic and trade law? Are its institutions well-designed and sufficiently capable of meeting the environmental concerns of the public at large? This raises the issue of the decision-making process in the regional and global institutions and the involvement of state and non-state actors therein. Are the norms and principles precise enough to influence states' and other actors' behavior? Should we speak in terms of *hard law* or even *hard/hard law* (so as to refer to both the instrument and its content) or is a *soft law* approach more conducive to produce effective results? These are some of the questions that will be addressed by the panelists. They are a distinguished group of people. First, the editors of a forthcoming handbook on international environmental Law, Professors Dan Bodansky, Jutta Brunnée, and Ellen Hey, will each look at such issues as the question of whether international environmental law (IEL) constitutes a distinct field of international law, as the structure of IEL and its processes for law-making, implementation, and enforcement as well as the role of international institutions in global environment governance. After their presentations, Professor Ileana Porras, and Mr. Kevin Gray, a co-chair of the International Environmental law Interest Group, will make comments, more particularly assessing the foundations and the structure of IEL, its legitimacy, and its use of new regulatory approaches.

DOES ONE NEED TO BE AN INTERNATIONAL LAWYER TO BE AN INTERNATIONAL ENVIRONMENTAL LAWYER?

By Daniel Bodansky†

IEL is a relatively young field. In 1945, when the United Nations was created, environmental issues did not even rate a mention in the Charter. Indeed, as recently as 1964, when Wolfgang Friedman wrote *The Changing Structure of International Law*, he did not include environmental protection among his "new fields of international law"—even though international

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environmental law is a paradigmatic case of the new law of international cooperation that he argued was emerging.

But in its comparatively short history, IEL has emerged into virtually an industry. It is taught in more than one hundred law schools across the country and is the subject of four casebooks and several specialty journals. Therefore, this is perhaps a good time to step back and take a broader look at the field.

The question I want to address is whether one can now say that IEL represents a distinct field. Of course, it is a distinct field in the sense that it addresses a distinct set of problems and has developed a wide body of primary rules in response. However, is it a distinct field in the stronger sense of having its own characteristic methodologies and techniques?

A number of scholars still answer this question in the negative. In their view, IEL represents nothing more than the application of international law to environmental problems. Furthermore, to the extent that IEL has developed distinctive features, some have argued that this is a bad thing because it undermines the fundamental unity and coherence of international law, thereby contributing to the fragmentation of international law into different subfields.

In my talk today, I want to take issue with both of these arguments. First, in my view, IEL does not represent merely the application of international law to environmental issues, but instead has its own distinctive features. Second, the emergence of IEL as a distinct field is not a bad thing but is instead an entirely appropriate response to the distinctive character of international environmental problems.

But first, a caveat. I will be painting with a very broad brush. I will be taking a view, as it were, from 30,000 feet. The picture on the ground is obviously more complicated and murky. Nevertheless, I think taking this broad view, although oversimplistic, helps throw into sharper relief the ways in which international environmental law is similar to, and different from, other areas of international law.

Now, in saying that IEL has become a distinct field, the first question to consider is, distinct from what? Discussions of the fragmentation of international law all presuppose that, until now, the international legal system has had common features, which are beginning to erode.

Usually, what is thought to tie international law together—what makes it a "system" rather than simply an amalgamation of rules—is not its primary rules of conduct, but rather its secondary rules: its rules about how the international legal process works—how international law is created, interpreted, applied, and enforced—as well as about the fundamental structural elements of the international system—the concepts of sovereign equality, state responsibility, international legal personality, and so forth. This is the general, as opposed to the specialized, part of international law—the part that every international lawyer should know, regardless of his or her subfield. I will refer to this as "general international law," not in the sense that this term is sometimes used, as applying generally to all states, but rather in the sense of applying generally to the different substantive areas of international law.

Now whether there really is any general international law in this sense is debatable. The arguments I am making here regarding IEL might well be made about other fields of international law, such as trade or human rights law. My argument is simply that, whatever may be the case for the rest of international law, IEL has developed its own characteristic approaches to issues of process and structure, which make it a distinct field.

Now there is a weaker and stronger version of this claim. The weaker version sees the new and distinctive features of IEL not as displacing general international law but rather as

supplementing it. This version accepts that international environmental law is part of international law, albeit a distinctive part. The stronger and more provocative version of my claim is that IEL has emerged not merely as a distinct field, but as an autonomous one—in essence, that to be an international environmental lawyer, one no longer needs to be an international lawyer.

Now, obviously, the strong version of the claim goes too far. However, I think it challenges us to think hard about what aspects of international law remain relevant to IEL. Certainly, treaties remain relevant. Most international environmental regimes have a treaty basis. And states remain relevant. In my view, they still represent the fundamental structural element of the international environmental system; they remain the principal actors both in the creation and implementation of international environmental standards. And, finally, international institutions remain relevant.

But all three of these elements—treaties, states, and international institutions—have been substantially transformed. International environmental treaties, for example, no longer represent static agreements among states at a particular point in time. Instead, they are dynamic arrangements. They establish ongoing regulatory processes. The result is that, in most international environmental regimes, the treaty text itself represents just the tip of the normative iceberg. The majority of the norms are adopted through more flexible techniques, which allow IEL to respond more quickly to the emergence of new problems and new knowledge and understanding.

Similarly, although states remain central to IEL, they no longer are treated as autonomous and homogeneous. Instead, they are interconnected with one another in innumerable ways and are subject to often very different requirements, pursuant to the principle of common but differentiated responsibilities and respective capabilities.

Finally, as Robin Churchill and Geir Ulfstein have argued, the central international environmental institution—the conference of the parties—represents a new form of international cooperation.[1] From the perspective of general international law, these bodies are neither intergovernmental conferences nor traditional international organizations.

Beyond these three elements, most other features of general international law have even less relevance to IEL. Consider, for example, customary law. I realize that my comments here personify what Benedict Kingsbury has characterized as the "American" approach to sources, which emphasizes treaties to the exclusion of custom.[2] But, at least in the environmental arena, this theoretical bias has an empirical basis. The fact is that most of the action in IEL relates to treaties rather than custom. The decentralized and uncoordinated nature of customary lawmaking makes it ill-suited for generating the kinds of detailed rules necessary to regulate hazardous materials, or trade in endangered species, or emissions of long-range pollutants. At most, the customary lawmaking process is able to articulate only quite general principles, such as the precautionary principle or the duty to prevent transboundary harm, which serve to frame debate rather than to govern conduct.

In place of general international law, IEL has developed its own distinctive approaches to standard-setting and compliance. Consider, first, standard-setting. As I mentioned earlier, IEL has developed a wide range of flexible and dynamic standard-setting techniques. These include:

[1] Robin Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 ASIL PROC. 623 (2000).

[2] *See* KINGSBURY, *supra* at 175.

- soft law instruments such as codes of conduct and guidelines;
- the framework convention/protocol approach;
- tacit amendment procedures;
- elaboration through decisions of the parties that are not formally binding but are, in practice, accepted as authoritative.

On the compliance side, the picture also looks quite different from general international law, which focuses on breach, state responsibility, invocation of responsibility by another state, dispute settlement, and ultimately remedies such as restitution and compensation. As is well known, this general model is seldom applied in IEL. Instead, international environmental regimes have developed their own *sui generis* arrangements, the objective of which is not so much to determine state responsibility and impose remedies as it is to make the regime more effective in the future.

In general, these compliance processes are political and pragmatic, rather than strictly legal, and reflect the more general blurring in IEL between law and politics. We see this blurring in various aspects of the international environmental process. For example, the compliance bodies established by international agreements comprise not independent experts, as in the human rights field, but rather government representatives. In the climate change regime, the detailed rules for how the Kyoto Protocol will work were adopted by a simple decision of the parties, leaving their precise legal status subject to debate. And the new compliance committee under Kyoto has what is called an "enforcement branch" whose decisions are nonetheless not, strictly speaking, legally binding. Indeed, the very terminology used in international environmental law reflects the blurring of law and politics: we speak, for example, of "commitments" rather than "obligations," "noncompliance" rather than "breach," and "consequences" rather than "remedies" or "sanctions."

The line between law and politics is not the only that has become blurred in IEL. We also see the blurring of the lines between public and private, international and domestic. In IEL, the private sector engages in the quintessential public task of setting standards—for example, through the International Organization for Standardization. And in a regime such as MARPOL, which is aimed at limiting oil pollution from tankers, private sector actors play a key role in the compliance process, through the inspection and certification of ships.

I might add, finally, that, as a result of the blurring of these other lines, the distinction between legal scholarship and nonlegal scholarship has itself become blurred in IEL. There is tremendous interaction between scholars from different fields. That is why, in the forthcoming *Oxford Handbook of International Environmental Law*, which I am co-editing with Jutta Brunnée and Ellen Hey, we decided to include a section examining these other disciplinary perspectives, and why about a quarter of our authors do not have a legal background.

Now, to the extent that I am right—namely, that IEL has emerged as a distinct field—is this a problem? Does it serve to undermine the fundamental unity and coherence of international law?

In my view, the emergence of new approaches to standard-setting and compliance represent an entirely appropriate response to the distinctive characteristics of international environmental problems. These problems are not simply political but physical and involve a great deal of technical complexity. They result primarily from private rather than governmental conduct. They are highly uncertain and rapidly changing. All of these factors mean that to address international environmental problems, we need complex regulatory regimes, which include

more flexible and dynamic standard-setting processes, and take a pragmatic and forward-looking approach.

Are these characteristics unique to IEL? Of course not. That is why there is the potential, in some cases already realized, of cross-fertilization between IELand other fields of international law. But in thinking about the possibilities of cross-fertilization, it is important to identify first what is new and distinctive about IEL, rather than to see it as simply a continuation of the past.

International Environmental Law: Rising to the Challenge of Common Concern?

By Jutta Brunnée[*]

We were asked whether IEL is up to the challenge of common environmental concerns: whether its norms are "precise enough to influence states' and other actors' behavior," and whether it is "forceful enough to impose itself in the face of important economic and political interests." These questions appear to assume that to succeed IEL must be "precise" and "forceful," and that it may not sufficiently meet either of these demands. In my remarks, I will reflect on these assumptions and consider both the conceptual structure of IEL and its processes for law-making, implementation, and enforcement.

IEL remains rooted in customary law concepts that aim to balance competing sovereign interests. Under the foundational harm principle, environmental concerns have legal relevance only to the extent that they coincide with a direct impact on a state's territory. Collective environmental concerns, such as climate change, are difficult to capture in this framework. Of course, the conceptual structure of IEL has expanded beyond the classical interstate paradigm. The emergence of a legal concept of common concern of humankind suggests that certain types of environmental decline are matters of community interest. Although the concept of common concern does not imply a specific rule for the conduct of states, it does signal that their freedom of action may be subject to limits even where other states' sovereign rights are not affected in the direct transboundary sense envisaged by the harm principle. Such limits flow precisely from the fact that the concept identifies certain types of environmental degradation as of concern to all, which would appear to imply that obligations are owed *erga omnes*. In turn, a closely related concept has emerged that may be said to structure what states owe to one another in the context of common concerns: their participation in problem-solving in accordance with their common-but-differentiated responsibilities (CBDRs) and respective capabilities.

However, the rub of the matter is that it remains uncertain whether or not any of the collective concern concepts that have emerged during the last fifteen years or so have crystallized into customary IEL. The unsettled legal status of these concepts is compounded by the uncertainties that continue to plague general international law when it comes to the legal impact of community interests, including through the concepts of *jus cogens* and norms *erga omnes*.

Turning to the processes of IEL, here too classical international law fits uneasily with global environmental protection. The fact that law making is strictly consent based, with customary law development necessitating wide agreement among states, accounts in large part for the only tentative development of common concern norms. It also helps explain why

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