Teaching and Research in International Environmental Law

David A. Wirth, Boston College Law School

Available at: https://works.bepress.com/david_wirth/33/
TEACHING AND RESEARCH IN INTERNATIONAL ENVIRONMENTAL LAW

David A. Wirth*

Over the past decade and a half, there has been a dramatic increase in awareness of environmental threats that demand concerted international responses. As the public has come to appreciate the urgency of warnings from the scientific community about widespread species loss, dramatic depletion of the stratospheric ozone layer over Antarctica, and other troubling indicators of the poor state of our planet's environment, governments have begun to respond. Issues such as the integrity of the global climate, which attracted negligible interest among the public and policy makers as recently as the middle of the last decade, now command attention at the highest levels of government. For instance, global warming featured prominently on the agenda of the 1992 United Nations Conference on Environment and Development ("UNCED"), attended by more than a hundred heads of state and governments. The creation of the new position of Under Secretary for Global Affairs at the Department of State in 1993 reveals the extent to which international environmental concerns have been elevated within our own government.

As the demand for policy responses has increased, the international law of the environment has also developed at a furious pace. International agreements, such as the two major multilateral conventions on biological diversity and climate signed at UNCED, have been negotiated and adopted at a feverish clip in recent years. New non-binding instruments on a wide variety of subjects and in many forms continuously augment the authorities applicable in the field. Moreover, there are now more international fora in the field of environmental policy and law than ever before. The Office of the Legal Adviser at the State Department, which as recently as the mid-1980s had only one lawyer working exclusively on environmental issues, now boasts a staff complement of at least six attorneys who spend part of their time on environmental issues.

Against this background, international environmental law has begun to come into its own as an academic sub-discipline. At least four new law school texts on international environmental law have been published in the past five years,1 where previously there had been none. Approx-

* Visiting Professor of Law, Boston College; Professor of Law, Washington and Lee University, and Summer Faculty, Vermont Law School. The author is also former Attorney-Adviser for Oceans and International Environmental and Scientific Affairs in the United States Department of State and Senior Attorney and Co-Director of International Programs at the Natural Resources Defense Council. The author gratefully acknowledges the research assistance of Adam Sulkowski in the preparation of this Article.

1. LAKSHMAN D. GURUSWAMY, ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK (1994); EDITH BROWN WEISS, ET AL.,
mately forty percent of law schools now offer a course on international environmental law. Two law schools, Colorado and Georgetown, have created student-edited journals devoted entirely to the discipline. International environmental law has become a recognized legal discipline. A number of prominent scholars specialize primarily or exclusively in the area and, accordingly, academic writing in the field is now abundant. Subspecialties are beginning to proliferate, as are even more highly specialized courses. A minimum of eight law schools have offered courses devoted exclusively to the emerging issue of trade and environment, and at least one institution, the Washington College of Law at American University, offers a masters degree with a specialization in international environmental law.  

This Article is intended as a personal reflection on the evolution of the discipline of international environmental law over the past two decades. In Part I, the piece analyzes the challenging but rewarding task of teaching international environmental law. This Part addresses course design and objectives, published teaching materials, and opportunities for practical experience. Part II contains perspectives on the evolution of scholarship in the field and suggestions for the role of the academic researcher in this rapidly changing area.

I. INTERNATIONAL ENVIRONMENTAL LAW IN THE CLASSROOM

Teaching and learning in the field of international environmental law present opportunities, challenges, and demands that are 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 that governs the relations among states. If one were compelled to identify international environmental law as a sub-discipline of either domestic environmental law or public international law, one would probably choose the latter. That is not to say that international environmental law operates exclusively within the confines of public international law; on the contrary, as discussed below, understanding the complexity of the interface between the international legal system and domestic or municipal law is critical to a full appreciation of the field. Just as domestic environmental law cannot be understood, as is sometimes claimed, as a subset of administrative law, neither can international environmental law be viewed merely as a special case of public international law. At the same


2. Until recently, the University of Washington also offered a graduate degree program in international environmental law.
time, the fundamentals of the discipline cannot be understood except in
the decentralized world of states as the principal actors. There is no in-
ternational legislature, no international court of general jurisdiction, and
decision-making is burdened by the twin downward drags of consent and
consensus.

A course in international environmental law is an excellent way to
demystify many aspects of international practice. Simulated negotiations,
for example, are not only an effective way to teach but also demonstrate
the law and the policy dynamics surrounding international interactions.
In a simulated multilateral negotiation on global warming,\(^3\) students rep-
resenting a small island nation that stands to be flooded by a rising sea
level learn how to accomplish policy objectives in this unfamiliar setting
where a superpower that bears more than a superficial resemblance to the
United States refuses to reduce its emissions of greenhouse gases.

First, student negotiators begin to appreciate the role of law in the
international system. They see firsthand that concepts of law and legality
often have trivial significance in an international setting. Second, they
discover how states actually function and what motivates them. Students
in the roles of government representatives occasionally surprise their
peers with their single-minded pursuit of narrow national interests to the
near-total exclusion of the integrity of the global commons. Perhaps the
most important lesson is the most obvious, namely that the multitude of
international agreements studied 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
the international analogues of contracts. This experience also makes the
task of treaty interpretation considerably more immediate and the experi-
ence of teaching this essential skill that much more satisfying and effec-
tive. Further, participation in the negotiation of an international agree-
ment heightens students' appreciation of the practical significance of
crucial analytical concepts in the discipline, such as the distinction be-
tween binding international agreements and non-binding "soft law" in-
struments.

A course in international environmental law is also a wonderful op-
portunity to address the structure and operations of international organi-
zations. An instructor can easily cover at least a dozen international or-
ganizations in the course. After analyzing a "garden variety" intergov-
ernmental organization, of which the United Nations Environment Pro-
gram ("UNEP") is probably a good example, the instructor can identify a
wide variety of permutations on basic themes: bilateral organizations
(e.g., International Joint Commission); supranational organizations (e.g.,
European Union); regional organizations (e.g., UN Economic Commiss-

\(^3\) See, e.g., GURUSWAMY ET AL., supra note 1.
sion for Europe); non-UN system organizations with purposefully limited memberships (e.g., Organization for Economic Cooperation and Development); organizations with non-consensus decision-making procedures (e.g., World Bank and regional banks); organizations not created by multilateral treaty (e.g., Organization for Security and Cooperation in Europe); organizations with on-the-ground operational mandates (e.g., World Bank and regional development banks); organizations whose membership includes both states and non-governmental organizations (e.g., World Conservation Union); and organizations in which non-state actors may participate in decision-making processes (e.g., International Labour Organization). One key lesson for students is that of these, only one, UNEP, has environmental protection as its principal mandate. Some might see this as a weakness, while others might see it as a strength of the international system. One way or another, it is essential that students come to grips with environmental issues as defined in light of the missions of organizations designed to lend money for development projects (e.g., World Bank and regional banks), or to create and enforce trade rules (e.g., World Trade Organization), whose functional mandates may accommodate environmental considerations only peripherally if not reluctantly.

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

As suggested by the example of Antarctica, opportunities for integrating structure and substance abound. For example, early in the course it is useful to introduce the concept of environmental impact assessment ("EIA")—the international analogue of the environmental impact statement requirement in the domestic National Environmental Policy Act—utilizing such instruments as the UNEP Goals and Principles. The concept later reappears in the substantive treatment of Antarctica, reinforcing and expanding the earlier studies. A subsequent discussion of the World Bank and the role it plays in sustainable development, combined with analysis of the Bank's instrument addressing EIA,

---

7. See World Bank Operational Directive No. 4.01: Environmental Assessment (Oct.
provides yet another occasion to review, contrast, and elaborate on the insights acquired earlier in the context of a different international organization.

These structural templates also help students develop 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 basic structure and function of international organizations and 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.

If a course in international environmental law appears to be a 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 pressing demands of globalization are apparent. For instance, environmental considerations were a principal motivating force in the creation of the World Bank Inspection Panel. This major development was the first instance in which any multilateral institution has submitted the adequacy of its internal operations to external review. Perhaps more importantly in the long term, the Inspection Panel became an entry point through which non-state actors such as citizens' organizations could enforce public rights in a legal system that does not even acknowledge the complainant’s existence. Similarly, the North American Agreement on Environmental Cooperation, the so-called “side agreement” to the North American Free Trade Agreement (“NAFTA”), creates a channel through which private parties can request review of allegations of non-enforcement of domestic environmental laws by any of the three NAFTA states. International environmental law contains other innovations with obvious relevance to the larger corpus of public international law, such as the non-consensus decision-making procedures of the Montreal Protocol on Substances that Deplete the Ozone Layer.

A course in international environmental law should also 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. First, students need to learn to analyze the interaction of international agreements and domestic law. The little-taught Japan Whaling case, concerning domestic implementation of the Whaling Convention, is an excellent example of the way in which legal and policy considerations unique to foreign relations may generate conflicts with domestic statutory mandates. The next level of complexity concerns highly prescriptive international agreements of a regulatory character, such as those governing stratospheric ozone depletion and international trade in wastes, which must mesh with complex domestic statutory frameworks. Once again, this sort of analytical training has considerably greater application than just to the discipline of environmental law. This recently became apparent when the International Court of Justice, in response to a case initiated by Paraguay asserting a violation of a multilateral consular convention, issued an order directing the United States to refrain from executing a Paraguayan national sentenced to death in Virginia.

While the international aspect of this case may have caught criminal lawyers by surprise, environmental cases now routinely require analytical treatment of similar interfaces between international and domestic law.

In common with domestic environmental law, the international field presents relatively obvious opportunities for addressing theories of regulation. The number of international agreements is now large enough and the variety of approaches motivating them sufficiently diverse that different instruments can be analyzed from the point of view of comparing regulatory approaches. The various protocols to the Economic Commission for Europe's ("ECE") Convention on Long-Range Transboundary Air Pollution present a particularly broad range of public policy strategies. For example, technology-based controls, as in domestic environmental regulation, are a common theme in ECE protocols. Particularly noteworthy in this regard are the two sulfur protocols, the first was adopted in 1985, and the second nearly a decade later. In common with many international environmental agreements, the first sulfur protocol articulates a flat national percentage reduction approach. The later

agreement, reflecting a maturation in the international community’s treatment of the substantive issue, assigns differential reductions based on a critical load theory designed to take into account varying sensitivities to the effects of acid deposition throughout Europe. Also highly instructive for students is the response of the United States to these instruments, which often reflects domestic regulatory rigidities and constraints as, in the case of sulfur, from the structure of the domestic acid rain control program adopted in the Clean Air Act Amendments of 1990.

Unfortunately, to do full justice to the field, students would have to have training in all of the following fields: (1) public international law; (2) the domestic law of foreign relations, including the treaty power and the distinction between executive agreements and treaties in the Constitutional sense; (3) domestic environmental law, to the extent of at least passing familiarity with the basic statutes; (4) domestic administrative law, particularly with respect to rulemaking and judicial review; and (5) structural elements of domestic Constitutional law, particularly separation of powers jurisprudence. At the same time, because in legal education teachers have students for such a short time in the upperclass years, one might object to such an extensive list of prerequisites. A somewhat uneasy compromise has been to identify no prerequisites and instead to expressly teach issues of foreign relations law, including the legal parity between international agreements and statutes, the Senate’s advice and consent function, reservations to treaties on the domestic level, and, most importantly, the treaty-executive agreement distinction. Interestingly, the result is similar to that encountered in many domestic courses on environmental law, which amounts to a selective compendium of doctrines necessary to address the subject matter.

For a thorough understanding of the field, students should also be able to contend with cognate questions in foreign legal systems. For example, one of the favored techniques at the international level is harmonization of national requirements on such issues as EIA. 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 typically involves a multiplicity of simultaneous undertakings by states to alter their domestic policy and legal infrastructure in an agreed manner. Often a highly effective policy and legal strategy, harmonization is frequently 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 a 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"). However, EU law is exceedingly complex and EU environmental legislation can probably only be comprehensively covered in a course dedicated exclusively to that purpose. Successful courses on EU environmental law have been offered at a number of U.S. law schools. In any event, a basic course in international environmental law should expose students to at least a qualitative description, if not an analytically rigorous examination, of the basic Community institutions and 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. The 1985 directive on environmental assessment\(^{16}\) is very useful for this purpose because it is suitable for comparison with both U.S. legislation and international instruments.

With the publication of at least four new texts\(^{17}\) and a fifth currently in preparation, a major breakthrough in teaching international environmental law has occurred in the past five years. Two new case books have appeared in the past year alone. Previously, most teachers in the field employed their own, sometimes idiosyncratic, manuscript teaching materials. The authors of the new texts have solved one of the most difficult dilemmas encountered in teaching in this rapidly changing area, namely keeping materials current. At least as of publication, instructors can assume that the texts are up-to-date.

All the texts share a number of common attributes. First, the authors acknowledge the need to treat policy and law in tandem. Given the current impediments to effective cooperation in the international system, combined with the obvious need to train not only the students of today but the lawyers of tomorrow, this is the only possible approach. Not only must we teach students to apply existing international legal doctrine—often based on outmoded notions of interactions among states—as constraints on the universe of policy options, but students must also learn to identify the tools required to address particular environmental problems from a policy perspective and then creatively overcome international legal impediments to effective realization of public policy goals. As the planet, perhaps thankfully, does not seem to be headed in the direction of world government anytime soon, the need for such skills will only increase in the future.

Second, any teaching materials in the area of international environmental law must address the tension between cross-cutting, overarching principles, such as the precautionary principle and intergenerational eq-


\(^{17}\) See supra note 1.
uity, and expectations for treatment of specific subject matter areas such as global warming. Teaching evaluations strongly suggest that students prefer the subject-matter-specific portions of the course, and their personal interest in one or several of these topics is often the reason students choose to take the course. However, firsthand experience demonstrates that the ideal blend is probably a brief but explicit treatment of basic skills, followed by more substantive topics that quickly engage the students' interest. These discrete subject matter areas can then be effectively used as vehicles for refining and expounding upon the basic skills in such areas as international law making and the binding/non-binding distinction introduced at the beginning of the course.

Consistent with this observation, all four texts have a mix of general principles, such as the role of custom, treaties, and “soft law,” followed by more specific subjects. A review of the texts reveals that all cover the following topics in reasonable detail: acid rain; stratospheric ozone depletion; climate change; marine pollution; exports of hazardous wastes and toxic chemicals; endangered species and biodiversity; and trade and the environment. Issues addressed by some but not all of the texts in some depth include the following: international watercourses; Antarctica; human rights and the environment; the environment and national security; wetlands; international regulation of multinational corporations; international financial institutions and the environment; regulation of nuclear materials and nuclear accidents; groundwater; marine resources and fisheries; and population.

A corollary to this perspective is the need for students to work with primary materials of various kinds, in particular 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 a diagnostic tool. Any number of agreements will suffice for this purpose, but the Espoo Convention lends itself particularly well to a simple hypothetical involving transboundary pollution. The relatively accessible language of the agreement, combined with straightforward obligations arrayed in a simple temporal sequence, clearly communicate to students the expectations 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.

To some extent, all of these texts recognize the need for analysis of primary instruments; two are accompanied by documentary supplements and the others contain liberal excerpts of operative language. One point

---

for both teachers and authors to bear in mind is the more extensive the
documentary material provided, the more flexibility the teacher has to
select the subjects that will be covered in the greatest depth.

With respect to other criteria, there is some variation among the
texts. One adopts a problem-oriented approach involving the analysis of
hypothetical scenarios. Another is presented in looseleaf format, with a
chapter on protection of the marine environment available separately. The
two newest texts contain brief introductions to legal research in the field,
including discussions of access to computerized databases and the Inter-
et. Because many of the courses in this area adopt a seminar format
with an associated requirement for a research paper, this material is a
welcome inclusion. By providing instant on-line access to primary texts,
the Internet has democratized research in the field, as recent documents
previously could be quite difficult to obtain. Even the best of the text-
book treatments, however, could be considerably expanded to serve as a
more thorough reference for student researchers.

It is also worth noting that most case books on environmental law
now contain a chapter on international legal issues, as do most texts on
public international law. Of these, the latter tend to be more successful
than the former. This is not because of the relative efficacy of the draft-
ing, but because international environmental law, as noted above, tends to
draw upon skill sets and analytical approaches more closely related to
public international law than to domestic environmental and regulatory
law.

No discussion of education in international environmental law
would be complete without mentioning the “real world” opportunities in
the field. Many students come to the course motivated by personal inter-
est, oftentimes with highly useful backgrounds in the natural sciences,
the Peace Corps or other overseas experience, government, or other rele-
vant settings. Some would like to create career opportunities or “break
into the field.” While it is obviously not possible to find post-law school
jobs for each student in the class, it is not at all difficult to deliver on le-
gitimate expectations of a real-world perspective in the course, particular-
ly if students are actively engaged in research, such as for a senior pa-
per.

With the help of an extraordinarily generous five-year, $150,000
grant, the Washington and Lee University School of Law has been able to
provide a comprehensive program that synthesizes all of these elements.
Contemporaneously with the receipt of the grant, the law school created
two innovative new courses, one on international environmental law and
another entitled “Advanced Environmental Law” that covered a number
of international topics. The courses were unusual in that, unlike most
upperclass courses in law school, they lasted for an entire year. These
courses contained two related but distinct components: (1) a semester of
classroom instruction to teach students the background, skills, and ana-
lytical tools necessary to work in this area; and (2) a year-long writing project, the equivalent of a masters-level thesis, in which the students would undertake real-world environmental research projects proposed by international organizations, government agencies, legislators, and public interest organizations. The class reconvened in the second semester when the students gave hour-long presentations of their research. These presentations, an integral part of the course design, substantially expanded the substantive scope of the class, often with cutting-edge projects of immediate interest from a public policy point of view to the external sponsor. Drafts were distributed to the class in advance, with the expectation that the students in the class would read them, and discussion was lively and the student participants highly engaged.

The most salient feature of the writing project was the connection to real-world sponsors. Although not involving direct client representation, it gave the class a quasi-clinical flavor. The instructors sent out a massive mailing the summer before the class began which typically yielded about seventy proposals for a class of a dozen students—a ratio of approximately six external requests per student. Not only did demand for the students' services substantially outstrip supply, but certain student papers on extremely timely topics generated a steady flow of requests from the larger legal and policy communities. Over a five-year period, students undertook referred research projects for public interest organizations such as the Environmental Defense Fund and the Natural Resources Defense Council, government agencies like the Department of the Interior and the Office of the United States Trade Representative, international organizations including the World Bank, Congressional committees, and unusual "clients" such as the Government of Hungary.

Most of the grant money was devoted to summer fellowships for students. Over the course of five-years, the grant created international environmental law summer positions for twenty-one Washington and Lee students in international organizations, governmental agencies, and public interest groups in the United States and abroad. The student fellows received a stipend commensurate with similar job opportunities in the governmental and nonprofit sectors, typically about $450 per week for a ten week period, with limited additional funds available for travel and other unusual expenses associated with overseas work.

The students displayed extraordinary resourcefulness in taking maximum advantage of this unique opportunity, which was the equivalent of giving students a shopping bag full of money and instructing them to spend it as wisely as possible. Positions with Washington-based public interest law firms and the Environmental Protection Agency understandably featured prominently among each year's group. Other students chose to spend their summers in exciting foreign locations, often in positions that they had creatively designed to meet their own needs. One German-speaking student worked in Berlin at the Treuhandanstalt, the
government agency responsible for the privatization of state-owned enterprises dating from the communist regime in the former East Germany. Another student teamed up with a consultant on human rights to the Sierra Club Legal Defense Fund (now Earth Justice Legal Defense Fund) and assisted her in her work as an advocate before the United Nations Commission on Human Rights in Geneva during that body’s deliberations in August. A student with an interest in human rights chose to spend the summer with the Committee on the Elimination of Racial Discrimination (“CERD”) in Geneva. One student collaborated with Environmental Law Alliance Worldwide (“E-Law”) and through that organization spent the bulk of her summer with the Environmental Foundation, Ltd., a public interest law firm in Colombo, Sri Lanka. Another student spent a successful summer working in the African Development Bank in Abidjan, Côte d’Ivoire.

While such a resource-intensive program must necessarily be limited in scope, nearly every student with a viable project received funding. The payoff in some cases has been quite palpable, with a number of program alumni going on to positions with public interest organizations like the Environmental Defense Fund and the World Conservation Union/IUCN—jobs that would ordinarily be extraordinarily difficult for recent graduates to obtain without prior experience. It is interesting how many students took full advantage of each component of this comprehensive program—term-time instruction, a quasi-clinical experience during the academic year often involving direct contact with the outside “client,” and a subsequent summer internship—to consciously structure their own career trajectory.

The next logical step would be to set up a true clinic involving direct client representation. There is great potential for clinical offerings with representation of private parties through such channels, as noted above, as the World Bank’s Inspection Panel and citizen submissions to the North American Commission on Environmental Cooperation. Entry points for non-state actors are also expanding to such previously inaccessible institutions as the World Trade Organization (“WTO”).19 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 logistical effort without much pay-off to student lawyers, at least so far as management considerations are concerned. One possibility would be to team up with an organization such as the Earth Justice Legal Defense Fund (previously the Sierra Club

Legal Defense Fund) and let the partner group handle the mechanically, and often politically, complicated relationships with clients, particularly those located overseas. Students could then be referred, particular projects or even entire cases without the responsibility associated with being the “attorney of record.”

At least two other law schools, Yale and New York University, have programs similar to that described here and may go even further into direct and indirect client representation. The International Environmental Law Clinic at New York University places students with U.S. and international environmental advocacy groups, United Nations agencies, and other non-profit and governmental organizations in the field. The Yale Center for Environmental Law and Policy has undertaken several initiatives with international themes, including such topics as international environmental management, private international finance and the environment, and environmental protection in the Asia Pacific region.

It is important to emphasize that outside funding is not necessary to implement many of these initiatives. Of the constituent elements of the Washington and Lee program, only the summer fellowship component relied on external resources. Many schools already sponsor summer internships in government and public interest while some students are willing to work without pay. At the same time, institutional commitment is essential for any enterprise of this magnitude to be successful. At Washington and Lee, for example, this program has ceased to exist in the form described here not just because of the expiration of the five-year grant, but also due to constraints in the form of faculty resources needed to staff full-year courses.

II. SCHOLARSHIP IN INTERNATIONAL ENVIRONMENTAL LAW

In recent years international environmental law has been coming into its own not only as a subject of classroom instruction, but also as a recognized discipline of scholarly inquiry. One indicator, the issue of the Index to Legal Periodicals and Books covering the period September 1996 to August 1997, lists seventy-five journal articles under the heading “International environmental law and practice.” The analogous period for the year 1988-89, the first in which this entry appears in the service, contains forty-two entries, an increase of more than seventy-eight per cent in just eight years.

Just as international environmental law presents unique challenges in terms of teaching, scholarship is fundamentally different in the field. One approach, fading in popularity but still current, is what might be called “The Emerging Norm of X” article. In this piece, the author collects a variety of sources that demonstrate that “X,” whatever it is—environmental assessment, the precautionary principle, intergenerational eq-
uty—is maturing into a norm of customary law. While the exercise may be useful, such pieces have a tendency to leave at least some readers feeling vaguely dissatisfied.

For one, customary law plays a very limited role in actual practice among states on environmental issues. This point was painfully obvious in the case of the Chernobyl nuclear accident, after which there was a total absence of state-to-state claims based on a theory of state responsibility—a principal thrust of much prior scholarly work in the field. Second, many such pieces rely on questionable authority in inferring custom, such as treaty provisions or non-binding instruments. Genuine proof of a pattern of actual state practice amounting custom is painstaking and often unrewarding work performed surprisingly infrequently by international lawyers despite its central doctrinal role in the field. Without a detailed explanatory context, one might just as easily conclude that a treaty provision is a derogation from, not a codification of, custom.20 The paucity of genuine customary law in the field is immediately obvious when one examines the customary obligation not to pollute the environment of other states or of areas beyond national jurisdiction, a fundamental tenet of the field said to arise from the Trail Smelter arbitration21 and Principle 21 of the Stockholm Declaration.22 A glance at the actual state of the world demonstrates that instances in which states engage in ongoing pollution of each other’s territory overwhelmingly dwarf the number of times that states refrain from such activity out of a sense of legal obligation.

Recently, scholarship in international environmental law has tended much more toward the structure and function of the international legal system, and perhaps the interface with domestic law as well. One reason for the recent increase in interest in this direction among international environmental legal scholars has been the obvious clash between the international trade and international environmental regimes, as revealed most starkly in General Agreement on Tariffs and Trade (“GATT”) dispute settlement reports in the tuna-dolphin controversy23 and a recent

20. See Oscar Schachter, The Emergence of International Environmental Law, 44 J. INT’L AFF. 457, 462–63 (1991) (many international environmental principles “are de lege ferenda and still await the imprimatur of state practice and opinio juris communis to endow them with the authority of customary international law. . . . To say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day.”).
WTO Appellate Body reports on a similar dispute concerning shrimp caught in ways that harm endangered sea turtles. This is of course a matter of personal taste, but this line of scholarly inquiry would seem to be both more intellectually rewarding and of greater practical utility. As noted above in a teaching context, there are some inherent constraints on a scholar interested in making a meaningful contribution to legal thought and the progressive development of public policy in the field. Probably the most attractive option is to propose creative mechanisms to overcome the impediments in the international legal system while working within it and disrupting it as little as possible. Because international law of all kinds is changing so rapidly, there is a considerable market for new ideas. For instance, in a recent WTO Appellate Body decision there was a small but positive development expanding the rights of members of the public to present their views to dispute settlement panels. This encouraging step seems to have been facilitated at least in part by the opinions of legal scholars, who have overwhelmingly criticized the closed nature of WTO dispute settlement processes and identified the need for change.

Another related and productive area of scholarly inquiry is in the intersection of different areas, such as trade and environment, in largely unprecedented ways. Despite the apparently limited scope suggested by the name, international environmental law is anything but a confining discipline. The end of the Cold War and the ongoing process of globalization have revealed significant relationships between environmental quality and other public policy agendas once thought to be relatively distinct. Understanding of the connections between environment and trade in the late 1980s was largely confined to the cognoscenti. Environmental objections that contributed to the demise of President Clinton's request to Congress to authorize "fast track" negotiating authority for trade agreements, rendering him the first President since the procedure was initiated in the mid-1970s from whom that power has been withheld, have considerably elevated its public profile. Less obvious to the public, but nonetheless important, was the recent collapse of negotiations on a draft Multilateral Agreement on Investment, under consideration in the Organization for Economic Cooperation and Development and denounced on a multitude of proliferating web sites as "the corporate rule treaty" or "the plan to replace democratically responsible government." These recent controversies have not been at isolated junctures, but are emblems of a much more pervasive "interconnectedness" among the environment and other policy areas.

These relationships often manifest themselves under a rubric of "environment and...". Thus, the collapse of fast track is readily identifiable as a component of a larger debate on environment and trade. Similarly, there

24. See supra note 19.
25. See supra note 19.
are ongoing colloquies over the relationship between environment and
development and environment and security. Each of these three areas has
become well-defined, and has its own scholars, governmental officials,
and advocates specializing in these interdisciplinary approaches.

One common attribute of the "environment and ..." approach is
that it joins two apparently divergent public policies. On this level, it is
pointless or even counterproductive to employ the kind of good-versus-
evil metaphors often associated with unidirectional, mission-oriented
public policy agendas in areas such as environment. After all, trade, de-
development, and security also provide social benefits. The tendency of
proponents of free trade rather cavalierly to toss around the label "pro-
tectionist" as a synonym for "corrosive," "subversive," or simply "bad" is
perhaps the most obvious example.

While the approach of juxtaposing environment with trade, security,
and development may have extended the reach of international environ-
mental law, its analytical benefits are limited. At root, these associations
invite an approach that attempts to reconcile conflicts or tradeoffs be-
tween apparently competing policy goals. There is consequently a con-
siderable risk that this focus on the "bilateral" overlap between previ-
ously established categories of public policy will overlook a deeper syn-
thesis of these disparate elements at a higher level of conceptual gener-
ality.

The best candidate for such a comprehensive concept is probably
"sustainable development," the principal theme of UNCED. Unfortu-
nately, the term has been used in a catch-all sense by so many in such a
variety of contexts that it has ceased to have any substantive meaning, if
it ever did. While in some views the concept of sustainable development
encapsulates notions of tradeoffs, the better view is that the term is meant
to be an overarching construct that encompasses a variety of compart-
mentalized public policy goals, including environment, security, eco-


26. Although there is no consensus definition of the term "sustainable develop-
   ment," the following has gained broad acceptance:

Sustainable development is development that meets the needs of the present
without compromising the ability of future generations to meet their own
needs. It contains within it two key concepts:

* the concept of 'needs', in particular the essential needs of the world's poor,
to which overriding priority should be given; and

* the idea of limitations imposed by the state of technology and social organi-
   zation on the environment's ability to meet present and future needs.

27. For example, the WTO's constitutional instrument refers to "optimal use of the
    world's resources in accordance with the objective of sustainable development." Agreement
    Establishing the Multilateral Trade Organization, preamble para. 1, Dec. 15, 1993,
    Multilateral Trade Negotiations (The Uruguay Round), Doc. MTN/FA, 33 I.L.M. 13,15
    (1994).
speak of a "sustainable security policy," "sustainable trade," or even 
"sustainable environmental policy,"28 each of which cries out for further 
elaboration in the literature. For that matter, some have suggested that the 
international acceptance of the concept of sustainable development im-
plies the potential displacement of prior environmental law,29 an assertion 
with similar implications in terms of technical complexity.

Since World War II, an important paradigm has equated multilateral 
cooperation with a progressive political orientation. As a political matter 
within the United States, realization of the obvious potential benefits 
from multilateral cooperation has on occasion been impeded by opposi-
tion in some quarters to multilateral efforts and international organiza-
tions such as the UN. This hostility to concerted international action in 
turn has generated a counter-reaction tending to equate "multilateral" 
with "desirable" or "good," seemingly regardless of content. This kind of 
thinking has tended to insulate institutions such as the World Trade Or-
ganization, the World Bank, and the UN from criticism among supporters 
of multilateralism for fear of undermining their already fragile support. 
For example, it was not so long ago that even active scholars in the field 
could be found relying on the existence of an instrument, as opposed to 
its content, as evidence of beneficial multilateral activity in the area in 
question.

This is a matter of opinion, but in a global fin de siècle world, after 
the end of the Cold War, multilateralism would seem to be a firmly es-

tablished, virtually unstoppable trend driven by considerable demand 
among states and the public. In a setting of such vigor and resilience, one 
can afford, and arguably has a responsibility, to scrutinize the work prod-
uct of international institutions much more closely than before. To put in 
another way, just because Pat Buchanan is opposed to NAFTA does not 
mean that thoughtful observers have to like it. The implications of such 
perspective are already evident in international legal scholarship, which 
over the past several years has become much more skeptical of recent 
legal and policy responses on such matters as global warming.

28. See generally David A. Wirth, Globalizing the Environment, 22 WM. & MARY 

29. See generally Philippe Sands, International Law in the Field of Sustainable De-
velopment: Emerging Legal Principles, in SUSTAINABLE DEVELOPMENT AND INTERNA-
TIONAL LAW 53 (Winfried Lang ed., 1995) [hereinafter SUSTAINABLE DEVELOPMENT] 
(arguing that international law in field of sustainable development comprises "prior and 
emerging international law in three fields of international cooperation: economic develop-
ment, the environment and human rights. Historically, these three subjects have for the 
most part followed independent paths, and it is only with the advent of the concept of sus-
tainable development, endorsed by the international community at UNCED, that they will 
increasingly be treated in an integrated and interdependent manner."); cf. Howard Mann, 
Comment on the Paper by Philippe Sands, in SUSTAINABLE DEVELOPMENT, supra at 67 
(arguing that the entire body of international law should "be seen as being for sustainable 
development, rather than having the legal community struggle to define a new, separate or 
overarching branch of law—international law of sustainable development").
Indeed, an analytically critical perspective seems to characterize much of international environmental law today, both in the classroom and in the legal literature. Students, teachers, and scholars are disputing the efficacy of international responses to environmental threats and challenging the environmental integrity of the totality of international cooperation. Just as they have the responsibility to ask the hard questions, they—and we—also have a duty to participate in the search for answers.