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An economic analysis of international environmental rights

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[Jesse L. Reynolds](#) [✉](#) orcid.org/0000-0002-0624-5741¹

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Abstract

This article offers a descriptive and normative economic analysis of international environmental rights. States, sovereignty, international negotiations, and international law resemble legal persons, property, the market, and private law, respectively. Just as the initial entitlement of persons' property rights is important to increasing welfare when transaction costs are significant, so too is that of states' sovereignty rights, including those regarding the environment. What is the initial entitlement of these rights? Is this relatively efficient? How are these rights protected? The article considers three possible initial entitlements. First, states' right to cause transboundary environmental harm and, second, their right to be

free therefrom are each rejected due to weak theoretical support and insufficient state practice. These initial entitlements would also be less efficient. In contrast, an initial entitlement consisting of both the prevention of transboundary harm and the equitable use of shared natural resources is supported by theory and practice. This entitlement appears relatively efficient, and the relevant legal instruments reveal an implicit underlying economic logic. These international environmental rights are generally protected by mechanisms that resemble liability.

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Notes

1. To be specific, welfare is the satisfaction of preferences, which can presumably be transitively ranked and can be revealed through behavior. A voluntary trade or other action by a perfectly informed actor with negligible negative third-party impacts necessarily increases welfare, or at least does not decrease it. In reality, behavior can be involuntary and have negative impacts, and information is often imperfect.

Claims regarding efficiency generally require aggregating multiple actors' welfares, yet perfect interpersonal welfare comparisons are impossible. Economists thus often point to Pareto improvements, in which at least one actor's welfare increases and no actor's welfare decreases, and to Kaldor-Hicks improvements, in which those who are made better off would be (at least hypothetically) willing to compensate those who are made worse off. In this paper, claims of relative efficiency refer to Kaldor-Hicks improvements.

2. Here, "transaction costs" are used broadly to encompass all obstacles—including poorly defined property rights—to reaching an agreement regarding a transaction.
3. This analogy is at least as old as Holland ([1924](#): 393-394).

4. Trachtman (2008: 8) calls it a market in jurisdiction.
5. This analogy can be traced to Lauterpacht (1927). For an economic analysis of customary international law, see De Mot et al. (2017).
6. When cash is used, it is often disguised, such as “development aid.”
7. Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon, January 28, 1985, in force March 18, 1985. Available at <http://www.psc.org/download/45/miscellaneous/2337/treaty.pdf>.
8. International Telecommunication Convention, Final Protocol, Additional Protocols, Resolutions, Recommendations and Opinions, October 25, 1973, in force January 1, 1975. Available at <http://search.itu.int/history/HistoryDigitalCollectionDocLibrary/5.10.61.en.100.pdf>.
9. UN General Assembly Resolution A/Res/523(VI), of January 12, 1952, on Integrated Economic Development and Commercial Agreements. Available at [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/523\(VI\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/523(VI)&Lang=E&Area=RESOLUTION); UN General Assembly Resolution A/Res/626(VII), of December 21, 1952, on the Right to Exploit Freely Natural Wealth and Resources. Available at [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/626\(VII\)&Lang=E&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/626(VII)&Lang=E&Area=RESOLUTION); UN General Assembly Resolution A/Res/1803(XVII), of December 14, 1962, on Permanent Sovereignty over Natural Resources. Available at [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803\(XVII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII)); UN General Assembly Resolution A/Res/S-6/3201, of May 1, 1974, on the Declaration on the Establishment of a New International Economic Order. Available at http://legal.un.org/avl/pdf/ha/ga_3201/ga_3201_ph_e.pdf; UN

General Assembly Resolution A/Res/3281(XXIX), of December 12, 1974, on the Charter of Economic Rights and Duties of States. Available at [http://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281\(XXIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281(XXIX)).

10. Charter of Economic Rights and Duties of States, *ibid*, Article 2.1.
11. International Covenant on Civil and Political Rights, December 16, 1966, in force March 23, 1976, available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>, Article 1.2; International Covenant on Economic, Social and Cultural Rights, December 16, 1966, in force January 3, 1976, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>, Article 1.2.
12. *Armed Activities (Democratic Republic of the Congo v. Uganda)*, Judgment, December 19, 2005, *ICJ Reports* 2005, paragraph 244.
13. “Anarchic” here does not mean without rules but instead without centralized rule making, rule enforcement, and binding dispute resolution.
14. Wiener (1999: 750-755) thus suggests that this entitlement of rights be called “beneficiaries pay.”
15. The Stockholm Convention on Persistent Organic Pollutants, a global agreement, reaffirmed the Rio Declaration’s statement of the principle. Convention on Persistent Organic Pollutants, Stockholm, May 22, 2001, in force May 17, 2004, Available at <http://chm.pops.int/Portals/0/download.aspx?d=UNEP-POPS-COP-CONVTEXT-2009.En.pdf>. Preamble paragraph 17.
16. At states’ request, the International Law Commission explicitly excluded consideration of the polluter pays principle in its development of Draft

Guidelines on the Protection of the Atmosphere (International Law Commission [2018](#) Guideline 2.2; see Sand [2017](#): 206–207).

17. Environmental policies that are contrary to the polluter pays principle also continue to occur domestically. For example, subsidies for zero carbon and renewable energy, insulation, or more environmentally friendly equipment are payments to polluters.
18. United Nations Framework Convention on Climate Change, May 9, 1992, in force March 21, 1994, Article 4.2(a). Available at https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997, in force February 16, 2005, Articles 3.1, 12. Available at <https://unfccc.int/sites/default/files/kpeng.pdf>.
19. These policies in which the state that pollutes or engages in an otherwise environmentally harmful practice can be particularly problematic by creating perverse incentives to increase the harmful behavior to be eligible for more payments (Wiener [1999](#): 755–757).
20. *Trail Smelter Arbitration (USA vs. Canada)* (1938 and 1941) 3 RIAA 1905.
21. Stockholm Declaration on the Human-Environment, UN Doc. A/CONF.14/48/Rev. 1, June 16, 1972. Available at <http://www.un-documents.net/unchedec.htm>, Principle 21; Rio Declaration on Environment and Development, in *Report of the UN Conference on Environment and Development, Rio de Janeiro, June 3–14, 1992*, UN Doc A/CONF.151/26 (Vol I), August 12, 1992, available at http://www.unesco.org/education/pdf/RIO_E.PDF, Principle 2.
22. *Nuclear Weapons*, Advisory Opinion, July 8, 1996, *ICJ Reports* (1996),

paragraph 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, April 20, 2010, *ICJ Reports* (2010), p. 14.

23. The additional term “reasonably” is often, but not always, used as well. For brevity, this article uses “equitably” to include “reasonably,” as appropriate. See Castillo-Laborde ([2010](#)).
24. *Territorial Jurisdiction of the International Commission of the River Oder Case*, Judgment, September 10, 1929, *PCIJ Ser. A*, No. 23 (1929), p. 28.
25. International Law Commission ([1994](#)); *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, September 25, 1997, *ICJ Reports* (1997), paragraphs 78, 85; UN General Assembly Resolution A/51/229, of May 21, 1997, on the Convention on the Law of the Non-navigational Uses of International Watercourses, Article 5. Available at <http://www.un.org/documents/ga/res/51/ares51-229.htm>. See also International Law Commission ([2008](#)).
26. *Nuclear Weapons*, Advisory Opinion, July 8, 1996, *ICJ Reports* (1996), paragraph 29. See also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, April 20, 2010, *ICJ Reports* (2010), p. 14.
27. That it, it would be a Kaldor-Hicks loss.
28. Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997, in force August 17, 2014. Available at http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf. Although the Convention provides that riparian parties shall “take all appropriate measures to prevent the causing of significant harm to other watercourse States” (Article 7), this passage was particularly controversial (McCaffrey [1998](#)).

29. The court did not consider this claim in any depth. *Nuclear Tests Cases (Australia v. France)*, Interim Measures, June 22, 1973, *ICJ Reports* (1973), paragraph 101.
30. Because perfect interpersonal—in this case, interstate—welfare comparisons are impossible, this can be stated more precisely in Kaldor-Hicks terms: efficient duties of care are those in which the source state’s marginal cost of precaution equals the recipient state’s marginal willingness to pay for the source state to take precaution.
31. But see *Certain Activities (Costa Rica vs. Nicaragua)*, Compensation, February 2, 2018. Available at <http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>.
32. United Nations Convention on the Law of the Sea, December 10, 1982, in force November 16, 1994, Articles 133–191. Available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
33. Montreal Protocol on Substances That Deplete the Ozone Layer, September 16, 1987, in force January 1, 1989. Available at https://treaties.un.org/doc/Treaties/1989/01/19890101%2003-25%20AM/Ch_XXVII_02_ap.pdf.
34. Moreover, the Antarctic moratorium agreement was a response to the failure of a previous proposal for an administrative body. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, December 19, 1966, in force October 10, 1967, Art. II. Available at <http://www.unoosa.org/pdf/publications/STSPACE11E.pdf>. Protocol on Environmental Protection to the Antarctic Treaty, October 4, 1991, in force

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Author information

Authors and Affiliations

**Emmett Institute on Climate Change and the Environment, School of Law,
University of California, Los Angeles, 385 Charles E. Young Drive East,
1242 Law Building, Los Angeles, CA, 90095, USA**

Jesse L. Reynolds

Corresponding author

Correspondence to [Jesse L. Reynolds](#).

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