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Customary (and Not So Customary) International Environmental Law

DANIEL BODANSKY*

In this article, Professor Bodansky examines the creation and importance of customary international law. He suggests that the debate over the legal status of any given norm may be misplaced. Instead, he suggests that international lawmakers should spend their time and energy incorporating norms, regardless of their true status, into "concrete treaties and actions." The author begins his discussion by providing a working definition of customary international law. He asserts that such law can be based not just on uniformities of state behavior, as is traditionally held, but also on regularities in behavior. Thus, customary international law can be formed even when states do not fully comply with a particular norm. Next, Professor Bodansky contends that state declarations may be just as indicative and useful in uncovering customary international law as state behavior. But the author goes on to state that such "declarative law" does not and should not carry the same weight as customary norms based on state behavior. Because such norms are "non-legal," courts and other arbiters cannot enforce them against a state. The author concludes, however, that these non-legal norms may play a significant role in setting the terms of the debate, especially in negotiations between states. These norms can then be incorporated into treaties and other international agreements, making them more concrete and enforceable. Ultimately, as the author states, the international community should spend less time debating a norm's legal status and more time translating general norms into enforceable treaties.

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Recent years have witnessed a proliferation of international environmental agreements.¹ For each new environmental problem, a new treaty is negotiated: depletion of the stratospheric ozone layer,² transboundary movements of hazardous wastes,³ climate change,⁴ the loss of biological diversity,⁵ desertification, and so on.⁶ Although, the efficacy of these treaties remains an open question,⁷ and their relative benefits versus soft law instruments are poorly understood,⁸ most scholars consider treaties to be the preeminent method of international environmental lawmaking. Through the negotiation of treaties, states may develop detailed substantive rules and international supervisory machinery to address particular environmental problems.⁹

The growing importance of treaties suggests a diminished role for customary international environmental law. Nevertheless, many writers still consider custom an important source of international environmental law.¹⁰ Claims like the following by the distinguished German scholar Rüdiger Wolfrum are not infrequent: "There is agreement in international law that, in general, transfrontier damage is prohibited. This prohibition has essentially

1. Since 1980, the UNEP treaty register has increased from 102 to 164. UNITED NATIONS ENVIRONMENT PROGRAM, REGISTER OF INTERNATIONAL TREATIES AND OTHER AGREEMENTS IN THE FIELD OF THE ENVIRONMENT (1993); see also Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421, 424 (1989).

2. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. 11097, 26 I.L.M. 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (1987).

3. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N.E.P. Doc. IG. 80/3.

4. U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

5. U.N. Conference on Environment and Development: Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818.

6. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *opened for signature* Oct. 14, 1994, U.N. Doc. A/AC.241/15/Rev.7, 33 I.L.M. 1328 (1994).

7. Thomas Bernauer, *The Effectiveness of International Environmental Institutions: How We Might Learn More*, 49 INT'L ORG. 351 (1995).

8. *Environmental Law: When Does It Make Sense to Negotiate International Agreements?*, 87 PROC. AM. SOC'Y INT'L L. 377 (1993); Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65 (1980).

9. E.g., PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 11, 84-85 (1992); Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 470 (1991).

10. BIRNIE, *supra* note 9, at 87; see also Pierre-Marie Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in INTERNATIONAL LAW AND POLLUTION 61 (Daniel B. Magraw ed., 1991); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-604 (1987).

been developed under customary international law.”¹¹ Scholars have asserted, for example, that whales have an emerging right to life under customary international law;¹² that states must take steps to protect endangered species;¹³ and, more generally, that states have a duty to provide notice and engage in consultations concerning activities that may cause transboundary harm.¹⁴ Meanwhile, expert groups have spent considerable time and effort attempting to codify what they regard as the customary norms of international environmental law.¹⁵

True to their disciplinary training, international legal scholars tend to place importance on whether a norm represents customary international law and have spilled much ink debating whether particular environmental norms have achieved this status. I recently participated in one such debate concerning the customary law status of the so-called “precautionary principle.”¹⁶

In this essay, I wish to step back and ask two broader questions: First, what do we mean when we say that a norm is part of customary international law? Second, does it matter whether a norm has achieved this status and, if so, why? My preliminary conclusion is that much less is at stake than is ordinarily supposed. Rather than continue arguing whether a particular environmental norm is part of customary international law, international legal scholars might do better to invest their time elsewhere.

11. Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GER. Y.B. INT'L L. 308, 309 (1990). See also *id.* at 310 (Stockholm Principle 21 “is more than a policy programme, it has to be regarded rather as a restatement of international customary law.”); BIRNIE & BOYLE, *supra* note 9, at 89 (“It is beyond serious argument that states are required by international law to take adequate steps to control and regulate sources of serious global environmental pollution or transboundary harm within their territory or subject to their jurisdiction.”); Dupuy, *supra* note 10, at 63 (arguing obligation to prevent transfrontier pollution is “well-established”).

12. Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21 (1991).

13. Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT’L L. 1, 30 (1990).

14. See Wolfrum, *supra* note 11, at 313; RESTATEMENT, *supra* note 10, § 601, comment e; cf. Daniel G. Partan, *The “Duty to Inform” in International Environmental Law*, 6 B.U. INT’L L.J. 43, 83 (1988) (duty to inform “has finally emerged as a legal duty of all states under general international law,” although its customary law status open to doubt).

15. See, e.g., EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (1987). For a general discussion of principles of international environmental law, see PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (1994).

16. The precautionary principle states that when there is a threat of serious or irreversible environmental harm, lack of full scientific certainty should not be a reason to postpone action. Some scholars have argued that the precautionary principle is part of customary international law, see, e.g., James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT’L & COMP. L. REV. 1, 20-21 (1991). I have remained somewhat skeptical. See Daniel M. Bodansky, *Scientific Uncertainty and the Precautionary Principle*, 33 ENVIRONMENT 4 (1991).

I. THE ORTHODOX ACCOUNT OF CUSTOMORY INTERNATIONAL LAW

In claiming that a norm, such as the duty to prevent transboundary harm or the precautionary principle, is part of customary law, what kind of claim is one making? According to the standard account of customary international law, claims about customary law are empirical claims about the ways that states (and other international actors¹⁷) regularly behave.¹⁸ States, for example, generally grant immunity to foreign diplomats; refrain from exercising law enforcement functions in the territory of other states; and do not interfere with foreign vessels on the high seas. These represent significant regularities of behavior--apparently normatively based--amidst the extremely complex and often seemingly *ad hoc* interactions among states.

Anthony D'Amato, while departing in many respects from the standard account of customary international law, has forcefully captured its behavioral orientation:

To approach the subject of custom from the simplest starting point, we look at the international scene. We could have expected to see nothing but chaos and anarchy, everybody fighting with each other all the time and nobody having any idea about what's going on -- in other words, Hobbes' state of nature. But instead we see regularity. We see for the most part peace and peaceful accommodations. . . .

So we say to ourselves: "Aha! Something's going on here that's not explained." There is a systemic process here. . . . We are witnessing ordered behavior. . . .

Well, that's our customary-law problem: to figure out what laws account for these regularities. And so we start looking at what states do and what they claim. The laws could be anything. We don't dictate what international law is; we look for it and find it out there in the real world. International law is implicit in the interactions of these state units. Somehow they're interacting in ways that tell us that there is regularity there. If we were physicists we would say the same

17. For example, international organizations, transnational corporations and other non-governmental groups.

18. Thus, according to the standard theory, uniform and consistent state practice is the basis of custom. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 277 (describing custom as a "constant and uniform usage, accepted as law"). See generally KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (2d rev. ed. 1993).

thing. If we saw a bunch of microbes, and they were acting in a certain orderly fashion, we would say that there must be some laws regulating their behavior. . . . So today we're looking at states, and we say the same thing—that there are certain laws that seem to account for their regular behavior.¹⁹

In saying that customary rules represent regularities of behavior, several points should be noted. First, the approach is empirical rather than normative. It attempts to describe the existing norms that govern the relations among states, but does not advocate or prescribe new norms. Accordingly, it draws a clear distinction between *lex lata* (law as it is) and *lex ferenda* (law as it should be).²⁰

Second, customary rules are not equivalent to simple behavioral regularities. Behavioral regularities are like physical laws; they can be identified by an external observer, whose “view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop.”²¹ In contrast, the concept of following a rule has an internal as well as an external aspect: the red light is not merely a predictor or sign of traffic stopping; it is a *signal* for traffic to stop. The doctrine of *opinio juris* serves to introduce the internal point of view into the concept of customary international law: Customary norms depend not only on state practice (that is, on observable regularities of behavior), but also on acceptance of these regularities as law by states.

Finally, customary rules represent regularities, but not necessarily uniformities, of behavior. The behavioral approach requires a general congruence between rules and behavior.²² If a purported rule says one thing and states generally do something else, one can no longer say that the rule “governs” behavior. Nevertheless, mistakes and violations of rules are possible.

19. Anthony D'Amato, *Seminar on the Theory of Customary International Law* in INTERNATIONAL LAW ANTHOLOGY 73, 74 (Anthony D'Amato ed., 1994).

20. See South West Africa, 1966 I.C.J. 3, 34 (July 18) (drawing a sharp distinction between law and morality).

21. H.L.A. HART, THE CONCEPT OF LAW 87 (1961).

22. Cf. Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicar. v. U.S.), 1986 I.C.J. 4, 98 (June 27) (“The Court does not consider that, for a rule to be established as customary the corresponding practice must be in absolutely rigorous conformity with the rule. . . . [T]he Court deems it sufficient that the conduct of states should, in general, be consistent with such rules . . .”).

Although the concept of customary international law is often viewed as mystifying,²³ the emergence and application of custom are commonplace occurrences. Language provides a good example. Every time we speak, we apply an extremely complex set of customary rules of grammar and usage. These rules are not legislated or enforced by any centralized body (the attempts of the French Academy notwithstanding²⁴). Instead, they emerge and continue to evolve through the regular practice of language users. Like any type of customary rule, they need to be identified and learned if one is to participate effectively in society.

In ascertaining customary law, our task is similar to that of a legal anthropologist who wishes to determine how an alien society works or of someone trying to understand a strange game or a foreign language. We must observe what actors do to see what regularities or patterns exist.²⁵ In watching a football game, for example, we might notice that players' actions seem to be divided into discrete "plays;" one side has the ball for several such plays in a row; during each play, the ball can be advanced by running or passing or kicking, and so on. Similarly, in learning a foreign language, we could try to observe how natives regularly use and combine words. This is presumably how infants learn vocabulary (if not grammar)—through induction from observed behavior.

Do the purported norms of customary international environmental law—such as the prohibition on transboundary harm—represent regularities in state behavior? Would the proverbial Martian coming to Earth²⁶ be able to induce these norms by observing what states do? The short answer seems to be "no."²⁷ Consider, for example, the duty to prevent transboundary pollution, generally viewed as one of the most firmly established norms of customary international environmental law. Although I am unaware of any systematic empirical study of this issue, transboundary pollution seems much more the

23. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971) ("The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic."); G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 85 (1983); WOLFKE, *supra* note 18, at xiii ("[I]nternational custom and customary law still raise the greatest number of doubts and controversies" of any type of international law).

24. The French Academy was founded in 1635 by Cardinal Richelieu "to maintain the purity of the language . . . and to serve as the ultimate judge of approved usage." *THE NEW COLUMBIA ENCYCLOPEDIA* 1012 (William H. Harris & Judith S. Levey eds., 1975).

25. Cf. Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 *HARV. L. REV.* 539 (1947) (emphasizing study of judicial and arbitral decisions).

26. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 41-42 (1990).

27. Cf. Schachter, *supra* note 9, at 462-63 (admitting that there is only fragmentary evidence that international environmental principles are supported by state practice and *opinio juris*).

rule than the exception in interstate relations. Pollutants continuously travel across most international borders through the air and by rivers and ocean currents. In a few cases, states have undertaken efforts to reduce these pollution flows—generally, through treaties.²⁸ Leaving aside the question of whether these treaties can create or are evidence of a customary norm, they apply to the relations among only a small fraction of the 180-plus countries of the world, and presumably cover only a small part of the total flow of transboundary pollution.²⁹ As Schachter concludes, “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.”³⁰

If the putative rules of customary international environmental law reflected behavioral regularities, then they would have a predictive function. Based on these rules, for example, we could predict how a state would most likely behave when considering an activity with potential transboundary effects. The state would undertake an assessment, provide notice to and engage in consultations with potentially affected states, and not proceed if there were a significant risk of harm. Indeed, according to the precautionary principle, one would ordinarily expect states to refrain from actions that have the potential to cause substantial, irreversible harm even if significant uncertainties exist. Would these be sound predictions of state behavior? Quite the contrary. If one were a government lawyer providing advice to policy makers, reliance on the purported norms of customary international environmental law as the basis of one’s predictions would constitute malpractice.

As a growing number of international legal scholars are recognizing, there is a divergence between the traditional theory of customary law, which emphasizes consistent and uniform state practice, and the norms generally espoused as “customary.”³¹ Robert Jennings has observed, “Most of what we perversely persist in calling customary international law is not only *not*

28. *E.g.*, Convention on Long-Range Transboundary Air Pollution (LRTAP), Nov. 13, 1979, T.I.A.S. 10541, 18 I.L.M. 1442; Agreement Concerning Frontier Watercourses (Fin.-U.S.S.R.), Apr. 24, 1964, 537 U.N.T.S. 231. If any behavioral regularity were in the process of emerging, it would be that states negotiate treaties in response to transboundary pollution.

29. Schachter, *supra* note 9, at 462 (“Environmental treaties, though numerous, are limited in scope and in participation. On the whole, they are not accepted as expressions of customary law and are regarded as binding for the parties alone.”).

30. *Id.* at 463.

31. *See, e.g.*, Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87 (1991); N.C.H. Dunbar, *The Myth of Customary International Law*, 8 AUSTRAL. Y.B. INT’L L. 1 (1983); Stephen Zamora, *Is There Customary International Economic Law?*, 32 GERMAN Y.B. INT’L L. 9 (1989).

customary law; it does not even faintly resemble a customary law.”³² Torture is said to be prohibited by customary international law³³ even though it is common throughout the world.³⁴ Prompt, adequate, and effective compensation is held to be required by customary international law³⁵ even though this formula has seldom, if ever, been applied by states in actual expropriation cases.³⁶ Similarly, scholars characterize the duty to prevent transboundary pollution and the precautionary principle as customary obligations when there is little support for them in the actual behavior of states. As Jennings concludes, “Perhaps it is time to face squarely the fact that the orthodox tests of custom—practice and *opinio juris*—are often not only inadequate but even irrelevant for the identification of much new law today.”³⁷

II. “DECLARATIVE” INTERNATIONAL ENVIRONMENTAL LAW³⁸

According to the orthodox account of customary international law, few principles of international environmental law qualify as customary. Does this mean that claims about customary international environmental law are simply mistaken? Perhaps, but I would suggest that these claims may instead reflect a different conception of customary international law—one that focuses on what states say rather than what they do. While writers pay lip service to the traditional account,³⁹ they are really discussing a very different kind of law.

Consider the methodology used to establish the existence of customary international environmental norms. According to the traditional account, one would need to undertake a systematic survey of state behavior to determine whether a norm is part of customary law. For example, with respect to the duties to assess activities that may cause transboundary harm and to notify

32. Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982) (emphasis in original).

33. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

34. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82, 91-92 (1992).

35. Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 488 (1991).

36. Generally expropriation cases have been resolved through lump sum settlements, in which considerably less than full compensation has been paid. RICHARD LILICH & BURNS WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1975).

37. Robert Y. Jennings, *What Is International Law and How Do We Know It When We See It?*, 37 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 59, 67 (1981).

38. Chodosh, *supra* note 31.

39. See, e.g., Dupuy, *supra* note 10, at 61 (admitting that “from a strict point of view,” customary law should “consist only of those principles that receive a concrete application in the usual conduct and behavior of States.”).

potentially affected states, one would need to identify the set of activities that pose a significant risk of transboundary harm and then examine how often states undertake assessments and provide notifications. Similarly, with regard to the duty to prevent significant transboundary pollution, one would need to determine whether states regularly take action to limit the pollution escaping their borders.

Needless to say, attempting to induce the rules of customary international law directly from state practice would be a Herculean task.⁴⁰ While legal writers generally claim to adhere to the traditional account, their assertions about customary international law are not based on surveys of state behavior,⁴¹ nor does their training as lawyers equip them for this task. Even when surveys of state practice are undertaken—by committees of the International Law Association for example—the reliability of these efforts is questionable.⁴² If we really wanted systematic surveys of state practice, anthropologists and historians would likely do a better job.

Lawyers tend to be good, not at empirically studying behavior, but rather interpreting and utilizing texts—for example, cases, statutes, treaties, and resolutions. And, in writing about “customary” international law, this is exactly what international lawyers do. They base their arguments on both written and oral texts, produced in some cases by states, but often by non-state actors such as courts and arbitral panels,⁴³ intergovernmental and non-governmental organizations,⁴⁴ and legal scholars. Their methodology is to

40. *Cf.* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) (naming his ideal judge “Hercules”). Zamora comments that only the International Law Commission “in permanent session with armies of researchers could gather and sift through all the relevant evidence to establish, in a manner acceptable to social scientists, the existence of a rule of customary international law.” *See Zamora, supra* note 31, at 38.

41. Schwarzenberger’s comment, that “the immense material from which [international custom] may be gathered has hardly yet been touched by international lawyers,” still rings true today. *See Schwarzenberger, supra* note 25, at 563-64.

42. The following example from personal experience is illustrative. Currently, I serve on an International Law Association committee charged with examining coastal state jurisdiction over marine pollution. As the U.S. member, I was responsible for reporting on U.S. practice. Initially, I expected this would be a relatively straightforward task. The problem of coastal state jurisdiction is an old one, of which government officials are well aware and about which they might be expected to keep records. Nonetheless, it has proven surprisingly difficult to obtain systematic information about incidents of pollution of U.S. coastal waters by foreign vessels and the subsequent U.S. response. If this information is inaccessible with regard to the United States, think how much more difficult it must be to obtain for most other states. By necessity, my report focused on U.S. legislation and regulations, with only anecdotal information about actual pollution incidents.

43. *See Norton, supra* note 35, at 497-98 (“Virtually all of the recent opinions [of the Iran-U.S. Claims Tribunal] have placed their principal reliance on judicial and arbitral precedents.”).

44. The International Law Association and the Institute of International Law are examples.

collate these texts to see whether a critical mass of authority exists in support of a given norm. A perusal of any work on customary international environmental law confirms that this methodology is the rule, not the exception. At most, scholars cite one or two celebrated incidents, such as the Chernobyl or Sandoz accidents, but provide little or no analysis of whether these incidents typify state behavior. The International Law Association, for example, concluded that the duty to notify was a norm of customary international law, citing only seven examples of state practice,⁴⁵ out of the presumably countless instances in which states have undertaken activities with a significant risk of transboundary harm. Instead, emphasis was placed on the various resolutions and treaties in which the putative customary norm appeared.⁴⁶

Discussions of the duty to prevent transboundary pollution provide another good example of this methodology. Generally, writers begin by citing *Trail Smelter*,⁴⁷ which after more than fifty years is still the only case in which a state was held internationally responsible for causing transboundary harm.⁴⁸ Writers then cite to Principle 21 of the Stockholm Declaration,⁴⁹ now joined by the recent reiteration of this principle (very slightly modified) in the 1992 Rio Declaration.⁵⁰ For good measure, references are also usually included to the O.E.C.D. Council Recommendation Concerning Transfrontier Pollution,⁵¹

45. See Partan, *supra* note 14, at 51. Three of these examples were based on treaties. Even with respect to the four instances of notification not based on treaty, whether these were made out of a sense of international legal obligation is, according to Partan, "problematical" and "entirely speculative." *Id.* at 54.

46. *Id.* at 51-53.

47. *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1938, 1965 (Mar. 11, 1941) ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.").

48. The *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4 (judgment of Apr. 9), also cited by most scholars in support of the duty to prevent transboundary environmental harm, did not involve transboundary pollution. Instead, it enunciated the more general principle that a state may not knowingly allow its territory to be used to injure another state. *Id.* at 22.

49. Stockholm Declaration on the Human Environment, princ. 21, REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, Stockholm, June 5-16, 1972, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14, pt. 1, ch. 1 (1973), reprinted in 11 I.L.M. 1416 (1972) ("States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

50. Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 876.

51. OECD Council Recommendation C(74)224, Nov. 14, 1974, Title B(2), in OECD, OECD AND THE ENVIRONMENT 142 (1986) (states "should, individually and jointly, take all appropriate measures to prevent and control transfrontier pollution").

U.N. General Assembly resolutions,⁵² the International Law Association's Montreal Rules of International Law Applicable to Transfrontier Pollution,⁵³ various treaties,⁵⁴ and the numerous international law scholars who have asserted that customary law imposes a duty to prevent transboundary environmental harm.⁵⁵

Of course, the focus on verbal rather than physical practice could reflect not a search for a different type of legal norm, but merely a methodology for discovering the rules of state behavior. Just as one might find it easier to learn the rules of cricket by studying a rules book or by asking someone familiar with the game rather than through direct observation and induction, it may be easier to apprehend the rules of state behavior by studying what states say about customary law rather than by directly observing what they do. This would be an appropriate methodology when a state's statements and actions are congruent; when state declarations are a good guide to behavior. In the environmental realm, however, verbal claims and physical behavior often diverge. States acknowledge a duty to prevent significant transboundary harm, but continue to cause such harm; they accept resolutions recommending assessments and notification, but seldom act accordingly. Consequently, studying verbal practice appears to be a misguided methodology for discovering behavior regularities.

In my view, the focus by scholars on verbal practice is not merely methodological; it represents a fundamentally different ontology of international law—one that is discursive rather than behavioral in orientation. International environmental norms reflect not how states regularly behave, but how states speak to one another. They represent the evaluative standards used by states to justify their actions and to criticize the actions of others. Writers

52. *E.g.*, Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States, G.A. Res. 3129 (XXVIII), U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9030/Add.1 (1973).

53. Montreal Rules of International Law Applicable to Transfrontier Pollution, art. 3(1), Int'l Law Assn., Rep. 60th Conf., at 1-3 (1982) ("States are in their legitimate activities under an obligation to prevent, abate, and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.").

54. *E.g.*, U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 194(2), U.N. Doc. A/Conf.62/121, 21 I.L.M. 1261 (1982) ("States shall take all measures necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other States and their environment.").

55. *See, e.g.*, BIRNIE & BOYLE, *supra* note 9, at 89-95. Dupuy, for example, cites the *Trail Smelter* and *Corfu Channel* cases, Stockholm Principle 21, several U.N. General Assembly resolutions, OECD Council recommendations, the Helsinki Final Act, and the UNEP Draft Principles of Conduct on Shared Natural Resources. Dupuy, *supra* note 10, at 64-65. As far as "concrete cases" of state practice are concerned, however, he notes that states "seem partly to ignore" the rule prohibiting transboundary pollution. *Id.* at 66.

persist in characterizing these norms as “customary,” the catch-all term generally applied to any non-treaty norm,⁵⁶ but it would be more accurate to distinguish this type of norm from custom. Chodosh has suggested the term “declarative law.”⁵⁷ A more pointed characterization is “myth system,”⁵⁸ since these norms represent the collective ideals of the international community, which at present have the quality of fictions or half-truths.⁵⁹

III. THE ROLE OF “DECLARATIVE” LAW

Assuming that so-called customary international environmental norms represent regularities in discourse rather than regularities in state behavior, what difference then do these norms make? Should we care about whether this myth system counts as international law and, if so, why?

In thinking about these questions, it is useful to distinguish between three ways to implement and enforce legal norms: by courts and arbitral tribunals (third-party control); through voluntary compliance (first-party control); and through interactions among the subjects of the legal system (second-party control).⁶⁰ Third-party control—the paradigm of domestic legal systems—is the easiest situation. Where the possibility of adjudication or arbitration exists, the distinction between legal and non-legal norms matters, since courts will

56. See Chodosh, *supra* note 31, at 88. Another possibility is that these norms represent “general principles of law.” See Partan, *supra* note 14, at 72 (duty to inform is a general principle of law). This at least brings them under the rubric of one of the accepted sources of international law (although arguably with little advance in understanding, since the category of “general principles” has no well-accepted meaning). Cf. Schwarzenberger, *supra* note 25, at 549 (criticizing the resort to general principles of law as a means of avoiding the need to research state practice). Most international environmental principles, however, do not fit within any of the proposed theories of “general principles of law.” They are not principles of legal logic, nor do they appear to represent principles common to most national legal systems. Although traces of the precautionary principle can be found in U.S. and European environmental law, generalizing from this to the rest of the world reflects a Eurocentric view. TIMOTHY O’RIORDAN & JAMES CAMERON, *INTERPRETING THE PRECAUTIONARY PRINCIPLE* (1994). Finally, they do not represent principles of natural law. Although their proponents tend to defend them in natural law terms (i.e., as necessary to cope with international environmental problems), the primary authority for their legal status is positivist. Scholars justify these norms not in terms of abstract justice, but by reference to certain kinds of evidence, including U.N. General Assembly resolutions, treaties, reports of experts groups, and the writings of other international law scholars.

57. Chodosh, *supra* note 31.

58. W. MICHAEL REISMAN, *FOLDED LIES* 15-36 (1979) (discussing the difference between “myth system” and “operational code”).

59. *AMERICAN HERITAGE DICTIONARY* 1196 (3d ed. 1992) (defining “myth” as a story “delineating the psychology, customs, or ideals of society” and as “a fiction or half-truth, especially one that forms part of an ideology”).

60. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 126-27 (1991) (distinguishing between systems of first-, second-, and third-party control).

enforce legal but not non-legal norms.⁶¹ Debates about whether a norm is part of international law are not purely academic, for if one can convince a court that a norm represents the law, then that court can apply and enforce the norm.

A good illustration is the *Filartiga v. Pena-Irala* case,⁶² in which the plaintiff persuaded the Second Circuit Court of Appeals that customary international law prohibits torture. The possibility of judicial enforcement gave significance to the debate about whether the prohibition on torture is customary. The same situation prevails in the Iran-U.S. Claims Tribunal, which has applied the "prompt, adequate and effective" compensation formula as part of customary international law.⁶³

In my view, most writers on customary international environmental law instinctively assume a state of affairs where third-party dispute resolution is available, and subconsciously address their arguments to legal decisionmakers, such as courts and arbitrators.⁶⁴ These legal decisionmakers are the real target audience for the voluminous writings on customary international environmental law.⁶⁵ The problem is that courts and arbitral tribunals currently play only a relatively minor role in addressing international environmental issues.⁶⁶ Third-party dispute resolution has resolved few environmental problems.⁶⁷ That is why *Trail Smelter* must bear such a heavy load in current scholarship on customary international environmental law. The establishment of an environmental chamber of the International Court of Justice and the recent cases between Nauru and Australia and between Hungary and Slovakia may signal the emergence of a greater judicial role. But, at present, legal discourse that presupposes a judicial audience plays to a largely empty house.

Of course, even when judicial enforcement is unavailable, norms may still affect behavior by exerting a compliance pull on states.⁶⁸ Non-legal as well as

61. See Bothe, *supra* note 8, at 87.

62. *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

63. *Sedco v. National Iranian Oil Co.*, 10 IRAN-U.S. CL. TRIB. REP. 180 (1986 I), 25 I.L.M. 629, 631 (1986).

64. Legal arguments are also addressed to legislatures, but here the arguments are normative rather than descriptive; they concern what the law *should* be, not what it *is*.

65. See Hans Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISE 407, 413 (Norbert Horn ed., 1980) ("[W]henver the volume of learned comment outstrips the supply of 'hard' decisional law, and especially wherever scholarly discussion starts to feed on itself, it loses touch with reality.").

66. In a few international regimes, such as the European Union and the World Trade Organization, the situation is different, but these regimes remain the exception.

67. Thus far, domestic courts have infrequently applied international environmental norms, in contrast to human rights norms, which have often been the subject of litigation in U.S. courts.

68. See FRANCK, *supra* note 26. This factor is stressed by Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995).

legal norms may exert such a pull. Moral norms, for example, can influence behavior through the operation of conscience.⁶⁹ But, arguably, the legal status of a norm enhances its influence.⁷⁰ If people feel that the “secondary” rules for the creation of law are legitimate, then they are likely to accept a rule produced through that lawmaking process, whether they like the substance of the rule or not. Much compliance with law results from this voluntary mechanism.⁷¹

Does declarative international environmental law exert a significant compliance pull on states? Again, I am not aware of any empirical studies of this question, but my intuition is that the answer is no. First, at least some important states do not accept the secondary rule of law formation underlying declarative law--*i.e.*, that commonly repeated statements in treaties, declarations, and the like create general norms of behavior, applicable to the entire range of state action, not just the more specific areas where the norms were originally propounded. Second, in the absence of judicial enforcement, customary norms must have a relatively high degree of specificity in order to exert a constraining influence on states.⁷² Indeed, the determinacy of norms--the degree to which they establish certainty of expectations about future action--may influence compliance more than their legal or non-legal character. The declarative rules of international environmental law, however, are very general and provide little specific guidance to states.⁷³ States are told, for example, to avoid significant transboundary pollution, but what constitutes “significant”? They ought to undertake precautionary action, but in what circumstances and to what degree? As a result of this vagueness, states may basically do what they like and argue that their actions are consistent with customary international law.

Given the rarity of third-party dispute resolution, and the weak compliance pull exerted by “declarative” international environmental norms, the biggest

69. Similarly, political obligations undertaken in solemn form, such as the Helsinki Final Act, are often taken seriously by states and exert a compliance pull. Bothe, *supra* note 8, at 85.

70. *Id.* at 78 (states find it somewhat easier not to comply with resolutions that are not legally binding, but this is only one factor among many in determining actual compliance).

71. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

72. See FRANCK, *supra* note 26, at 52 (arguing that the determinacy of rules is an important factor in their legitimacy).

73. See *Developments in the Law--International Environmental Law*, 104 HARV. L. REV. 1484, 1504-05 (1991); Ian Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 179, 179 (1973). Dupuy argues that customary international environmental norms are no more vague than domestic norms such as good faith or due process. Dupuy, *supra* note 10, at 69. The difference, however, is that courts can give more specific meaning to domestic norms in the context of concrete cases. In contrast, the general unavailability of international adjudication implies that norms such as the duty to prevent transboundary pollution remain vague.

potential influence of these norms is on second-party control mechanisms. Most international environmental issues are resolved through mechanisms such as negotiations, rather than through third-party dispute settlement or unilateral changes of behavior. In this second-party control process, international environmental norms can play a significant role by setting the terms of the debate, providing evaluative standards, serving as a basis to criticize other states' actions, and establishing a framework of principles within which negotiations may take place to develop more specific norms, usually in treaties. Consider, for example, the role of the duty to prevent transboundary harm in the U.S.-Canada acid rain dispute. This norm did not directly constrain the United States; but it arguably had an indirect effect by providing a shared normative framework for the negotiations that led ultimately to the 1991 U.S.-Canada Air Quality Agreement.⁷⁴ To the extent the norm influenced state behavior, it was through this indirect mechanism.

My hypothesis, however, is that these functions of international environmental norms do not depend on a norm's legal status. Whether the duty to prevent transboundary pollution or the precautionary principle are part of customary international law, they will set the terms of international discussions and serve as the framework for negotiations. If so, the current debates over the legal versus non-legal status of these norms are of little consequence. They would matter if dispute resolution were more prevalent. But so long as courts and arbitrators play a minor role, these debates will remain a sideshow. Rather than continue them, our time and efforts would be better spent attempting to translate the general norms of international environmental relations into concrete treaties and actions.

74. U.S.-Canada Air Quality Agreement, Mar. 31, 1991, 30 I.L.M. 676 (1991).

