CHAPTER 16

What is Wrong with International Environmental Law?

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1 Introduction

“What is wrong with international environmental law?” is one of the questions put to the contributors to the liber amicorum for Professor Alfred H.A. Soons, and is a very remarkable question indeed. The question will, at least to a certain extent, call for an answer which, in essence, will not be much different from an answer to the question of what is wrong with international law in general, of which international environmental law is only a part.

A first question is what should be understood by “wrong” in this connection? A further question which arises immediately in this connection is who is to determine whether international environmental law is “wrong”? Which suggestions could be made which would not readily be criticized for showing lack of common sense, gross naïveté, irresponsible hubris, or showing that one is a weltfremd believer in an International Legal Utopia? So, it can only be with the necessary caveats and reservations that in all modesty one can try to make some suggestions on what is “wrong” and should be improved in international environmental law.

Is there anything wrong with the formation of international environmental law? Are environmental problems properly covered by present international environmental law?

Does international environmental law provide for adequate liability and responsibility for environmental damage? Does it provide for proper and effective mechanisms for the settlement of disputes involving international environmental problems? These are the main questions which will be dealt with.

2 Is There Anything Wrong with the Formation of International Environmental Law?

This brings us to the question who creates international environmental law and to the formal sources of that law, i.e. the generally recognized methods of the formation of that law.
The primary and principal sources are, as is well-known, treaties, customary international law, and, as a subsidiary source, the principles of law recognized by “civilized” nations. Resolutions adopted by international organizations or by states at international conferences are seldom legally binding on states or their citizens.

The reality is that international (environmental) law is still primarily created by states, whether or not operating through international diplomatic conferences or through organs of international organizations. It is only through the representatives of their state as duly mandated by the organs of their state that citizens, companies and associations affected by encroachments upon the environment and interested in the protection of the environment can make their views and positions known. However, while this may not be ideal, it is difficult to see how this could be otherwise.

Another reality is that the international community has so far not in general accepted the possibility of law-creation by way of decisions adopted by (a qualified) majority vote.

Moreover, except in certain international financial organizations, the principle of sovereign equality of states leading to the one-state-one-vote system still applies in most international conferences or organizations, regardless of the size, population, economic power, contribution to the environmental problem or extent of damage sustained by the states concerned.

One may perhaps consider it “wrong” that decisions dealing with the global problem of climate change can be taken only by consensus of all participating states whether or not being small island countries, countries with low-lying coastal areas, countries with arid and semi-arid areas, forested areas and areas liable to forest decay, countries with areas prone to natural disasters, countries with areas liable to drought and desertification, countries with areas of high urban atmospheric pollution, countries with areas with fragile ecosystems, including mountainous ecosystems, countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products, and land-locked and transit countries, so nicely summed up in Article 4(8) of the UN Framework Convention on Climate Change.

It could be argued that at least with regard to the global problem of climate change states must be prepared to accept legally binding obligations by (a qualified) majority vote in order to enable appropriate and effective measures to cope with the problem. This is what could be deemed required “for the benefit of present and future generations of humankind.” And by the precautionary principle, by virtue of which measures must be taken to anticipate, prevent or minimize the causes of fundamental global environmental