



# ***I. What is International Environmental Law?***

## ***Environmental Laws in General***

Environmental laws are the standards that governments establish to manage natural resources and environmental quality. The broad categories of “natural resources” and “environmental quality” include such areas as air and water pollution, forests and wildlife, hazardous waste, agricultural practices, wetlands, and land-use planning. In the United States, some of the more widely known environmental laws are the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act. The body of environmental law includes not only the text of these laws but also the regulations that implement and the judicial decisions that interpret this legislation.

In general, the standards set forth in environmental laws can apply to either private parties or the government. The Clean Air and Clean Water Acts, for example, are frequently used to regulate the polluting activities of private enterprises. These laws mandate certain pollution-reducing technology or limit the levels of pollution for power plants and factories. The National Environmental Policy Act (NEPA) applies only to the actions of the U.S. government. NEPA requires that the federal government undertake a comprehensive environmental impact assessment before it can proceed with projects that are likely to harm the environment.

## ***Distinguishing National Law from International Law***

To understand the nature of international environmental law, one must first understand the difference between national and international law. National law is law that is adopted by the government of an individual country. In the United

States, the most common examples of national law are federal and state legislation and judicial decisions. Agency regulations and executive orders would also fall within this category.

Although these national laws are adopted by an individual country, they may have international impacts. A foreign manufacturer whose defective product injures a person living in the United States may be held liable for resulting damages under U.S. law. The U.S. Corrupt Practices Act prevents a U.S. corporate executive from bribing a foreign government official. While these laws affect international activities and non-national parties, they are generally not considered international law. Rather, they are considered *extraterritorial* applications of national law.

International law, on the other hand, concerns agreements among different nations, or between citizens or corporations of different nations. Agreements or treaties among different nations are generally referred to as public international law. Contracts between private parties (corporations or citizens) residing in different nations are generally referred to as private international law. Because the field of international environmental law focuses on the relations and agreements among nations, it is part of public international law.

## ***Distinguishing between Hard and Soft International Law***

A distinction is often made between hard and soft international law. Hard international law generally refers to agreements or principles that are directly enforceable by a national or international body. Soft international law refers to agreements or principles that are meant to influence individual nations to respect certain norms or incorporate them into national law. Soft international law by itself is not enforceable. It serves to



articulate standards widely shared, or aspired to, by nations.

Similar parallels can be found at the national level. Often an official, a legislative body, or an agency will announce a new public policy or priority. In this announcement, or proclamation, there are often pledges to incorporate this new policy or priority into specific legal provisions. While the announcement itself is not enforceable in court, it nonetheless can have a powerful influence on the development and implementation of specific legal provisions.

Private international law generally concerns business transactions between citizens or corporations of different countries. Because most of the rules governing these private transactions are enforceable in the courts of the concerned countries, these rules are usually deemed hard international law. Most of international environmental law, however, concerns general principles agreed upon among nations. Although these principles sometimes oblige countries to adopt implementing legislation, they are not usually enforceable on their own in court.

The soft status of international environmental law, and most international law, is a result of concerns over sovereignty. Nations are generally reluctant to surrender control over their territory, peoples, and affairs to external international authorities. Even when nations have joined in international agreements, many of them have added reservations to preserve their right to decline to be bound by particular parts of the agreement. The exercise of this power weakens the total effectiveness of many international agreements.

### ***Means of Implementing and Enforcing International Environmental Law***

There are forums where international environmental disputes can be adjudicated, such as national courts, the International Court of Justice, and international arbitration panels. These forums, however, generally require that the disputing parties voluntarily submit to the jurisdiction of the court or panel. Additionally, even when these forums obtain jurisdiction over an international environmental dispute, they must rely on the cooperation of national govern-

ments to enforce rulings. For economic and political reasons, this cooperation is often withheld.

A small number of environmental agreements have established international institutions that can directly impose trade sanctions (such as the Montreal Protocol, discussed on p. 20) or have authorized member states to impose trade sanctions against violating parties (such as the International Convention for the Regulation of Whaling, discussed on p. 29). For instance, in response to Japan's violation of the International Whaling Commission's whaling moratorium, the United States threatened to restrict Japanese fishing vessel activity in U.S. territorial waters. Japan elected to accede to the whaling moratorium rather than suffer any such restrictions.

The type of sanctions envisioned under the Montreal Protocol and International Whaling Commission are procedurally very difficult to impose. In general, there is no international body authorized to directly enforce international environmental law. The task of direct enforcement is left to the member nations, whose governments propose and adopt implementing policies. Sometimes the implementing national legislation is identical to the international agreement. For example, Canada implemented the Migratory Birds Treaty (with the United States) by adopting the Migratory Birds Treaty Act. Because the language of this act is identical to language in the treaty, the law is basically a legislative codification of the international agreement.

Other times, however, the international environmental agreement is of a general nature and national governments must draft and implement more specific laws. For instance, in 1989 the International Convention on Transboundary Movement of Hazardous Waste was signed in Basel, Switzerland. This convention forbids the export of hazardous wastes to countries that lack "adequate means to dispose of them." Under the terms of the convention, signatory nations are called upon to draft their own more specific national laws to implement this pledge.

Although international institutions are generally not responsible for directly implementing and enforcing international environmental law, they often play important monitoring, informational, and diplomatic roles. For example,



agendas adopted at the 1992 Convention on Environment and Development at Rio de Janeiro created a new international body, the Commission on Sustainable Development (CSD). The CSD meets yearly at the United Nations in New York to review and advance the implementation of Agenda 21—an enormous and complex mandate. Most global agreements, such as the Biodiversity Convention and the Framework Convention on Climate Change, are implemented by an annual or biennial Conference of Parties (COP). These COPs lack the power to bring enforcement actions against either governments or private parties. They help monitor national compliance by requiring member nations to submit annual reports. Through meetings and publications, COPs also provide a forum to discuss and debate issues associated with the implementation of the agreement.

There are other institutions similar in function to the CSDs and the COPs. The North American Commission on Environmental Cooperation (NACEC), based in Montreal, Canada, monitors compliance with the North American Agreement on Environmental Cooperation, one of the side agreements under the North American Free Trade Agreement (NAFTA). The European Environmental Agency, based in Copenhagen, Denmark, monitors the compliance of individual European countries with environmental directives adopted by the European Union.

Although the CSD, COPs, NACEC, and the European Environmental Agency indicate that the international community is trying to improve compliance with environmental agreements, there is still a lack of effective implementation and enforcement. A 1992 study by the U. S. General Accounting Office concluded that international environmental agreements lack adequate procedures to monitor and ensure compliance. Countries have become skilled in negotiating international environmental agreements, but they are much less skilled at making the agreement operate effectively.

In the past two decades, states have also used economic incentives and trade bans to encourage compliance with international environmental agreements. For example, the Montreal Protocol,

the Framework Convention on Climate Change, and the Biodiversity Convention provide economic incentives in the form of technical assistance, technology transfers, and money to build the administrative capacity of national environmental agencies. These incentives have been of particular value in promoting the involvement and compliance of developing countries—part of the Rio bargain between northern (developed) and southern (developing) countries. The Global Environmental Facility (GEF), a new international funding institution, also provides money for training, equipment, and enforcement related to environmental protection measures. Some recent international environmental agreements, such as the Biodiversity Convention, have designated the GEF as their exclusive funding mechanism.

### ***Jurisdiction for Disputes: Courts, Parties, and Enforcement***

Roughly speaking, jurisdiction may be defined as a court's legal ability to hear a complaint. If the subject matter of the case is not within the scope of a court's jurisdiction, or if one of the parties, either the one bringing the case (plaintiff) or the one against whom it is brought (defendant) is not within a court's jurisdiction, the court will not hear the dispute. This is particularly relevant to international environmental law for a number of reasons. First and foremost, if a treaty or convention does not specify an international forum that has subject-matter jurisdiction, often the only place to bring a suit with respect to that treaty is in the member state's domestic court system. This then presents at least two additional hurdles. If the member state being sued does not have domestic implementing legislation in place to hear the dispute, there will be no forum available. Even in the event that the domestic legislation provides for suits of this nature, the judges who decide the case are residents of the country against which it is brought, and the resulting potential conflicts of interest are apparent.

With respect to parties, only nations are bound by treaties and conventions. In international forums, such as the International Court of Justice, countries must consent to being sued in order to preserve their sovereignty. Thus, it is often impossible to sue a country. In any case, it is often a



transnational corporation (TNC), not a country, that has violated an international agreement. It is nearly impossible to sue a country for not enforcing its laws against a TNC or for not enacting sufficient implementing legislation.

The final difficulty in the jurisdictional arena is the question of who may bring a suit. Often, only countries may sue countries, not individual citizens and not nongovernmental organizations. This has huge repercussions in that the environmental harm must be large and notorious for a country to even notice it. Second, for a country to have a stake in the outcome of the subject matter, some harm may have to cross the borders of the violating country into the country that is suing. Finally, even if transboundary harm does exist, the issue of causation, especially in the environmental field, is often impossible to demonstrate with any certainty.

In addition, in all fields of international law no country is ever in perfect compliance with every international obligation. Moreover, some countries are substantially more powerful than others. This may seem self-evident and unimportant, until one considers that suing another country may expose the plaintiff country to retaliatory actions. In spite of this political reality, however, Mexico successfully challenged the United States in the World Trade Organization in the Tuna-Dolphin Case, and several Asian countries successfully challenged the United States over U.S. efforts to compel shrimp-exporting countries to harvest shrimp without harming turtles.

The enforcement issue is one where advocates for a safer environment often find themselves stymied. The entirety of international law, beyond the environmental field, remains largely unenforceable, even if a treaty or convention provides for specific substantive measures to be taken by a country (which is not always the case, since many treaties merely provide frameworks), and even if a forum for litigation or dispute resolution is specified or sanctions by member states for noncompliance are authorized. A country cannot be forced to do what it is not willing to do. One can sanction the country, order damages, restrict trade, or, most frequently, declare noncompliance, but beyond that, if a country will not comply, there is very little to be done.

Countries usually accept or avoid international environmental obligations because it is in their economic self-interest to do so. Nations rarely take actions that may harm their domestic economy or their international trade for altruistic reasons. They take these actions expecting some economic or political benefit sooner or later.