

TEACHING AND LEARNING IN INTERNATIONAL ENVIRONMENTAL LAW

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This paper is a personal reflection on nearly a quarter century of working in the field of international environmental law as a government attorney, public interest lawyer, and legal academic. More specifically, this paper addresses international environmental law as a sub-discipline of "another" legal system -- in the sense of other than the domestic legal system in which I was formed -- namely public international law.

Teaching and learning in the field of international environmental law present opportunities, challenges, and demands quite different from those encountered in a strictly domestic milieu. In contrast to domestic environmental law, the international law of the environment must be understood in the larger context of public international law, the law governing the relations among states. A course in international environmental law is an excellent occasion to demystify international practice, including but by no means limited to its legal aspects.

Simulating Multilateral Negotiations

Simulated negotiations are an excellent way not only of "teaching" but also of demonstrating to students firsthand both the law and the policy dynamics surrounding international interactions. In a simulated multilateral negotiation on global warming students representing a small island nation that stands to be inundated by sea level rise learn a great deal about how to accomplish policy objectives in this unfamiliar setting when a superpower that bears more than a superficial resemblance to the United States refuses to reduce its emissions of greenhouse gases. Some students will have had prior experience with exercises such as model United Nations, on which they can then build in this more sophisticated setting.

First, student negotiators begin to appreciate the role of law in the state of nature that is the international system. They see firsthand and sometimes all too painfully that concepts of law and legality all too often may have trivial significance in an international setting. Second, the student participants discover how states actually behave and what motivates them. Without exception, students in the roles of instructed representatives of governments rapidly rise to this challenge, occasionally shocking their peers in their

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single-minded pursuit of narrow national interests to the near-total exclusion of concern about the integrity of the global commons.

Understanding International Organizations

A course in international environmental law is also a wonderful occasion for addressing the structure and functioning of international organizations. A course instructor can easily traverse at least a dozen international organizations without the slightest conscious effort while teaching the course. One of the lessons for students is that of the lot only one, the UN Environment Program, has environmental protection as its principal mandate. Some might see this as a weakness, others might see it as a strength of the international system. But the essential point for students is that they must come to grips with environmental issues as defined in light of the functional missions of organizations designed to lend money for development projects (World Bank and regional development banks), or to create and enforce trade rules (World Trade Organization), whose functional mandates may accommodate environmental considerations only peripherally if not with outright difficulty.

International organizations, while a useful starting point, of course are not the only setting in which international environmental policy and law is crafted. Once again, this subject matter is a perfect vehicle for addressing international regimes that may have less formal institutional structures but that are nonetheless highly efficacious. The Antarctic Treaty system is an excellent concrete example, which also provides an entry point into an important substantive inquiry. Another is the framework-convention-with protocols model, supervised by a conference of the parties, found in such subject matter areas as acid rain, stratospheric ozone depletion, global warming, and biodiversity.

In addition, these structural templates assist students in developing an appreciation for international agreements as establishing dynamic structures for cooperative decision making by states, as opposed to articulating a static set of obligations. Having mastered the basics of the structure and functioning of international organizations and having gained some appreciation for treaty-based structures, students are then well-positioned to move into the more sophisticated realm of conflicts among regimes. The quintessential example is the trade-and-environment debate, now effectively *de rigueur* in courses in this field.

Synthesizing Disparate Legal Systems

If a course in international environmental law seems the perfect setting for teaching basic concepts of public international law, that is no coincidence. Indeed, international environmental policy is at the forefront of many progressive developments that prefigure more general trends in public international law, a relatively primitive legal system whose limitations in responding to the all-too-pressing demands of globalization are all too apparent. So, for instance, environmental considerations were a principal motivating force in the creation of the World Bank Inspection Panel. This major development is not just the first instance in which any multilateral institution has

submitted the question of the adequacy of its own operations to external review. Perhaps more importantly in the long term, the Inspection Panel is an important entry point through which non-state actors such as citizens organizations can enforce public rights in a legal system that does not even acknowledge the complainant's existence.

A course in international environmental law also should require students to learn to integrate international legal requirements and the domestic regulatory structure. In the United States we live in a dualist legal system, in which the international and domestic legal systems do not intersect except through the operation of some mechanism linking the two. At a relatively straightforward level students need to learn to analyze the interaction of international agreements and domestic law. The little-taught *Japan Whaling* case in the United States Supreme Court, concerning domestic implementation of the 1946 International Convention for the Regulation of Whaling, is an excellent example of the way in which legal and policy considerations unique to the foreign relations area may generate conflicts with domestic statutory mandates.

For a thorough understanding of the field, students should also be able to grapple with cognate questions in foreign legal systems. For example, one of the favored techniques at the international level is harmonization of national requirements. International agreements or non-binding instruments that adopt such approaches can be explained only partially, and not entirely satisfactorily, as involving a traditional flow of rights and obligations. Instead, harmonization more typically involves a multiplicity of undertakings by states simultaneously to alter their domestic policy and legal infrastructure in an agreed manner. Potentially a highly effective policy and legal strategy, harmonization is often desirable to overcome competitive disadvantages that otherwise might impede unilateral domestic action or a concerted multilateral response. The prevalence of international instruments employing strategies of harmonization strongly suggests the need for students to have at least some exposure to comparative law and the structure and functioning of the legal systems of other countries, not strictly for its own sake but also as an instrumental tool for better appreciation of the efficacy of international undertakings.

As a subset of international law, foreign law, or more accurately *sui generis* as supranational law, students cannot avoid the law of the European Union (EU). But EU law is exceedingly complex and treating all the EU legislation on environment is probably a task that can be accomplished only in a course dedicated exclusively to that purpose. Successful courses on European Union environmental law have been offered at a number of schools. In any event, in a basic course in international environment law students should be exposed to at least a qualitative description, if not an analytically rigorous legal treatment, of the basic Community institutions and the forms of EU legislation. It is also helpful to analyze at least some EU instruments from an in-depth textual point of view, preferably a directive as opposed to a regulation because of the unfamiliar form.

Working With Texts

International environmental law also inescapably spotlights the need for students to work with primary materials of various kinds, including most particularly international agreements. It is surprising how frequently students fail to understand how to interpret operative language. Given the importance of international agreements in this field, at least one treaty interpretation exercise involving close reading of operative text is highly desirable as, if nothing else, a diagnostic tool. Choosing an agreement with relatively accessible language, together with straightforward, crisp obligations that are arrayed in a simple temporal sequence, clearly communicates to students what the expectations are in this area. Such an exercise is also an opportunity to address the apparently mundane, but nonetheless conceptually important, final clauses addressing such matters as signature, ratification, and entry into force.

Perhaps the most important lesson is the most obvious to come from conducting a simulation exercise, namely that the multitude of international agreements that students study in this discipline are not handed down like stone tablets to Moses, but instead memorialize brokered deals. As lawyers, scholars, and students, we read these instruments as legal authorities, but they must also be understood in a fundamental sense as what they are: the international analogues of contracts. This experience also makes the task of treaty interpretation considerably more immediate and the experience of teaching this essential skill that much more satisfying and effective. Further, participation in the negotiation of an international agreement heightens students' appreciation of the practical significance of other crucial analytical concepts in the discipline, such as the distinction between binding international agreements and non-binding "soft law" instruments.

Creating Clinical Opportunities

No discussion of teaching opportunities in international environmental law would be complete without mentioning the "real world" opportunities presented by the subject matter. Many students come to the course motivated by personal interest, oftentimes with highly useful prior backgrounds in the natural sciences, in the Peace Corps or other on-the-ground overseas experience, in government, or in other relevant settings. Some have hopes, not always reasonable, of creating career opportunities or of "breaking into the field." While it is obviously not possible to find post-law-school jobs for each of the students in a class in international environmental law, it is not at all difficult to deliver on legitimate expectations of a real-world perspective into the course, particularly if students are actively engaged in research, as for a seminar paper.

The next logical step would be to set up a true clinic involving direct client representation. The potential for clinical offerings involving representation of private parties is rapidly expanding through such channels, as noted above, as the World Bank's Inspection Panel and citizen submissions to the North American Commission on Environmental Cooperation, created by the side agreement to NAFTA. Entry points for non-state actors are also expanding into the work of such previously difficult-to-crack

institutions as the World Trade Organization (WTO). There is a loose analogy with citizen suits under the domestic environmental laws, which have not only empowered the public but have also provided significant clinical opportunities for student lawyers.

One has to remember, however, that client representation on the international level is very complex and requires a great deal of effort as far as logistics are concerned without necessarily much in the way of payoff to student lawyers, at least so far as management considerations are concerned. One possibility would be team up with an organization such as the Earth Justice Legal Defense Fund (previously the Sierra Club Legal Defense Fund) and to let the partner group handle the mechanically, and often politically, complicated relationships with clients, particularly those located overseas. Students could then take, on a referred basis, particular projects or even entire cases, without the responsibility associated with being the “attorney of record.” It is important to emphasize that outside funding is not necessary to implement many of these initiatives.